

The relevance of EC State aid control for PPP infrastructure funding

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I. Introduction

The concept of "Public Private Partnerships" is nowadays on everyone's lips. Although the times of first euphoria may well be over, State funding of infrastructure through PPP has become more and more important in recent years. Mostly due to budgetary constraints, Member States rely more heavily than ever on Public Private Partnerships to establish and to operate infrastructure and to distribute public services. This increasing number of PPP projects not only proved a challenge to the EC State aid regime (see below). It also revealed potential shortcomings of this way to provide infrastructure facilities. At times, the formation of a PPP seemed nothing more than a welcome opportunity for public authorities to shift costs to the future and to present a balanced budget. One could easily get the impression that "PPP" de facto means "private power for public budgetary problems" or – even more pointedly – "Prozac for public poverty". However, it is also clear, that PPP arrangements can generate considerable positive economic effects by allowing an efficient sharing of the risks and costs and the required technical or managerial know-how between public and private actors. But in general, these beneficial effects will not accrue unless the applicability of a PPP construction is carefully scrutinized with respect to the

individual circumstances; for there should often be a more efficient solution for providing infrastructure facilities. As long as PPPs are being viewed as a "magical formula" for addressing infrastructure issues, there is a certain risk that their economic potential is going to be discredited.

II. Strict observation of relevant funding-levels

To avoid an inefficient implementation the required conditions of a PPP should be well-defined and easy to apply. In this regard, the Commission's 2005 Communication on Public Private Partnerships and Community Law on Public Procurement and Concessions¹ was an important step. However, given that the Communication deals mostly with aspects of concessions and the requirement of follow-up initiatives at EC level, a considerable number of questions concerning the implementation of basic EC State aid principles remains unclear. Apart from the general problems in subsuming individual cases under the scope of Article 87 (I) EC, particularly the non-observance of a strict differentiation between the relevant beneficiary- and market-levels causes legal uncertainties. To overcome these uncertainties, the logic of PPP infrastructure funding under EC State aid control shall be summarized² by explaining especially the system of State aid control on behalf of the different markets and levels concerned. 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, all relevant markets and levels, i.e. the level of end-users of an infrastructure, the level of owners and operators of an infrastructure and, finally, the level of shareholders owning the holder and/or operator of an infrastructure, at which favouring of specific undertakings appears to be possible have to be examined.³ It must be ensured that neither the end-users nor the owners, nor the operators, nor the shareholders receive more than

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1 Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on Public-Private-Partnerships and Community Law on Public Procurement and Concessions of 15.11.2005 (COM(2005) 569 final).

2 Please note that the analysis shall be confined on the scope of Article 87 (1) EC.

3 Koenig/Scholz (2003), *EuZW* 2003, 134 et seq.; Koenig/Pfromm (2003), *SächsVBl.* 2003, 282; Koenig/Pfromm (2004), *NzBau* 2004, 376. This differentiated approach was applied by the Commission e.g. in the *InfraLeuna Infrastruktur und Service* case, see Commission, Decision 1999/646/EC, OJ 1999 L 260/1 – *InfraLeuna Infrastruktur und Service GmbH*, p. 11 et seq.

an adequate market return on their investments or for their activities.⁴

1. The Commission's State Aid screening pattern

Before delving into the details, it shall be emphasized that the issue of whether a certain public funding activity falls within the scope of Article 87 (1) EC is normally confined to essentially two of the five State aid criteria: firstly, the actual favouring of an undertaking and secondly, the selectivity of the favouring. Possible effects on competition and trade are not generally analysed in a separate and self-contained step⁵. This practice has recently been met with criticism⁶ and is expected to change⁷ in accordance with the Commission's 2005 "State Aid Action Plan"⁸. It is still unclear to what extent these reform plans of EC State aid control is going to affect the control of PPP infrastructure funding. Still, despite this increased emphasis on the criteria "distortion of competition" and "effects on trade", it should be ensured that future legal practice keeps in view its previous careful approach to the selectivity criterion, as that offers the chance of an exact differentiation between the individual benefit-levels of an infrastructure funding and therefore facilitates a pre-assessment of its possible State aid-character. Finally, a careful analysis of the selectivity criterion may help to reduce the risk of decisions in which the criteria of Article 87 (1) EC are affirmed rashly due to a confusion of the levels and parties concerned.

