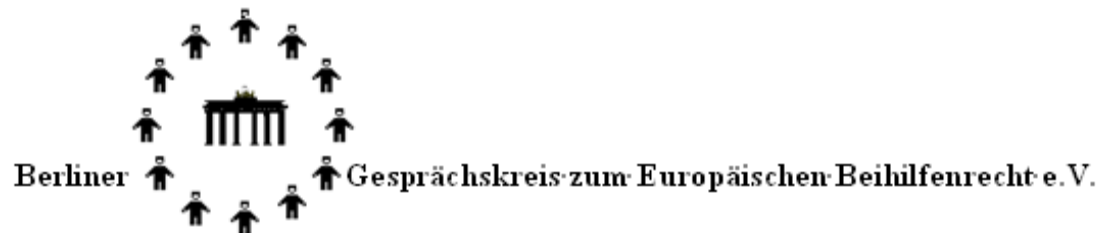


EU-beihilferechtliche Stolpersteine der Infrastrukturförderung

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Upstream and downstream stumbling blocks in
infrastructure funding under State aid law terms



December 7, 2012

Main results of *DHL – Leipzig/Halle*

- The operation of (regional) airport infrastructure is an **economic activity**: services on the market for regional airport services (operating a runway, receiving landing charges, etc.)
- **Financing the construction** of (regional) airport infrastructure is hereof an **integral part**
- The economic or non-economic character of the construction is **determined by the use** of the infrastructure (runways increase the capacity of an airport and enlarge the economic activity of the operator)
- The construction and operation of regional airports is not excluded from the State aid rules as it can **no** longer be regarded as an **administrative task** → regional, economic or transport policy objectives can only be taken into account in the compatibility assessment
- A publicly owned operator can **grant State aid and be beneficiary** at the same time

Lessons learned from *DHL – Leipzig/Halle*

- The **investment in infrastructure**, which will be economically exploited, constitutes an economic activity and is **caught by State aid control**
- Activities that normally fall under State responsibility in the exercise of its official powers as a public authority are not of an economic nature and do not fall within the scope of the rules on State aid
- Nevertheless: A **changing economic environment** may justify the application of State aid rules regarding the public funding of the construction of infrastructure even though this activity was (formerly being a State responsibility) excluded from State aid rules in the past
- **Many sectors** have undergone similar changes as the (regional) airport sector: e.g. sea ports, sports, telecommunication, energy, railway
- → If there is an option of commercial exploitation, the infrastructure measure will be a matter of State aid control

Relevance for other infrastructure sectors (1/3)

- The Commission takes a close look at public funding of infrastructure in others sectors as well. Example 1: sports sector
- The Commission's request for information regarding public financing of infrastructure used by professional football clubs addressed to the member states (October 1, 2012, COMP/C4/WP/AH/ZZ/md-D*2012/98568):
 - Reaction to complaints concerning measures by municipalities in favour of the local football club and measures on the national level
 - Investments in football stadiums as well as owning and operating a football stadium constitute an economic activity, because professional football is an economic activity (sale of tickets, broadcasting rights, player transfers, etc.)
 - Supporting youth/amateur teams and school classes with public resources via professional clubs does not constitute State aid, as long as these activities are separated from the economic activity (separate accounting to avoid cross-subsidisation) (*Subventions publiques aux clubs sportifs professionnels, France, N 118/2000*)

Relevance for other infrastructure sectors (2/3)

- Commission aims at increasing awareness of local authorities that State aid for sports infrastructure may provide undue advantages at various levels (owners, operators, users)
- → Commission conducts a kind of “sports infrastructure sector inquiry”
- → Commission assesses the effects of State aid on all market levels

Example 2:

