State Aid Rules and Public Financing of Infrastructure. The Case of Autostrada Wielkopolska S.A.

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Abstract: The operation of a toll road typically involves an economic activity for which State aid rules apply. However, if the construction and operation of the road infrastructure is bundled and they are tendered out together, they usually fall outside the State aid regime. The reason for it lies in the fact that the use of competitive procurement procedures aim to increase the efficiency of public expenditure and to ensure a level playing field for private operators to compete for public contracts. Nevertheless, based on the European Commission's decisional practice, it transpires that an economic advantage for a concession holder cannot be ruled out automatically, in particular when there are amendments made to the original agreement. On the example of the Autostrada Wielkopolska S.A. case, critical State aid issues are discussed, among others, the application of State aid rules to public financing of infrastructure, the amendments made to a concession contract in the light of the risk assignment problem, as well as the existence of State aid in the form of overcompensation for a concession holder. The considerations are carried out on the canvas of a concrete case; however, they are enriched by the analysis of relevant legal provisions as well as conclusions from the EU courts and the European Commission decisions made in similar cases.

Keywords: *concession, construction and operation of a toll road, overcompensation, public financing of infrastructure, State aid*

1. Introduction

Financing the high initial cost of constructing infrastructure (such as building a motorway) and the payments for services provided by the infrastructure can both take a variety of forms. Over recent decades, interest in attracting private capital for this purpose has increased substantially. A number of public-private partnership arrangements are practised, where risk is distributed in varying degrees between the public and private parties. Payments for infrastructure services, which are used to repay private financing costs over the life of the asset, can come from the government by way of a budget transfer as well as from the users of the infrastructure in the form of charges such as tolls.

An approach to infrastructure financing from the perspective of the EU State aid rules has evolved. Initially, it was based on the presumption that public funding of infrastructure is not an issue for the State aid control as it pertains to the domain of general measures of economic policy and does not provide a selective advantage for an undertaking. It can be argued that till the 1990s, State aid and public support for infrastructure were perceived as two separate, non-conflicting domains, although both were important for economic growth stimulation and fostering integration (Bruzzone & Boccaccio, 2018; Ruechardt, 2018; Gayger, 2016). An issue of concern was the construction and infrastructure improvement rather than controlling public support for it. Generally, the construction and non-discriminatory operation of infrastructure were not considered economic activity falling under the scrutiny of the EU competition policy. However, this has changed in the course of time, along with the introduction of competition into previously state-controlled sectors and the general trend towards tightening State aid control. At first, the Commission's focus was only on the users of infrastructure as potential aid beneficiaries and did not examine the presence of State aid on the markets of infrastructure developers or operators (see, e.g., *Matra SA v. Commission of the European Communities* [1993]).¹ For instance, in the *XXV Report on Competition Policy 1995*, the European Commission expressed the opinion that, in general, as long as access and usage remain public and general, public investment in infrastructure

¹ Paragraph 29 reads: "With respect to the investment in infrastructure [...] it must be emphasised that the Commission found in the contested decision that the infrastructure [...] would not benefit the joint venture exclusively, enabling it to conclude that the financial assistance granted by the Portuguese Republic should not be regarded as State aid" (*Matra SA v. Commission of the European Communities* [1993], para. 29).

would not involve State aid and be regarded as being in the public interest (European Commission, 1996). For the public support to be qualified as State aid, “the infrastructure-related advantages should be conferred selectively, with the aim of helping specific firms: for example, a purpose-built facility for the sole use of one undertaking or discriminatory access restrictions” (European Commission, 1996, para. 175). Subsequently, in its compatibility assessment, the Commission has started to differentiate between different levels of aid beneficiaries: the owner/developer, operator/concessionaire and user levels. Concession agreements are those policy instruments that can affect the various segments of market for a long time. As they typically entail granting exclusive rights to operators of infrastructure, they have the potential to distort competition to a considerable degree.