2. The selectivity requirement of Article 87 (1) EC

Thus, the starting point for addressing the question of whether infrastructure funding falls within the scope of EC State aid control is the selectivity criterion of Article 87 (1) EC. A differentiation between an infrastructure owned and operated solely by the State and an infrastructure in Public-Private-Partnerships structures is thereby essential.

a. Infrastructure owned and operated by the State

Measures favouring the economy in general do not fall within the concept of State aid⁹. Better infra-

structure usually improves the appeal of a region as a business location¹⁰. This does not lead to a benefit for specific undertakings but favours any undertaking which decides to settle in that particular region¹¹. The funding of an infrastructure owned and operated by a public authority will not constitute State aid, if the infrastructure is made available to all potential users on non-discriminatory terms¹². 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 similar vein, financial support for the development of a nature experience area serves a certain area in general and cannot be qualified as favouring any specific undertaking or the production of certain goods.¹³ Most funding of land transport infrastructure (e. g. road infrastructure constructed 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 either.¹⁴ The construction of a

4 Cf. Koenig (2003), EuZW 2003, 641; Koenig/Pfromm (2004) 376.

5 Schohe/Arhold, EStAL 2006, 2 (6).

6 See, for example, EuGH 13.3.1985, Slg. 1985, 809, 824 Rn. 24 – Niederlande und Leeuwarder Papierwarenfabrik, EuG 30.4.1998, Slg. 1998 II 717, 742 f. Rn. 64 – Vlaams Gewest/Kommission; EuGH 19.10.2000, Slg. 2000 I 8855, 8916 Rn. 66 – Italien und Sardegna Lines/Kommission; Heidenhain in: Heidenhain, Handbuch des Europäischen Beihilfenrechts (2003), § 4 Rn. 60.

7 See for example Friederiszick/Röller/Verouden, "European State Aid control: An economic framework", 18.11.2005, <http://www.crai.com/Agenda/Roller-state.pdf>.

8 "State Aid Action Plan: Less and better targeted state aid: a road-map for state aid reform 2005-2009" (Consultation document), Brussels, 7.6.2005, COM (2005) 107 final.

9 Cf. Soltész (2001) 108; Koenig/Kühling (2001), DÖV 2001, 882; Koenig/Scholz (2003) 133. See for example Commission, State aid No. N 392/1999 – Maßnahmen zur Dorf- und Stadtentwicklung.

10 Koenig/Scholz (2003) 133.

11 Cf. Commission, Decision 2000/369/EC, Sangalli Manfredonia Vetro, OJ 2000 L 137/1, paras 26 et seq.; see also Koenig/Scholz (2003) 133.

12 See Commission, State aid No. N 649/2001 – Freight Facilities Grant (FFG), para. 45; Commission, State aid No. N 356/2002 – Network Rail, para. 70; Commission staff working paper, Guidelines on criteria and modalities of implementation of structural funds in support of electronic communications, SEC (2003) 895, p. 11; Santamato/Westerhof (2003) 646. As for more details on the principle of non-discrimination in this context, see Koenig/Kiefer (2005), EStAL 2005, 419.

13 Commission, State aid No. N 86/2000 – Support for nature experience areas, p. 11.

14 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, para. 12; Commission, State aid No. N 511/1995 – Jaguar Cars Ltd. and Ford Motor Company, OJ 1996 C 311/15, p. 16.

