

# The Logic of Infrastructure Funding under EC State Aid Control

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## I. The relevance of EC State aid control for infrastructure funding

The question of whether State funding of infrastructure constitutes State aid within the meaning of Article 87(1) EC has become increasingly important in recent years. State funding which favours the economy as a whole cannot be qualified as State aid. Therefore, the European Commission initially did not focus its efforts on the funding of infrastructure facilities by State authorities. This has changed significantly. Today, there is an extensive Commission practice of screening the development, the construction, the operation and the use of infrastructure facilities in the light of the EC State aid control provisions. In earlier years, the Commission mainly had to decide on cases involving possible distortions of competition due to infrastructure owned by the State which favoured one undertaking or a group of specific undertakings. In recent years, the problems to deal with have become much more complex. This is based on the fact that Member States have increasingly set up public-private partnership structures to establish and to operate infrastructure and to distribute public services. This recourse to public-private partnerships in many cases has been incited by budget constraints confronting the Member States and the need for private funding of the public sector<sup>1</sup>.

Additionally, there is the desire to benefit more from the know-how and working methods of the private sector. Finally, the development of the public-private partnership phenomenon is part of a general change in the role of the State in the economy, moving from a role of direct operator to one of organiser, regulator or controller<sup>2</sup>. This turn towards public-private partnership projects has proved to be a challenge to the State aid control exercised by the European Commission. In the following, the logic of infrastructure funding under EC State aid control shall systematically be explained. The examination will especially concentrate on the case law of the European Commission concerning State funding of infrastructure.

## II. The Commission's screening pattern

### 1. The non-selectivity requirement of Article 87(1) EC

#### a. Infrastructure owned and operated by the State

Article 87(1) EC provides that there has to be a favouring of "certain undertakings" in order to qualify a State measure as State aid within the meaning of EC law. Measures favouring economy in general, e. g. the construction and funding of school buildings, of sewerages and of waste deposits or the development of industrial or business parks, do not fall within the concept of State aid<sup>3</sup>. The provision of infrastructure improves the attractions of a region as a business location<sup>4</sup>. Such a benefit does not aim at specific undertakings but favours any undertaking which decides to establish itself in that particular region<sup>5</sup>. The funding of an infrastructure owned and operated by a public authority does not constitute State aid since it is made available to all potential users on non-discriminatory terms<sup>6</sup>. For example, the creation of a business park open to all interested firms of many sectors does not constitute a benefit for a specific undertaking. In the same way, financial support for the development of a nature experience area serves a certain area in general and cannot be qualified as favouring any specific

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1 Commission, Directorate-General Regional Policy, Guidelines for successful public-private Partnerships of January 2003.  
 2 Commission, Green Paper on Public-Private Partnerships and Community Law on Public Contracts and Concessions, COM (2004) 327 final of 30.04.2004.  
 3 Cf. Soltész, EuZW 2001, page 107 (108); Koenig/Kühling, DÖV 2001, page 881 (882); Koenig/Scholz, EuZW 2003, page 133 (133). See for example: Commission, State aid No. N 392/1999 – Maßnahmen zur Dorf- und Stadtentwicklung, Decision of 13.03.2000.  
 4 Siemer, Die kommunale Wirtschaftsförderung und die Regionalpolitik der Europäischen Gemeinschaften, 1992, page 124; Koenig/Scholz, EuZW 2003, page 133 (133).  
 5 Cf. Commission Decision of 20.07.1999, Sangalli Manfredonia Vetro, OJ 2000 L 157/1 (5); see also Koenig/Scholz, EuZW 2003, 133 (133).  
 6 See Commission, State aid No. N 649/2001 – Freight Facilities Grant (FFG), Decision of 20.12.2001, point 45; Commission, State aid No. N 356/2002 – Network Rail, Decision of 17.07.2002, point 70; Commission staff working paper, Guidelines on criteria and modalities of implementation of structural funds in support of electronic communications, SEC (2003) 895 of 28.07.2003, page 11; Santamato/Westerhof, EuZW 2003, 645 (646).