The overarching aim of this article is to examine the link between State aid rules and public financing of infrastructure projects, with a special emphasis on concession agreements for roads construction and operation. A case study design has been used as a realistic demonstration of a theory in practice. On the example of the case of *Autostrada Wielkopolska S.A. v. European Commission* [2019] (the AW S.A. case), critical State aid issues are discussed in four subsequent parts, following the FIRAC approach, which is an acronym for a five-step analytical process and stands for: Facts–Issue–Rule–Application–Conclusions (Statsky, 2010). First, the concept of State aid under EU law is introduced, and the evolution of the application of State aid rules to public financing of infrastructure is presented to set the scene for an ensuing discussion. It also includes a brief description of the facts of the case under study (facts). Next, the main issues are indicated that need to be considered in order to identify aid in a concession agreement (issues), as well as rules pertinent in deciding the issues specified (rules). The problems of alternations of a concession contract in the light of the risk assignment problem and the existence of State aid in the form of overcompensation for a concession holder are also investigated and referred to the case under study (application). The considerations are carried out on the canvas of a concrete case; however, the EU courts and the European Commission (EC) decisional practice in similar cases provide additional guidance on the issues discussed. They have enabled to develop the framework for the assessment of State aid existence in concession agreements for roads construction and operation.

2. Setting the scene: the concept of State aid under EU law

The general definition of State aid is set out in Article 107(1) of the Treaty on the Functioning of the European Union (TFEU), according to which

any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the internal market. (Consolidated version of TFEU, 2012, Art. 107(1))

This provision can be broken down into four criteria which must be met cumulatively for a measure to be qualified as State aid. These are: (1) the measure must be financed through State resources and be imputable to the State; (2) it must confer an economic advantage on its recipient; (3) the advantage must be selective; and (4) the measure must distort or threaten to distort competition and affect trade between Member States. It suffices that one of the above-specified criteria is not fulfilled to escape the State aid regime.

For the ensuing discussion, it is worth to stress two issues. First, there is a general ban on State aid falling under Article 107(1) of the TFEU in the EU. Second, rules governing the admissibility of State aid are one of the few areas where the Union enjoys exclusive competence.² The rationale for the EU State aid control stems from the fact that it is perceived as a mechanism which underpins the functioning of the internal market and supports economic integration (Clarke, 2013). Without State aid rules, Member States might engage in wasteful subsidy races, which are non-sustainable in the long run, the localisation of economic activities across the Member States could be affected, the dynamic incentives of firms be disrupted as less efficient firms would be able to survive or expand to the detriment of other market players. However, there are so many exemptions from this ban that some even compare the EU State aid regime to Swiss cheese as it contains more holes than actual cheese (Marquardt, 2007). Therefore, the European Commission's efforts are more concentrated on ensuring that State aid granted by the Member States is in line with the EU rules and does not cause undue distortion of competition than, in fact, on preventing Member

² According to Article 3 of the TFEU, "establishing of competition rules necessary for the functioning of the internal market" is an exclusive competence of the Union.

States from supporting undertakings.³ Nonetheless, it is worth stressing the role of State aid in steering public aid towards objectives of common interest, (such as infrastructure projects), that otherwise would not be realised in a given manner.

Due to financial constraints, public authorities increasingly often enter into various forms of cooperation with private sector economic operators for the development and operation of infrastructure, such as roads. This was the case of Autostrada Wielkopolska S.A., a private company set up to build and operate the first Polish toll motorway A2 from Świecko to Konin. In 1997, the company was granted a concession for the construction and operation of this part of the A2 motorway, following a public tender. The construction and the operation of a road infrastructure were bundled (i.e., the same entity was in charge of the construction, maintenance and operation of the infrastructure). The concession agreement obliged the AW S.A. to construct and maintain the A2 motorway section and, in exchange, the company received a temporary right for a period of forty years (i.e., until 10 March 2037) to operate the constructed motorway section, including the right to collect and retain all tolls from all of its users. Five different categories of tolls were introduced depending on the vehicle category and their maximum rates. However, due to a legislative change excluding heavy goods vehicles from the obligation to pay a toll for using the motorway, a concession holder—the AW S.A.—suffered a loss of revenues. Therefore, a special compensation mechanism was introduced in the form of direct payments made by the State for a concession holder, thereby altering the initial concession agreement. The case is interesting as it regards the first and assumedly the most expensive motorway section in Poland, and is one of the very few State aid cases brought before the General Court where the State had not only divergent but also opposing interests to those of the concession holder (the Autostrada Wielkopolska S.A). It can serve as a prime example illustrating the key issues of the assessment of State aid existence in a concession agreement for roads construction and operation.