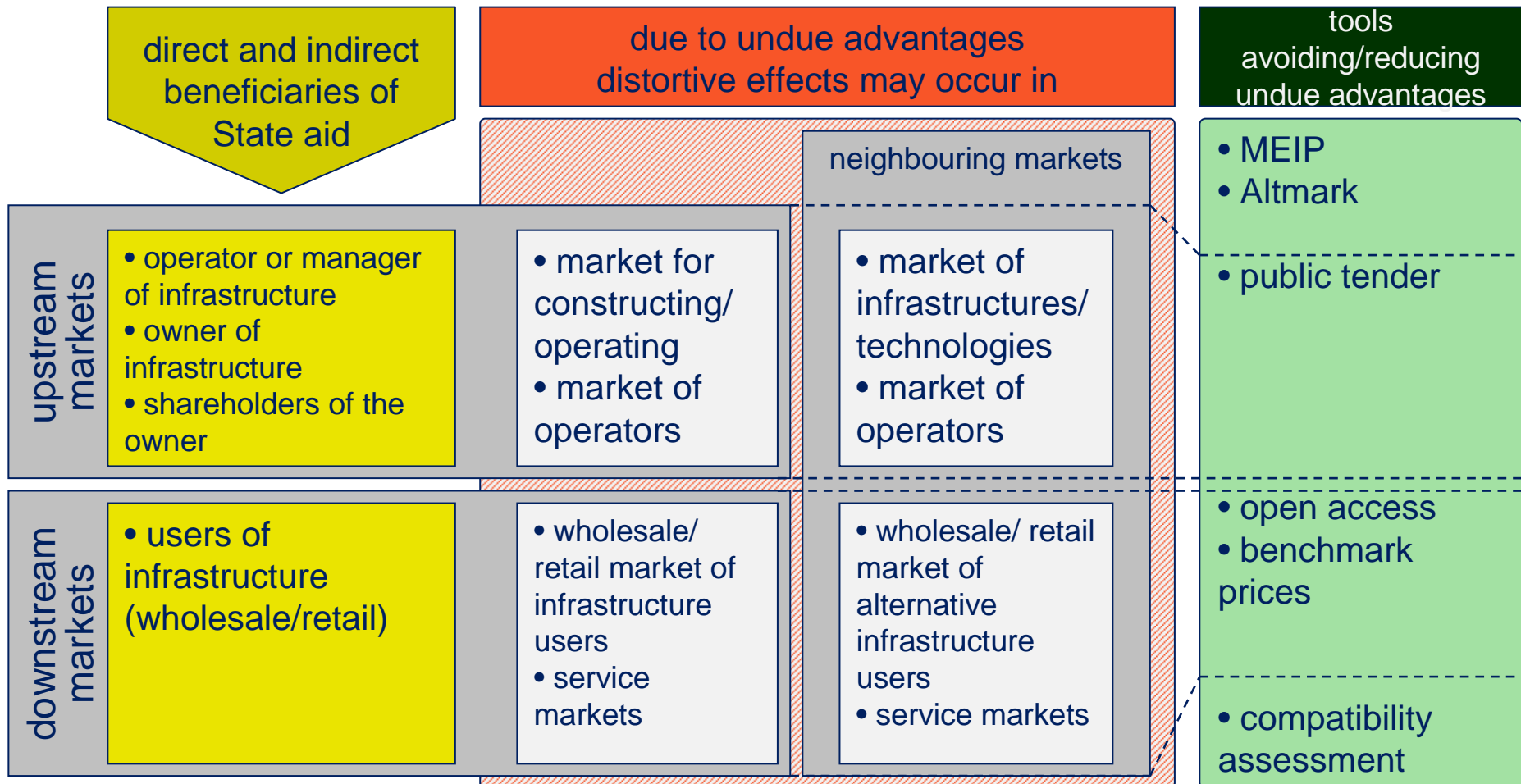
- The Commission’s strict approach in the cases *Copenhagen multiarena* (SA.33728) and *Uppsala arena* (SA.33618) of March 21, 2012:

	Copenhagen multiarena	Uppsala arena
Ownership	“Arena Company“ (set up by the City of Copenhagen and Realdania [private foundation])	“Property Company” → exclusively private investors
Operation	Lease agreement with private operator	Lease agreement with private “Events Company”

Relevance for other infrastructure sectors (3/3)

- Infrastructure build to provide services on the market (in the cases *Copenhagen multiarena* and *Uppsala arena*: music, culture and sport events on a commercial basis) → in-depth assessment of the measure:
- Art. 107 (1) TFEU State aid assessment:
 - Construction level: if an infrastructure project is publicly funded in the absence of a private investor interest, the public authority can not invoke the market economy investor principle (MEIP)
 - Operation level: selection criteria regarding the operator have to be open, transparent and non-discriminatory
 - User level: use has to be non-discriminatory (especially not in favour of frequent users)
- Art. 107 (3) TFEU Compatibility assessment: necessity and proportionality of the measure which pursues a policy objective of common interest

Assessing neighbouring, upstream and downstream markets



Undue advantages on different levels: upstream markets

- Undue advantages of the direct beneficiaries of State aid on the upstream markets lead to distortive effects:
 - competition for constructing/operating the infrastructure:
 - Competition for the market concerning the construction of infrastructure takes place even in the case of a natural monopoly
 - Public undertakings or single purpose vehicles may also be beneficiaries of State aid
 - competition of infrastructure operators:
 - Example: possible effects of the new Copenhagen multiarena (SA.33728) on the market for the hosting of commercial mid-sized and large live entertainment events
 - Example: market for regional airport services → EU-wide competition for the establishment of a European hub for parcel operations (*DHL – Leipzig/Halle Airport*, SA No. C 48/2006)

Undue advantages on different levels: downstream markets (1/2)

- Public funding of undertakings engaged in the development and the setup of infrastructures may result in benefits of undertakings using the new infrastructures
- Leverage of upstream infrastructure funding onto downstream benefits may also occur, if the granted public funds on the upstream level are not regarded as State aid (case *Decoder*, OJ L 147/2007)
- → “*Decoder doctrine*”: State aid effects are possible, due to distortive downstream favouring, even if the infrastructure investor is chosen under upstream market terms in an open tender