undertaking or the production of certain goods<sup>7</sup>. Also, most land transport infrastructure financing (e. g. road infrastructure construed and maintained by the public authorities, inland waterway channels) does not confer an advantage upon a specific undertaking in the sense of Article 87(1) EC<sup>8</sup>. The construction of a flood barrier which serves as a protective measure against storm tides and improves the navigability of a river is not State aid within the meaning of EC State aid law<sup>9</sup>. This approach may also apply to maritime ports<sup>10</sup>. In consequence, there is a competition of Member States and regions within the European Union by means of provision of infrastructure facilities<sup>11</sup>. This competition of regions has been considered as to be compatible with the common market and the EC State aid control regime by the European Commission<sup>12</sup> as well as by the European Court of Justice (ECJ)<sup>13</sup>.

An infrastructure must not only be legally especially dedicated to one specific firm but must not be actually favouring one certain undertaking, either<sup>14</sup>. A State measure fails to meet the non-selectivity requirement if in fact one specific undertaking can benefit from an infrastructure facility exclusively<sup>15</sup>. In the case of Kimberly Clark Industries an industrial park was created near a river, which specifically favoured a manufacturer of paper products by providing the necessary water supply as well as waste water treatment facilities<sup>16</sup>. The creation of this industrial park was actually favouring one certain undertaking and, therefore, had to be qualified as State aid within the meaning of Article 87(1) EC.

Provided an infrastructure is specifically designed for the use by one certain undertaking or even is expressly awarded to one undertaking, a benefit can be excluded if the infrastructure is rented out at market conditions. The end-user has to pay adequate fees at the market price level.

### b. Infrastructure in public-private partnership structures

The legal situation is much more complex if an infrastructure is not exclusively owned and operated by public authorities but is realised or operated in the form of a public-private partnership. Then, all relevant markets and levels at which favouring of specific undertakings appears to be possible have to be examined in the light of the EC State aid provisions, i. e. the level of end-users of an infrastructure, the level of owners and operators of an infrastructure and, at last, the level of shareholders owning the holder and/or operator of an infrastructure<sup>17</sup>. This differentiated approach was exemplary applied by the Commission in the case of InfraLeuna Infrastruktur und Service<sup>18</sup>. It must be ensured that neither the end-users nor the owners, the operators and the shareholders receive more than a normal market return on their investments or for their activities<sup>19</sup>.

### First level: the end-users or Customers of an infrastructure

#### (1) Open access to all potential users on a non-discriminatory basis

On the level of the end-users or customers of an infrastructure a selective favouring is excluded if the infrastructure is open to all potential users on non-discriminatory terms. The open access requirement relates to the questions of whether and under which conditions an infrastructure is available to undertakings. Only one or a group of specific undertakings being able to take recourse to an infrastructure might indicate that there is a specific benefit. Concerning an infrastructure operated in the form of a public-private partnership, the same criteria apply as to an infrastructure which is exclusively owned and operated by a State authority. In the case of a Propylene Pipeline from Rotterdam to the German Ruhr Area the Commission assessed that the State funding favoured only the producers of propylene and ethylene, because the pipeline only serves to transport these substances<sup>20</sup>. Since this project does not meet the non-selectivity criterion, its State funding must be assessed as State aid within the meaning of Article 87(1) EC.