³ Recent advancements in the EU State aid policy have introduced a more effects-based approach. This effects-based approach emphasises the economic implications of State aid and is embedded in the so-called “balancing test” (see further Coppi, 2011; Schwalbe, 2011).

3. Applicability of State aid rules to public financing of infrastructure. Concession agreements for roads construction and operation

There are three main problems which are to be addressed to identify State aid in a concession agreement: Does this project involve economic activity? Has the project affected competition or trade between the Member States? And finally, does the project confer a selective advantage on the concession holder?

As far as the first issue is concerned, in the case of *Mitteldeutsche Flughafen AG and Flughafen Leipzig-Halle GmbH v. European Commission* [2012], paras. 43 & 44 (also confirmed in the case of *Eventech Ltd v. The Parking Adjudicator* [2015], para. 42), the EU Court of Justice adjudicated that the construction of an infrastructure which would be commercially exploited constitutes an economic activity. Hence, the State aid control has been extended to infrastructure and, most significantly, it has been confirmed that the intended use of infrastructure is relevant in the State aid assessment, meaning the construction itself cannot be isolated from future infrastructure purposes. This stance is echoed in Paragraph 220 of the Notice on the Notion of Aid: “While roads made available for free public use are general infrastructures and their public funding does not fall under State aid rules, the operation of a toll-road constitutes in many instances an economic activity”.⁴ This is a substantial change, as twenty years earlier, the Commission, in its 1994 Aviation Guidelines, stated that “the construction or enlargement of infrastructure projects (such as airports, motorways, bridges, etc.) represents a general measure of economic policy, which cannot be controlled by the Commission under the Treaty rules on State aid” (European Commission, 1994, para. 12).

In that situation, a further step in State aid assessment is to verify whether the project distorts or threatens to distort competition and affects trade between the Member States. Pursuant to the Notice, the construction of infrastructure is free from State aid if it relates to a road infrastructure which is a natural monopoly, for which replication would be uneconomical due to the high start-up costs and powerful economies of scale. For the reason that such an infrastructure does not face direct competition from other infrastructures of the same kind or of a different kind but with a high

⁴ Any activity consisting in offering goods or services on a given market, performed for economic motive, such as earning profit or acquiring wealth constitutes an economic activity. All other activities, carried out without any charge and not for commercial exploitation, are regarded as being “non-economic” (Commission Notice C/2016/2946).

degree of substitutability, it is considered as having no effect on competition and trade between the Member States. This is verified on the basis of the following three cumulative conditions: (a) an infrastructure faces no direct competition; (b) private financing is insignificant when assessed at the level of the sector and Member States concerned (rather than at the regional or local level); and (c) an infrastructure does not favour a specific undertaking or sector but provides benefits for society at large (Commission Notice C/2016/2946, para. 211). Additionally, Member States should ensure that public funding of a given infrastructure project is not used to cross-subsidize or indirectly subsidize other economic activities of an undertaking (Commission Notice C/2016/2946, para. 212). This is typically the case for roads (as in our case), as well as railway infrastructure, or inland waterways, but unlike in fields such as airports or ports that are often in competition with similar infrastructure (European Commission, 2016a).

However, no potential distortion of competition for the construction of an infrastructure does not mean that there is no potential distortion of competition for the operation of that infrastructure, as State aid can be present at the operator's level. The potential distortion of competition for the operation of an infrastructure is excluded when a service (the operation of an infrastructure) is realised under a legal monopoly (Commission Notice C/2016/2946, para. 188). What is important in terms of our case is that a legal monopoly should not only exclude competition on the market—that is, a given service should be reserved by law to an exclusive provider with a clear prohibition for any other operator to provide such service, but also for the market, which means that it should exclude any possible competition to become the exclusive provider of the service in question (the operation of an infrastructure). In the AW S.A. case, an undertaking was granted an exclusive right to operate a motorway (no competition on the market), but a concession was awarded through a competitive procedure, which means there must have been competition for the market.