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.¹⁵ This approach also applies to maritime ports.¹⁶ In consequence, there is a competition of Member States and regions within the European Community by means of provision of infrastructure facilities.¹⁷ This competition of regions is considered to be compatible with the common market and the EC State aid control regime by the Commission¹⁸ as well as by the Community Courts.¹⁹

Thus, in general, an infrastructure which is neither dedicated to one specific firm nor favours one specific undertaking falls outside the scope of Article 87 (1) EC²⁰. By contrast, a State measure fails to meet the non-selectivity requirement if in fact one specific undertaking can benefit from an infrastructure facility exclusively²¹. In *Kimberly Clark Industries*²² for example, 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. 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 is even explicitly awarded to one undertaking, a benefit can be excluded if the infrastructure is rented out at market conditions²³. The end-user has to pay adequate fees at the market price level.

b. Infrastructure owned and operated by a PPP

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 PPP. In this case, all relevant markets and levels at which a favourable treatment of a specific undertaking appears to be possible, that is to say: the level of the end-users of an infrastructure, the level of the owners and operators of an infrastructure and, finally, the level of the shareholders owning the holder and/or operator of an infrastructure, have to be examined very carefully²⁴. It has to be ensured that neither the end-users nor the owners, nor the operators, nor the shareholders receive more than an adequate market return on their investments or for their activities²⁵.

(1) First relevant level: The end-users or customers of an infrastructure facility

(aa) 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. If there is only a small group of specific undertakings – or more obviously: only one undertaking – that is able to take advantage of an infrastructure, this can indicate a specific benefit. With regard to an infrastructure operated in the form of a public-private partnership, the same criteria apply as in cases of infrastructures owned and operated exclusively by a State authority. In its *Propylene Pipeline* case, the Commission assessed that the State funding favoured only the producers of propylene and ethylene, because the pipeline

15 Commission Decision, *Ems flood barrier at Gandersum*, Press Release of 17.06.1998, IP/98/539.

16 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, p. 3; Commission, State aid No. N 438/2002 – Subsidies to the port authorities for carrying out public authority tasks.

17 Cf. Koenig/Kühling (2001) 882 et seq.

18 Cf. Communication of the Commission, *Veltin-Tal*, OJ 1992 C 324/3, p. 3; Communication of the Commission, *Alkalische Salze*, OJ 1993 C 59/4, p. 5.

19 ECJ, Case C-225/91, *Matra*, [1993] ECR I-3203, paras 27 et seq.

20 Soltész (2001), *EuZW* 2001, 109.

21 Santamato/Westerhof (2003), *EuZW* 2003, 645 et seq.

22 Communication of the Commission, *Kimberly Clark Industries*, OJ 1994 C 170/8, p. 8; see also Commission, Invitation to submit comments pursuant to Article 93 (2) of the EC treaty, concerning the aid C 61/98 (ex NN 189/97) (*Lenzing Lycocell*), OJ 1999 C 9/6, p. 14 and p. 17; Commission, Decision 2000/194/EC, OJ 2000 L 61/4 – *Weida Leder GmbH*, para. 34; see Koenig/Kiefer (2005) 415.

23 Koenig/Haratsch (2004), *EStAL* 2004, 394.

24 Koenig/Scholz (2003) 134 et seq.; Koenig/Pfromm (2003) 282; Koenig/Pfromm (2004) 376. This differentiated approach was applied by the Commission e.g. in the *InfraLeuna Infrastruktur und Service* case, see Commission, Decision 1999/646/EC, OJ 1999 L 260/1 – *InfraLeuna Infrastruktur und Service GmbH*, p. 11 et seq.

25 Cf. Koenig (2003) 641; Koenig/Pfromm (2004) 376.

only served to transport these substances²⁶. Since this project did not meet the non-selectivity criterion, its State funding qualified as State aid within the meaning of Article 87 (1) EC.

(bb) Multi-functionality of an infrastructure

In the context of the construction of sports stadiums, the Commission additionally applies the criterion of multi-functionality²⁷. According to the Commission, this requirement serves to distinguish general infrastructure measures from infrastructures typically dedicated to a specific category of users. However, while this criterion can be applied to special transport facilities like skiing cableways²⁸ or fuel pipelines²⁹ where only specific users are able to use the infrastructure, i.e. skiers concerning skiing cableways and fuel producers concerning fuel pipelines, it fails to provide meaningful results where other infrastructure facilities are involved. 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 communities³⁰. But even if they are exclusively used for sports, they would at least be potentially open to any person willing to take part in a particular sports event. Thus, those arenas benefit the general public³¹. Therefore, the criterion of multi-functionality can only serve as an indication for the non-selectivity of a funding measure³².