- 7 Commission, State aid No. N 86/2000 – Support for nature experience areas, Decision of 06.04.2000, OJ 2000 C 127/11.
- 8 Commission Communication on the Application of Articles 92 and 93 of the EC Treaty and Article 61 of the EEA agreement to State aids in the aviation sector, OJ 1994 C 350/5, point 12; Commission, State aid No. N 511/1995 – Jaguar Cars Ltd. and Ford Motor Company, OJ 1996 C 311/15 (16).
- 9 Commission Decision, Ems flood barrier at Candersum, Press Release of 17.06.1998, IP/98/539.
- 10 Cf. Commission, Invitation to submit comments pursuant to Article 93 (2) of the EC treaty, concerning the aid C 81/98 (ex N 421/97) – Italy – measures under Law No 30/98 in favour of the port sector, OJ 1999 C 108/2 (3); Commission, State aid No. N 438/2002 – Subsidies to the port authorities for carrying out public authority tasks, Decision of 16.10.2002.
- 11 Cf. Koenig/Kühling, DÖV 2003, page 881 (882 et seq.).
- 12 Cf. Communications Veltin-Tal, OJ 1992 C 324/3 (3), and Alkalische Salze, OJ 1993 C 59/4 (5).
- 13 ECJ, Judgment in Case C-225/91 – Matra, [1993] ECR I-3203, paragraphs 27 et seqq.
- 14 Soltézs, EuZW 2001, page 107 (109).
- 15 Santamato/Westerhof, EuZW 2003, page 645 (645 et seq.).
- 16 Communication of the Commission, Kimberly Clark Industries, OJ 1994 C 170/8; see also Communication of the Commission, Lenzing Lycocell, OJ 1999 C 9/6 (14, 17); Commission Decision of 14.07.1999, Weida Leder GmbH, OJ 2000 L 61/4 (8).
- 17 Koenig/Scholz, EuZW 2003, page 133 (134 et seqq.); Koenig/Pfomm, SächsVBl. 2003, page 281 (282); Koenig/Pfomm, NZBau 2004, page 375 (376).
- 18 Commission Decision of 25.11.1998 on measures by Germany to assist InfraLeuna Infrastruktur und Service GmbH, OJ 1999 L 260/1 (11 et seqq.).
- 19 Cf. Koenig, EuZW 2003, page 641; Koenig/Pfomm, NZBau 2004, page 375 (376).
- 20 Commission, State aid No. C 67/2003 (ex N 355/2003), C 68/2003 (ex N 400/2003), C 69/2003 (ex N 473/2003) – Propylene Pipeline from Rotterdam via Antwerp to the German Ruhr Area, decision of 16.06.2004, point 49; see also Commission, State aid No. N 527/2002 – Aviation Fuel Pipeline supplying Athens International Airport, Decision of 02.04.2003, OJ 2003 C 148/11.

## (2) Multi-functionality of an infrastructure

In the context of the construction of sports stadiums, the Commission additionally applies the criterion of the multi-functionality of an infrastructure<sup>21</sup>. This requirement shall also serve to distinguish general infrastructure measures from infrastructures typically dedicated to a specific category of users. While this criterion might be valuable for special transport facilities like skiing cableways or fuel pipelines, because there are only specific users which are able to use the infrastructure, i. e. skiers concerning skiing cableways<sup>22</sup> and fuel producers concerning fuel pipelines<sup>23</sup>, it can lack significance for other infrastructure facilities. Sports arenas, for example, might be regarded as multi-functional because they can be used for sports events as well as for concerts or for conventions of political parties or religious communities. But even if they were exclusively used for sports, they would be potentially open to any person willing to take part in a particular sports event and thus benefit the general public<sup>24</sup>. Therefore, the criterion of multi-functionality might only serve as an indicator for the non-selectivity of a funding measure<sup>25</sup>.

### *Second Level: The Owners and Operators of an Infrastructure*

On the level of the owners and operators of an infrastructure facility, a specific favouring within the

meaning of Article 87(1) EC can be ruled out, if an infrastructure owner or operator is chosen by an open and non-discriminatory procedure, and if the State support granted to it for construction and maintenance of the infrastructure represents the market price to achieve the desired result<sup>26</sup>. This might be done by a tendering or a public procurement procedure<sup>27</sup>.

If a public procurement procedure is actually not possible because of property rights of the investor with regard to the site on which the infrastructure should be constructed, the Commission has accepted the application of the low-profit principle to exclude any specific favouring<sup>28</sup>. According to the low-profit principle, the private owner or operator of an infrastructure facility is obliged to make no or at least limited profits or to re-invest profits received into the maintenance of the infrastructure. This obligation shall serve to minimize the danger of any cross-subsidy of other markets by avoiding profits incited by State funding to leak into other markets<sup>29</sup>.