As the impact on competition and impact on trade are, as a rule, linked,⁵ the effect on trade between Member States in that case could have been ruled out only if a project had a purely local impact. Bacon points out:

These conditions [distortion of competition and effect on trade] are closely related and are often considered together. But the two conditions

⁵ Paragraph 81 of the Judgment of the General Court, Joined Cases T-298/97, T-312/97 etc., reads: “when State financial aid strengthens the position of an undertaking compared with other undertakings competing in intra-Community trade, the latter must be regarded as affected by that aid” (*Mauro Alzetta and Others v. Commission of the European Communities* [2000], para. 81).

remain distinct in principle. A measure may distort competition, but relate to a wholly local situation. Equally, a measure may affect a market in which there is intra-EU trade, but the distortion or likely distortion of competition may not properly be demonstrated. (Bacon, 2013, p. 83)

Taking into account the fact that the A2 motorway is an important export corridor, it cannot be said that an operator/concession holder provides services only to a limited area within a given Member State and is unlikely to attract customers from other Member States.

Owing to the fact that the considerations here do not yet allow to exclude the existence of State aid in the Autostrada Wielkopolska case, the latter issue—whether an undertaking has received a selective economic advantage—would be decisive for the assessment. The question arises whether a transaction with a concession holder corresponds to market terms, i.e., whether State confers an economic advantage upon an undertaking that it would not have obtained in similar circumstances under normal market conditions (the market economy operator principle, or MEOP). This stems from the fact that State can act both as a public authority and as an entrepreneur and Article 345 of the TFEU ensures equal treatment of undertakings. In the Communication from the Commission: EU Guidelines for the application of State aid rules in relation to the rapid deployment of broadband networks it is stated: “According to the case-law of the Court, it follows from the principle of equal treatment that capital placed by the State, directly or indirectly, at the disposal of an undertaking in circumstances which correspond to normal market conditions cannot be regarded as State aid” (Communication 2013/C 25/01, para. 16). As a rule, the Commission enjoys a wide margin of discretion while applying the MEOP, and this is because the test requires a complex economic appraisal (Cyndeka, 2016). However, when the bundled construction and operation of a road infrastructure is tendered out together, i.e., is assigned to an undertaking on the basis of a competitive, transparent, non-discriminatory and unconditional tender, it can be presumed that the agreement is in line with market conditions. The reason for it lies in the fact that the use of competitive procurement procedures aim to increase the efficiency of public expenditure and to ensure a level playing field for private operators to compete for public contracts.⁶ Hence, it appears that the concession

⁶ However, even if they have not been selected following a public tender, it is still possible to establish that the fees paid by the operator/concessionaire are in line with normal market conditions. This can be done through benchmarking or on the basis of a generally-accepted standard assessment methodology. See Commission Notice C/2016/2946, paras. 97–105.

Figure 1. The application of State aid rules to concessions agreements for financing and operation of road infrastructure

Source: Own elaboration based on the Commission Notice C/2016/2946.

agreement signed between Polish authorities and the AW S.A. fell outside the scope of Article 107(1) of the TFEU.

4. Introducing the compensation mechanism for the concession holder in the light of State aid rules

A characteristic feature of a concession is the right of a concessionaire to exploit the works or services which goes hand in hand with the transfer (full or partial) to a concessionaire of operating risk of an economic nature. Hence, it can occur that a concession holder will not recoup, under normal operating conditions, the investments made and the costs incurred in operating the works or services awarded. Not justified are those provisions of the concession agreement which stipulate the discharge of a concession holder of any potential loss by guaranteeing a minimal revenue which is equal or higher to the investments made (Directive 2014/23/EU, Art. 5). However, certain external circumstances may appear that could not have been foreseen at the time of the concession awarding, which can lead to the alternations in the initial agreement. In the AW S.A. case, the original concession agreement did not raise any objections on the part of the European Commission. These were the changes introduced to it that caused initiating the formal investigation procedure. The amendments made were dictated by the new law excluding heavy goods vehicles from the obligation to pay a toll for using the motorway in the period from 1 September 2005 to 30 June 2011. The new wording of the Act on Toll Motorways and the National Road Fund (2005) transposed the Directive 1999/62/EC of the European Parliament and of the Council on the charging of heavy goods vehicles for the use of certain infrastructures. This Directive required the EU countries to eliminate double charging for heavy goods vehicles for the use of a single road section (Directive 1999/62/EC, Art. 7(3)). For this reason, those heavy goods vehicles who paid the vignette (a toll card) for using national roads in Poland were exempted, as from 1 September 2005 till 30 June 2011,⁷ from tolls on motorways covered by concession agreements. In order to compensate a loss of revenues of a concession holder, a special compensation mechanism was introduced for the period in question.