(cc) Cost-efficiency as a requirement?

It is still unclear whether or not infrastructure facilities have to be operated in a cost-covering way. In general, users may well receive a special benefit and a 'favouring' within the meaning of Article 87(1) if the infrastructure facility is offered on terms and conditions that no commercial supplier would offer. However, many infrastructure facilities are operated in that way, i.e. they are either supplied completely gratuitous or on conditions that are not sufficient to cover costs. An obvious example is the German public road infrastructure which can largely be used free of charge. Another example is the large number of cultural institutions that can be found in any major European city: Most theatres, operas and museums normally receive a considerable amount of subsidies and are hardly ever profit-making. Accordingly, it is difficult to see how

these facilities could ever meet the Commission's demand for a cost-covering operation – especially since that demand also seems to necessitate a commercially acknowledged way of allocating costs to individual users. A different reading of the Commission's demand for cost-covering reveals, however, that a public subsidy which is common may be seen as a separate source of income and may therefore reduce the amount of costs that are to be covered in the first place. This interpretation appears to be in line with two recent informal Commission notices that were issued with regard to the construction of sport arenas in Wembley and Hannover. In both cases it was clear that the end-users would indeed be favoured by the construction of these arenas; yet in both cases the Commission did not ask for a complete cost-covering.

(2) *The second relevant level: the owners and operators of an infrastructure facility*

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 in an open and non-discriminatory procedure, and if the State compensation granted for the construction and maintenance of the infrastructure represents the market price to achieve the desired result³³. This might be achieved through a tendering or a public procurement procedure³⁴.

- 26 Commission, Decision 2005/170/EC, OJ 2005 L 56/15 – Propylene Pipeline from Rotterdam via Antwerp to the German Ruhr Area, para. 49; see also Commission, State aid No. N 527/2002 – Aviation Fuel Pipeline supplying Athens International Airport.
- 27 Cf. Commission, Letter to the Ministry for Economy of the German Land Lower Saxony, COMP-2002-00757-00-00-DE-TRA-00 (EN) CS; see also Commission, Letter to the UK REP on the building of a new stadium at Wembley (both unpublished).
- 28 Commission, State aid No. N 376/2001 – Aid schemes for cableways, para. 15 et seq.
- 29 Commission, Decision 2005/170/EC, OJ 2005 L 56/15 – Propylene Pipeline from Rotterdam via Antwerp to the German Ruhr Area, para. 49; see also Commission, State aid No C 11/05 (ex N 21/05), Invitation to submit comments pursuant to Article 88 (2) EC, OJ 2005 C 100/18 – Aid for the construction of an ethylene pipeline; Commission, State aid No. N 527/2002 – Aviation Fuel Pipeline supplying Athens International Airport, p. 11.
- 30 Koenig/Haratsch (2004) 395.
- 31 Koenig/Scholz (2003) 135; a different view is taken by Santamato/Westerhof (2003) 648.
- 32 Koenig/Scholz (2003) 136.
- 33 Commission, State aid No. N 649/2001 – Freight Facilities Grant (FFG), para. 47.
- 34 Commission, State aid No. N 264/2002 – London Underground Public Private Partnership, para. 80 et seq. See also Koenig/Kühling (2003) 289 et seq.

(aa) The low-profit principle

If a public procurement procedure is not actually possible because of private investor property rights to the site on which the infrastructure is to be constructed, the Commission has accepted in a few cases the so-called low-profit principle as a safeguard against specific favouring³⁵. Accordingly, the Commission found it sufficient that the private owner or operator of an infrastructure facility was obliged to make no or at least limited profits or to re-invest its profits into the maintenance of the infrastructure. Such an obligation was thought to prevent cross-subsidisation by avoiding that profits which result from State funding are leaking into other markets³⁶. However, the low-profit principle was accepted only in a few cases³⁷. It is therefore difficult to say whether or not the Commission still sticks to this principle.