Nevertheless, this Commission approach seems to be ineligible, because it neglects that there is not only a competition on the market, but also a competition for the market<sup>30</sup>. The application of the low-profit principle might prevent distortions of competition by excluding specific benefits of the owners or operators of an infrastructure facility<sup>31</sup>. Provided an infrastructure is available to all potential end-users on non-discriminatory terms, the application of the low-profit principle might also exclude distorting effects in the downstream market of the end-users. But even here, the effects of the application of the low-profit principle might be very much in doubt, because low profit in practice often implies hidden extra gains. The fact that an undertaking is willing to accept low profit terms should make the Directorate-General Competition of the European Commission suspicious. However, the low-profit principle clearly fails at the prevention of distortions of competition in the upstream market of developers and constructors of competing infrastructure facilities<sup>32</sup>. For example, there is not only a competition of the potential end-users of a given infrastructure, for example for the services provided by the racetrack Hockenheimring in Germany (downstream market), but there is also a competition of the operators of the Hockenheimring with operators of other circuits in Europe, not only for the presentation of motor racing events, but also for the presentation of concert events of Europe-wide importance (upstream market). Any distorting effects on the competition in this upstream market cannot be prevented by the application of the low-profit principle. From the EC State aid control point of view, it is not crucial whether or not an undertaking is gaining profit, but whether an undertaking acts as a provider of services and competes with other service providers<sup>33</sup>.

21 Cf. Letter of the Commission to the Ministry for Economy of the German Land Lower Saxony, COMP-2002-00757-00-00-DE-TRA-00 (EN) CS; also see the Letter to the UK REP on the building of a new stadium at Wembley (both unpublished).

22 Commission, State aid No. N 376/2001 – Aid schemes for cableways, Decision of 27.02.2002, points 15 et seqq.

23 Commission, State aid No. C 67/2003 (ex N 355/2003), C 68/2003 (ex N 400/2003), C 69/2003 (ex N 473/2003) – Propylene Pipeline from Rotterdam via Antwerp to the German Ruhr Area, decision of 16.6.2004, point 49; see also Commission, State aid No. N 527/2002 – Aviation Fuel Pipeline supplying Athens International Airport, Decision of 02.04.2003, OJ 2003 C 148/11.

24 Koenig/Scholz, EuZW 2003, page 133 (135); a different view take Santamato/Westerhof, EuZW 2003, page 645 (648).

25 Koenig/Scholz, EuZW 2003, page 133 (136).

26 Commission, State aid No. N 649/2001 – Freight Facilities Grant (FFG), Decision of 20.12.2001, point 47.

27 Commission, State aid No. N 264/2002 – London Underground Public Private Partnership, Decision of 02.10.2002, points 80 et seqq. – Also see Koenig/Kühling, DVBl. 2003, pages 289 et seqq.

28 Commission Decision of 25.11.1998 on measures by Germany to assist Infrateuna Infrastruktur und Service GmbH, OJ 1999 L 260/1 (11 et seq.); Commission, State aid No. N 356/2002 – Network Rail, Decision of 17.07.2002, point 79.

29 Commission, State aid No. N 356/2002 – Network Rail, Decision of 17.07.2002, point 79; also see Koenig/Scholz, EuZW 2003, page 133 (136 et seq.); Koenig/Scholz, EWS 2003, page 223 (225 et seq.).

30 The Commission Decision in the case of Network Rails proves that the Commission is aware of this distinction, although in that particular case there was neither a competition on the market nor a competition for the market; cf. Commission, State aid No. N 356/2002 – Network Rail, Decision of 17.07.2002, points 75 et seqq.