Against this backdrop, two issues can be raised. First, the Commission does not rule out that in certain circumstances, when there is a change in the conditions

⁷ The possibility of double payment was eliminated on 1 July 2011 when Poland introduced the electronic toll collection system 'via TOLL', which replaced the vignettes.

of a concession, a State can financially compensate a loss of revenues of the concession holder that involves the adaptation of the concession agreement to the new circumstances without a new award procedure (see Directive 2014/23/EU, Art. 43). Secondly, a selective advantage for a concession holder (and thereby the existence of State aid) still can be excluded, based on the same reasoning which lay behind the Altmark case⁸ (the Altmark test is applied to determine whether an undertaking obtains an advantage from the compensation it receives when it carries out a public service mission).

In the case of Stalexport Autostrada Małopolska S.A. (SAM S.A.) case (State aid SA.29584 (ex N 541/2010)), which is similar to the Autostrada Wielkopolska S.A. case, the Commission specified under what conditions a compensation to the concession holder is admissible and does not constitute State aid. Likewise, the introduction of a special compensation mechanism for SAM S.A. was the result of excluding heavy goods vehicles, based on the new law, from the obligation to pay a toll for using the section of Polish A4 motorway between Krakow and Katowice in the period from 1 September 2005 to 30 June 2011. The Commission pointed out two important aspects that affected the assessment of the case: (1) the responsibility for the risk related to the change of law which hurt the concession holder lies with the State, and (2) the compensation was limited to the loss suffered by the concession holder and did not go beyond the direct effects of the legislative change. This is this latter condition that, in the opinion of the Commission, was not present in the AW S.A. case and resulted in a formal investigation procedure and, subsequently, an order to recover the incompatible State aid.

In both of the cases, the compensation was based on a shadow toll mechanism, which entails a direct payment made by State to a private undertaking that operates a road built and maintained using private finance initiative funding. The payment is made per driver using a road in question; hence, it is calculated based on the number of vehicles using a section of road. The main idea underpinning the calculation of the compensation was to keep the internal rate of return (IRR) for the investment at the same level as it would have been without the change of law. To this end, the foreseen costs to be covered by the concession holder were estimated as well as foreseen revenues from tolls what allowed to calculate IRR for the investment and the level of a shadow toll. The compensation was to cover a shadow toll multiplied by 70% of the number of heavy goods vehicles passing the motorway in a period in

⁸ *Altmark Trans GmbH and Regierungspräsidium Magdeburg v. Nahverkehrsgesellschaft Altmark GmbH*, and *Oberbundesanwalt beim Bundesverwaltungsgericht* [2003], see also Communication 2012/C 8/02, para. 4.

question. The reduction to 70% in the shadow tolls was dictated by the fact that the abolition of a real toll payment would expectedly lead to an increase in heavy goods vehicles traffic in comparison to the situation without a change in law. After a prescribed period, a toll rate was adjusted to the actual traffic data. The general idea of the compensation mechanism was the same in both of the cases and was viewed by the Commission as an appropriate approach.

However, in the AW S.A. case, while the State and the concession holder have agreed on additional compensation (and this raised no objection on the part of the Commission), its amount was a bone of contention between the parties. The concession holder demanded higher compensation pointing to the fact that an increase in heavy goods vehicles traffic affected his financial situation also indirectly. More intense heavy goods vehicles traffic decreases the attractiveness of the motorway for light vehicles traffic due to increased congestion what means less revenue for a concession holder from tolls, and on top of it—an increase in heavy goods vehicles' traffic generates higher operating and maintenance costs of the concession holder. In contrast to A4 motorway (the SAM S.A. case), which is mainly a commuter road and only a small portion of the traffic is made up of heavy goods vehicles, the A2 is an export corridor with a significantly bigger share of heavy goods vehicles. Hence, in the concession holder's opinion, there is a far greater impact on route choices and additional maintenance costs in this particular case.