Be that as it may, it should be stressed that the low-profit approach suffers from an inherent logical flaw as it neglects that there is not only competition in the market, but also competition for the market³⁸. Applying the low-profit principle might prevent distortions of competition by excluding specific benefits of the owners or operators of an infrastructure facility³⁹. Provided an infrastructure is available to all potential end-users on non-discriminatory terms, the low-profit principle might also

help to prevent distorting effects in the downstream market of the end-users. But even in this case the effects of the low-profit principle appear dubious because low profit in practice often implies hidden extra gains. The fact that an undertaking is willing to accept low profit terms should make DG Competition rather suspicious⁴⁰. Moreover, the low-profit principle clearly fails to prevent distortions in the upstream market where developers and constructors of infrastructure facilities compete⁴¹. There is not only competition between the potential end-users of a given infrastructure, for example for the services provided by the racetrack Hockenheimring in Germany (downstream market), but operators of the racetrack also compete with operators of other circuits in the European Community, not only for motor racing events, but also for concert events of EC wide importance (upstream market). These distorting effects on competition in the upstream market cannot be prevented by the low-profit principle. Yet the crucial question in EC State aid control is not whether an undertaking gains profit, but whether it acts as a provider of services and competes with other service providers on market terms.⁴²

(bb) The Altmark Trans ruling

Furthermore, the low-profit principle has been overruled by the Altmark Trans judgement of the ECJ⁴³. The application of the additional net cost calculation method which the ECJ has elaborated in this judgement detects any distortion 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 as well:

According to the ECJ in Altmark Trans, an economic advantage can be ruled out if an appropriate service is provided in return for a financial benefit. The compensation must not 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 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.⁴⁴ The costs to be taken

35 Commission, Decision 1999/646/EC, OJ 1999 L 260/1 – Infra-Leuna Infrastruktur und Service GmbH, p. 11 et seq.

36 Cf. Commission, State aid No. N 356/2002 – Network Rail, para. 79; see also Koenig/Scholz (2003) 136 et seq.

37 Commission, Decision 1999/646/EC, OJ 1999 L 260/1 – Infra-Leuna Infrastruktur und Service GmbH, p. 11 et seq. See also Commission, Decision 2005/170/EC, OJ 2005 L 56/15 – Propylene Pipeline from Rotterdam via Antwerp to the German Ruhr Area, paras 11, 58, and 63.

38 The decision of the Commission in the Network Rails case proves that the Commission is aware of this distinction, although in that particular case there was neither competition on the market (for operating and managing the national rail network) nor competition for the market; see Commission, State aid No. N 356/2002 – Network Rail, paras 75 et seq.

39 Koenig/Kühling (2001) 887.

40 Koenig/Haratsch (2004) 395.

41 Koenig/Kühling (2001) 887 et seq.; Koenig/Scholz (2003) 137.

42 Koenig/Scholz (2003) 137.

43 ECJ, Case C-280/00, Altmark Trans, [2003] ECR I-7747, paras 89-93, 95; see also ECJ, Joint Cases C-34/01 to C-38/01, Eni-rorse, [2003] ECR I-14243, paras 32 et seq.

44 ECJ, Case C-280/00 Altmark Trans [2003] ECR I-7747, paras 92 et seq.

into consideration include all the costs incurred in the operation of the service of general economic interest. Where the undertaking also carries out activities falling outside the scope of the service of general economic interest, only the costs associated with the service of general economic interest may be taken into consideration. The costs allocated to the service of general economic interest 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 service of general economic interest. Calculation of the costs must be based on generally accepted cost accounting principles. Nevertheless, compared to a cost analysis, the accomplishment of a public procurement procedure is still considered to be the better way to eliminate the risk of an over-compensation. In one of its leading PPP cases – London Underground – the Commission underlined the importance of observing an open, transparent and non-discriminatory procedure for an infrastructure project of both public and private partners. If such a procedure has been followed, the level of public support can be regarded as representing the market price for the execution of a project and therefore State aid within the meaning of Article 87 (1) EC can in principle be excluded.