31 Koenig/Kühling, DÖV 2001, page 881 (887).

32 Koenig/Kühling, DÖV 2001, page 881 (887 et seq.); Koenig/Scholz, EuZW 2003, page 133 (137).

33 Koenig/Scholz, EuZW 2004, page 133 (137).

The low-profit principle has been overcome by the Altmark Trans ruling of the ECJ<sup>34</sup>. The application of the additional net cost calculation method which the ECJ has elaborated in this decision is able to exclude any distortions of competition in downstream markets as well as in upstream markets. Although this judgment deals with a different topic, it provides criteria which can be applied to the funding of infrastructure facilities. The Altmark Trans case treats the question of whether an undertaking which has been entrusted with the provision of services of general economic interest and receiving financial consideration in return gains a benefit within the meaning of Article 87(1) EC<sup>35</sup>. According to the ECJ, the idea of economic advantage can be ruled out if an appropriate service is provided in return for a financial benefit. The third and fourth Altmark Trans conditions<sup>36</sup> require that the compensation cannot exceed what is necessary to cover the costs incurred in the discharge of public service obligations. If the undertaking which is to discharge public service obligations is not chosen pursuant to a public procurement procedure, the level of compensation needed must be determined on the basis of an analysis of the costs which a typical well-run undertaking would have incurred in discharging those obligations, taking into account the relevant receipts and a reasonable profit for discharging the obligations. According to paragraph 12 of the draft "Community framework for State aid in the form of public service compensation"<sup>37</sup>, such profits may include all or some of the productivity gains achieved by the undertaking concerned during an agreed limited period without affecting the quality level of the services. The costs to be taken into consideration are all the costs associated with the operation of the service. The costs allocated to the public service may cover all the variable costs incurred in providing the service, an appropriate contribution to fixed costs and an adequate return on the capital assigned to the public service. Calculation of the costs must be based on generally accepted accounting principles<sup>38</sup>.

These requirements can be modified and adopted to the creation, construction, development and operation of infrastructure facilities. The creation of an infrastructure facility in many cases implies a large and risky investment, which the market might not be capable of carrying out in its entirety on its own. This can be due to the fact that an infrastructure might prove as not being economically viable because the investor cannot expect to receive adequate returns on the capital invested<sup>39</sup>. This market failure can be compensated by State funding. To exclude an extra benefit, i. e. over-compensation, for the investor, the State funding must be reduced to the minimum necessary to allow the project to proceed and to allow the investor to receive a normal market return<sup>40</sup>. A benefit within the meaning of Article 87(1) EC is excluded if State funding is

restricted to the additional costs incurred in developing the infrastructure. Only the net costs may be granted to the investor, which means that all relevant receipts and other advantages conferred by the infrastructure exceeding an adequate return on the invested capital must be deducted. These additional net costs must be identified by means of an objective cost benchmarking. Only the costs can be refunded that would have been incurred by a typical well-run undertaking providing the infrastructure concerned. The adequate rate of return on capital must take account of the risk, or absence of risk, incurred by the undertaking by virtue of the intervention by the Member State. This rate must normally not exceed the average rate for the sector concerned in recent years. In sectors where there is no undertaking comparable to the undertaking concerned, a comparison may be made with undertakings situated in other Member States or, if necessary, in other sectors<sup>41</sup>.

If no suitable benchmarks are available, the financial requirements of an infrastructure have to be identified using an analytical cost model<sup>42</sup>, that models the objective costs that are expected to arise under (simulated) competitive conditions in the relevant markets for the provision of a particular infrastructure.

#### *Third Level: The shareholders of the owner and/or operator of an infrastructure*

The third level to be examined is the level of the favouring of the shareholders of the owner and/or operator of an infrastructure. There might be a specific benefit constituting State aid within the meaning of Article 87(1) EC if the shareholders of an undertaking developing or operating an infrastructure enjoy privileged access to the particular facility, for example if they have to pay lower prices than other end-users<sup>43</sup>.

34 ECJ, Judgment in Case C-280/00 – Altmark Trans, [2003] ECR I-7747, paragraphs 89-93, 95; also see ECJ, Judgment of 27.11.2003 in Joint Cases C-34/01 to C-38/01 – Enirisorse, EWS 2004, page 26, paragraph 32 et seqq.

35 Cf. Sinnavee, ESTAL 2003, pages 351 et seqq.; Bartosch, ESTAL 2003, pages 375 et seqq.; Koenig/Haratsch, ESTAL 2003, pages 569 et seqq.; see also Bartosch, EuZW 2004, pages 295 et seqq.