Undue advantages on different levels: downstream markets (2/2)

- The Commission picks up the *Decoder* doctrine in paragraph 14 of the broadband guidelines (OJ C 235/2009) and affirms it in paragraph 12 of the revised draft guidelines:
 - “While the use of a **tender ensures** that any aid is limited to the **minimum amount necessary** for the particular project, the financial support might enable the successful bidder to conduct a commercial activity on conditions which would not otherwise be available on the market. **Indirect beneficiaries** might include **third party** operators that obtain wholesale access to the infrastructure thus built, and also business users who get broadband connectivity under terms and conditions that would not apply without State intervention.”
- In contrast: leverage effect is not even addressed in the guidelines on the financing of airports and start-up aid to airlines departing from regional airports (OJ C 312/2005) → de lege ferenda: Commission should clarify the validity of the *Decoder* doctrine in new guidelines for airports and airlines
- → need for more consistency in methodology

Correct assessment of neighbouring markets

- Correct assessment of distortive effects on neighbouring markets is crucial
 - Examples: airports – railway, cable cars – taxis – railways – busses (*Cable Car for London*, SA.34056), fixed broadband – mobile broadband, digital broadcasting via satellite – cable – terrestrial network, etc.
 - requires an approach of technological neutrality
- → Need for a general methodology of defining the relevant upstream, downstream and neighbouring markets
 - Example: fixed broadband retail service markets benefit from upstream-funded (fixed) infrastructures → effect on demand for mobile broadband services → relevant product market is defined too narrowly, as important substitutes (mobile broadband services) are not included → need for “crowding out test”

Effects of State aid (1/2)

- Crowding out: undue advantages may squeeze competitors out of the market or may prevent new competitors to enter the market due to infrastructure duplication on subsidized terms
 - Example: fixed broadband infrastructure investments of municipalities prevent private investors from entering the market
- Duplicating existing infrastructure: may result in crowding out but may also lead to decrease of quality
 - Example: Copenhagen multiarena would to some extent result in duplication of infrastructures → other arenas exist both directly in the area and in nearby cities/countries
 - Example: nearby the regional airport Niederrhein/Weeze (SA.19880 and SA.32576) exist already ten operating airports

Effects of State aid (2/2)

- Effects do not only occur in upstream/downstream markets
→ intermodal competition can lead to “intermodal crowding out”
 - Example: (regional) airport funding and airline favouring interacts with railway services
 - Example: municipalities investing in fixed broadband infrastructures are in a position to charge artificially low prices → consumers will not switch to mobile broadband services
- → Public investments may hinder technical innovation: intermodal competition is optimized by technological neutrality
- → Methodology has to screen upstream/downstream market levels and neighbouring markets

Avoiding State aid (1/2)

- Altmark Trans Criteria:

- (1) Act of entrustment

- (2) Objective and transparent parameters of compensation setup in advance

- (3) Net additional cost method

- (4) Benchmark

- If Altmark Trans-Test fails: public authorities have to make sure, that no undue advantages will be provided at any market level (MEIP, public tender, open access, benchmark prices)

- Market economy investor principle (MEIP):

- If a public authority, financing infrastructure build, owned and/or operated by public authorities, acts in the same way as private operators on the market, no State aid will be involved on the same market level, however might occur downstream (*Decoder doctrine*)

Avoiding State aid (2/2)

- Public tender should be used to ensure limitation of aid to a minimum
→ does not prevent possible downstream benefits (*Decoder*)
- Open access on user and service level is necessary
 - → the criterion of multi-functionality of an infrastructure does not properly serve to distinguish general infrastructure measures from infrastructures dedicated to specific users
 - → on the contrary: it widens the scope of potential users, which have to be taken into account concerning the open access obligation
- Benchmark prices:
 - Benchmark prices based on the comparison of “State aid infected” markets perpetuate distortion of competition → most infrastructures are publicly (co-)financed
 - Danger of manipulated, State aid induced price benchmarks
 - → Counter check by verifying the price benchmark by an analysis of the concrete business case (including cost accounting methodology)

Compatibility with the common market

- The common public interest objective (e.g. economic and social development of the region) was previously primarily taken into account defining a measure as general infrastructure excluded from State aid control
- → The Commission's strict approach in the Copenhagen and Uppsala arena cases shifts the focus on the compatibility assessment (balancing test), whereas the measure itself is classified as State aid
- If the commercial exploitation of a publicly funded infrastructure is an option, municipalities will have to reduce infrastructure measures to what is necessary and proportional (duplicating test)

Conclusion: coherent approach necessary

- According to the Commission's practice, it is necessary to identify all possible beneficiaries and State aid effects on a case-by-case analysis → sine qua non: the correct assessment of all relevant markets (upstream, downstream, neighbouring)
- Need for comprehensive and coherent approach of defining those relevant markets (no sector-specific differentiation)
- Within the compatibility assessment, the negative effects on neighbouring markets due to intermodal competition have to be included in the considerations of the balancing test

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