(cc) The need for a general adoption of the Altmark requirements on PPP infrastructure

The Altmark requirements should be modified and adapted to the creation, construction, development, and operation of infrastructure facilities even beyond the scope of services of general economic interest⁴⁵. 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 entirely 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 invested⁴⁶. As the Commission expressly stressed in its 2005 State Aid Action Plan⁴⁷ (as well as in the context of a few more recent decisions like in its case CELF) a State funding can be a tool to address this sort of market failure⁴⁸. To exclude an extra benefit 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 an adequate market return⁴⁹. A benefit

within the meaning of Article 87 (1) EC can be ruled out if State funding is restricted to the additional costs incurred in developing the infrastructure⁵⁰. 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 invested 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. In determining what amounts to a reasonable profit, the Member State may introduce incentive criteria relating, among other things, to the quality of service provided and gains in productive efficiency. It is submitted that the prime example of these “incentive criteria” is the use of an analytical cost model⁵¹, that models the objective costs that are expected to arise under (simulated) competitive conditions in the relevant markets for the provision of a particular infrastructure⁵².

45 Koenig/Haratsch (2004) 396.

46 Santamato/Westerhof (2003) 646 and 648; Koenig/Pfromm (2004) 376.

47 “State Aid Action Plan: Less and better targeted state aid: a road map for state aid reform 2005-2009” (Consultation document), Brussels, 7.6.2005, COM (2005) 107 final.

48 However, one should be cautious when using the term “market failure” in this context. It may well be that the market is sending out the right signal – there is simply no need for this particular infrastructure and it might even be detrimental to the environment or to the economic well-being of the region (e.g. decline in tourism because of the infrastructure).

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

50 Koenig/Haratsch (2004) 396.

51 Koenig/Haratsch (2003), EStAL 2003, 577.

52 Koenig/Haratsch (2004) 396.

- (3) The third relevant level: The shareholders of the owner and/or the operator of an infrastructure facility

The third level to be examined is the level 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 pay lower prices than other end-users⁵³. Preferential terms for the use of an infrastructure might also emerge from the influence of shareholders during the planning⁵⁴. Shareholders may manipulate the design of an infrastructure according to their specific needs⁵⁵. Nevertheless, the shareholders' influence on 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 or not there is any specific benefit⁵⁶.

The payment of dividends to shareholders of an infrastructure facility might also constitute a benefit within the meaning of Article 87 (1) EC. By imposing an obligation to limit the maximum divi-

dend to market conditions, this favouring of infrastructure shareholders funded by the State can be reduced⁵⁷. Additionally, State grants for the construction of an infrastructure usually increase the value of the shares of the undertaking concerned. Therefore, the Commission sees the possibility of making large profits through selling assets and shares. This profit might also be relevant from a State aid law point of view as the Commission underlined in its *Infra Leuna* case⁵⁸. The profit can be excluded by a temporary ban of sale of assets or shares⁵⁹.

III. Conclusion

The funding of infrastructure poses a challenge for both public and private partners as well as for the EC state aid control authorities. But even if there are numerous trapdoors, this challenge will be manageable, if certain conditions are met. In assessing the application of Article 87 (1) EC to state funding measures in the field of infrastructure, the importance of the ECJ's *Altmark* ruling cannot be overestimated. In this context the *Altmark* criteria should not be limited to the funding of public service obligations, but should also apply to infrastructure funding beyond the scope of services of general economic interest. The execution of a public tendering procedure should be the preferred way to create a PPP.

Moreover, special attention should be paid to the different markets and levels involved in the PPP since the danger of falling under the scope of Article 87 (1) EC might be present on all these different levels and can therefore easily infect the whole project.

53 Commission, Decision 1999/646/EC, OJ 1999 L 260/1 – *Infra-Leuna Infrastruktur und Service GmbH*, p. 12.

54 Koenig/Scholz (2003) 137.

55 Commission, Decision 1999/646/EC, OJ 1999 L 260/1 – *Infra-Leuna Infrastruktur und Service GmbH*, p. 14.

56 Cf. Modlich (1996) 254; Koenig/Haratsch (2004) 397.

57 Koenig/Kühling (2001) 887.

58 Commission, Decision 1999/646/EC, OJ 1999 L 260/1 – *Infra-Leuna Infrastruktur und Service GmbH*, p. 13.

59 O'Koenig/Scholz (2003) 138.