36 ECJ, Judgment in Case C-280/00 – Altmark Trans, [2003] ECR I-7747, paragraph 92 et seq.

37 The draft can be downloaded from the world wide web: [http://europa.eu.int/comm/competition/state\\_aid/others/#compensation](http://europa.eu.int/comm/competition/state_aid/others/#compensation).

38 Cf. draft Community framework for State aid in the form of public service compensation, paragraph 13.

39 Santamato/Westerhof, EuZW 2003, page 645 (646, 648); Koenig/Pffromm, NZBau 2004, page 375 (376).

40 Cf. Commission staff working paper, Guidelines on criteria and modalities of implementation of structural funds in support of electronic communications, SEC (2003) 895 of 28.07.2003, page 11.

41 Cf. draft Community framework for State aid in the form of public service compensation, paragraph 16.

42 Cf. Stamm, Die Entgeltregulierung im Telekommunikationsgesetz, 2001, pages 174 et seqq.; Vogelsang, MMR 1998, pages 594 et seqq.; Koenig/Haratsch, ESTAL 2003, page 569 (577).

43 Commission Decision of 25.11.1998 on measures by Germany to assist InfraLeuna Infrastruktur und Service GmbH, OJ 1999 L 260/1 (12).

Preferential terms for the use of an infrastructure might also emerge from the influence of shareholders upon its planning process<sup>44</sup>. Shareholders often have the possibility to influence the design of an infrastructure according to their specific needs<sup>45</sup>. Nevertheless, the impact upon the planning process can only be an indicator, because, irrespective of the planning phase, only the planning result is decisive for the answer to the question of whether there is any specific benefit<sup>46</sup>.

As well, the payment of dividends to shareholders of an infrastructure facility might constitute a benefit within the meaning of Article 87(1) EC. The commitment to the aforementioned low-profit principle, e. g. the obligation to limit the maximum dividend at least to market conditions, can rule out this favouring of infrastructure shareholders funded by the State<sup>47</sup>. Additionally, State grants for the construction of an infrastructure usually increase the value of the shares of the undertaking concerned. Therefore, the European Commission sees the possibility of making sizeable profit through selling assets and shares. This profit might also be relevant from an aid point of view<sup>48</sup>. It can be excluded by a temporary ban of sale of assets or shares<sup>49</sup>.

## 2. Compatibility with the Common Market according to Article 87(3) EC

Any grant providing a specific benefit to a particular developer or operator of infrastructure falls within

Article 87(1) EC, provided the remaining requirements of the concept of State aid are fulfilled. According to Article 87(3) lit. c EC, State aid with regard to infrastructure may be considered as to be compatible with the common market to the extent it is necessary to facilitate the development of certain economic activities or of certain economic regions and provided it does not give rise to a distortion of competition to an extent contrary to the common interest<sup>50</sup>. The Commission has discretion whether to approve State funding as to be compatible with the common market<sup>51</sup>.

### a. Economic non-viability of the infrastructure project

The approval by the Commission under Article 87(3) EC requires that the infrastructure would not at all be generated by the market or would at least not be generated to the intended extent without State funding<sup>52</sup>. In the case of a Propylene Pipeline from Rotterdam to the German Ruhr Area the Commission approved State funding of the project since the market does not provide such a transport infrastructure at profitable conditions<sup>53</sup>. In the case of an Aviation Fuel Pipeline supplying Athens Airport the Commission demanded that the grant must be necessary to ensure the economic viability of the project<sup>54</sup>.

According to the "Altmark Trans philosophy" of the ECJ, the question of whether a project is economically viable under market conditions must be answered by means of an objective cost benchmark which serves to identify the additional net costs incurred in the discharge of public service obligations, taking account of the relevant receipts and a reasonable profit for discharging these obligations<sup>55</sup>. However, the Altmark Trans judgment deals with the question of whether State funding constitutes State aid within the meaning of Article 87(1) EC, whereas the approval by the Commission under Article 87(3) EC does not exclude the character of a State measure as State aid in the sense of EC State aid law. According to Article 87(3) EC the Commission can approve State funding although a grant constitutes State aid under Article 87(1) EC. Nevertheless, the Altmark Trans method of additional net cost calculation must be applied within the scope of Article 87(3) EC. An analogous application of criteria of the Altmark Trans ruling is not revolutionary, but lies within the logic of the EC State aid control system. Recently, the European Commission has adapted the "Altmark Trans philosophy" in its draft package of measures concerning the financing of services of general economic interest<sup>56</sup> and has applied some of the Altmark Trans requirements, especially with regard to the calculation of the additional net costs, to Article 86(2) EC which rules the justification of State funding being regarded as State aid within the meaning of Article 87(1) EC.

44 Koenig/Scholz, *EuZW* 2003, page 133 (137).

45 Commission Decision of 25.11.1998 on measures by Germany to assist InfraLeuna Infrastruktur und Service GmbH, OJ 1999 L 260/1 (14).

46 Cf. Modlich, *Nationale Infrastrukturmaßnahmen nach Art. 92 I EGV*, 1996, page 254.

47 Koenig/Kühling, *DÖV* 2001, page 881 (887).

48 Commission Decision of 25.11.1998 on measures by Germany to assist InfraLeuna Infrastruktur und Service GmbH, OJ 1999 L 260/1 (13).

49 Koenig/Scholz, *EuZW* 2003, page 133 (138).

50 Commission, State aid No. N 649/2001 – Freight Facilities Grant (FFG), Decision of 20.12.2001, point 48.

51 ECJ, Judgment in Case 730/79 – Philip Morris, [1980] ECR 2671, paragraph 26; ECJ, Judgment in Case C-301/87 – Bousac, [1990] ECR I-307, paragraph 49; ECJ, Judgment in Case C-303/88 – ENI Lanerossi, [1991] ECR I-1433, paragraph 34; ECJ, Judgment in Case C-355/95 P – Textilwerke Deggendorf, [1997] ECR I-2549, paragraph 26.

52 Santamato/Westerhof, *EuZW* 2003, page 645 (646).

53 Commission, State aid No. C 67/2003 (ex N 355/2003), C 68/2003 (ex N 400/2003), C 69/2003 (ex N 473/2003) – Propylene Pipeline from Rotterdam via Antwerp to the German Ruhr Area, Decision of 16.06.2004, points 55, 57.

54 Commission, State aid No. N 527/2002 – Aviation Fuel Pipeline supplying Athens International Airport, Decision of 02.04.2003, OJ 2003 C 148/11.

55 Cf. ECJ, Judgment in Case C-280/00 – Altmark Trans, [2003] ECR I-7747, paragraph 92.

56 The draft package of measures can be downloaded from the world wide web: [http://europa.eu.int/comm/competition/state\\_aid/others/#compensation](http://europa.eu.int/comm/competition/state_aid/others/#compensation); cf. also Bartosch, *EuZW* 2004, page 295 (298 et seq.); Koenig/Haratsch/Pffromm, *Das integrale WP-Gutachten in der Infrastrukturförderung: Mehr Kostenrechnung – weniger Juristenprosa* (soon to be published).

Therefore, it appears to be consequent to apply the Altmark Trans logic within the scope of Article 87(3) EC with regard to a minimisation of distorting effects to competition. In consequence, the additional net cost calculation method must not only be applied to Article 87(1) EC (classification of a measure as State aid), but also to Article 87(3) EC (possible approval by the Commission) and to Article 86(2) EC (justification).

#### b. Interest for the public

Additional to the economic non-viability of the infrastructure project, there must be an interest for the public<sup>57</sup>. A distortion of competition can only be accepted if it is motivated by the need to provide a service that falls within the normal responsibilities of the State towards the public. The European Commission has recognised this public service function of an infrastructure in case of open transport facilities such as roads, ports, airports, underground transport facilities<sup>58</sup>, and more recently pipeline transport facilities<sup>59</sup>. Such pipeline projects often provide an environmentally sound means to the transport of substances and avoid the pollution associated with the transport by road, by ship or by railway. The Commission has also recognised safety and industrial advantages as a substitute to alternative transport modes<sup>60</sup>.

#### c. Proportionality test under Article 87(3) EC

The distortion of competition caused by State funding must be in proportion to the infrastructure needs identified. To achieve this proportionality it is necessary to minimize the distorting effects of State funding by ensuring that the infrastructure is made available to all potential users on non-discriminatory terms and by the application of the additional net cost calculation method<sup>61</sup>. Over-compensation is always disproportionate because it is not necessary to overcome the market failure situation. Therefore, over-compensation must not be justified under the terms of the items Article 87(3) EC. The only way to meet the proportionality test is to apply the additional net cost calculation method elaborated by the ECJ in its Altmark Trans decision.

### 3. The need for an "Integrated Certificate of Added Value"

If a tendering or a public procurement procedure is not possible in order to exclude undue State aid advantages, there is a need for an independent review exercised by an independent chartered accountant (in German: "Wirtschaftsprüfer"). The calculation of costs serves as a surrogate of a tendering or procurement procedure. The chartered accountant must at first

examine the question of whether or not any State funding constitutes State aid within the meaning of Article 87(1) EC. If there is State aid, the review secondly is needed to identify to which amount the State grant exceeds the amount which is needed to provide the infrastructure. This is necessary for the assessment of whether State funding is proportionate to the distortion of competition within the common market and therefore is compatible with Article 87(3) EC. This review must cover all levels of the infrastructure project concerned and all levels of economic exchange, and finally has to evaluate the project as a whole. It results in an "integrated certificate of added value" (in German: "integrales Wertgutachten")<sup>62</sup>.

### III. Conclusion

This analysis of the Commission's case law shows that there is a logic of infrastructure funding under EC State aid control. The Commission has reacted steadily to State practices and the enormous variety of methods of funding infrastructure facilities. It has chosen a differentiated approach trying to cover all possible constellations and problems arising, especially from public-private partnership structures. The Altmark Trans ruling of the ECJ has tremendous impact on the entire EC State aid control regime and its ideas will gradually, but certainly penetrate all aspects of State aid control sectors. Hence, the control exercised by the Commission of State funding of infrastructure facilities will probably orientate more closely towards the ideas of the Altmark Trans ruling for the future. Nevertheless, some questions still remain to be answered and some blanks to be filled in.

57 Santamato/Westerhof, EuZW 2003, page 645 (647).

58 Also see Santamato/Westerhof, EuZW 2003, page 645 (647).

59 Commission, State aid No. C 67/2003 (ex N 355/2003), C 68/2003 (ex N 400/2003), C 69/2003 (ex N 473/2003) – Propylene Pipeline from Rotterdam via Antwerp to the German Ruhr Area, Decision of 16.06.2004; see also Commission, State aid No. N 527/2002 – Aviation Fuel Pipeline supplying Athens International Airport, Decision of 02.04.2003, OJ 2003 C 148/11.

60 Commission, State aid No. C 67/2003 (ex N 355/2003), C 68/2003 (ex N 400/2003), C 69/2003 (ex N 473/2003) – Propylene Pipeline from Rotterdam via Antwerp to the German Ruhr Area, Decision of 16.06.2004, points 53, 57.

61 Commission, State aid No. C 67/2003 (ex N 355/2003), C 68/2003 (ex N 400/2003), C 69/2003 (ex N 473/2003) – Propylene Pipeline from Rotterdam via Antwerp to the German Ruhr Area, Decision of 16.06.2004, point 58.

62 Cf. Koenig/Haratsch/Pfromm, Das integrale WP-Gutachten in der Infrastrukturförderung: Mehr Kostenrechnung – weniger Juristenprosa (soon to be published); Koenig, EuZW 2003, page 641; Koenig/Pfromm, SächsVBl. 2003, page 281 (283); Koenig, EuZW 2004, page 385.