This line of reasoning was accepted by the State (and shared by the Commission as well). Nevertheless, what was called into question was the benchmark for setting the appropriate shadow toll level. The Commission stressed that a compensation should restore the concession holder's expected situation just before the legislative change and not at the beginning of the concession, and the calculations should be based on the latest available traffic and revenue forecast for the real toll scenario (without a change in law), as it reflects more accurately the market reality at the time of the legislative change. Since in the AW S.A. case the wrong traffic study was used (the 1999 Wilbur Smith Associates study instead of the more up-to-date 2004 WSA study), which indicated a higher IRR for the concession holder, it was concluded that a concession holder received an economic advantage. The reasoning of the Commission was upheld by the General Court in its judgement of 24 October 2019 *Autostrada Wielkopolska S.A. v. European Commission* [2019].

In the AW S.A. case, one more issue deserves attention. Since there was a dispute between the State and concession holder over the amount of the compensation due, the case was brought by the latter before the arbitral

tribunal (UNCITRAL). Against this backdrop, a question can be raised about the relationship between commercial arbitration and State aid regime. The problem is vital because although arbitral tribunals are perceived as “creators of contract” and therefore should not exceed the mandate extended to them by the parties, there are situations where the ignorance of certain legal regimes may threaten the validity and enforceability of the arbitral tribunals’ awards (Geradin, 2017).

It should be argued that commercial arbitrators are obliged to apply the EU competition rules (including State aid regime) on their own, that is, even when the parties do not invoke them. First, when the parties chose the law of a Member State and, second, as public order provisions (Rusche, 2019). This stance can be found in EU case-law (see, e.g., *Asturcom Telecomunicaciones SL v. Cristina Rodríguez Nogueira* [2009]) and is confirmed in the ruling of the Polish Court of Appeal in Warsaw (I ACa 457/18), which stressed that fundamental principles of the legal order of the Republic of Poland contain EU competition rules.

In the AW S.A. case, the arbitral tribunal decided in favour of the concession holder obliging the State to pay higher compensation. As a consequence, the State satisfied the concession holder’s claim, but, in response, notified the measure to the European Commission as constituting State aid. EU authorities being exclusively competent to decide on compatibility of State aid ordered the recovery of overstated compensation. Against this background, two issues should be highlighted. First, it seems justified to argue that Article 29 of the Council Regulation (EU) 2015/1589 laying down detailed rules for the application of the Article 108 of the TFEU, according to which the national courts of the Member States may ask the Commission to provide information in its possession or give its opinion concerning the application of State aid rules, also applies to arbitral tribunals. However, the arbitral tribunal in the AW S.A. case failed to do so, and as a result, its award was set aside.⁹ Moreover, a State that notifies an aid measure which has been already implemented indirectly admits that it acted in violation of State aid rules (the standstill obligation). Yet, the principle of *nemo auditur propriam turpitudinem allegans* (“no one shall be heard who invokes his own guilt”) does not apply in such a case (Rusche, 2019). This stance is confirmed in EU case-law (*Residex Capital IV CV v. Gemeente Rotterdam* [2011], paras. 24–36). It follows that non-notified aid is considered as

⁹ It was the first case before Polish courts when the European Commission joined a case as an intervening party on the basis of the Council Regulation (EC) 2015/1589 of 13 July 2015, supporting the position of the General Counsel to the Republic of Poland (*Prokuratorii Generalnej RP*).

unlawful aid, which is subject to recovery. Even a final judgment having a force of *res judicata* cannot prevent it (*Klausner Holz Niedersachsen GmbH v. Land Nordrhein-Westfalen* [2015]). Only in exceptional circumstances it is deemed inappropriate to order repayment of the aid implemented in breach of Article 108(3) of the TFEU (Schöning, 2016).

Figure 2. Introducing the compensation mechanism for the concession holder in the light of State aid rules

Source: Own elaboration based on the Judgement in *Autostrada Wielkopolska S.A. v European Commission* [2019].

5. Conclusions

As Farly and Pourbaix (2015) point out, what sets concession contracts apart from other public contracts is the way in which the supplier is remunerated. The concession holder is able to recover its investment in the works or services being procured because the State grants them the right to exploit the works or services once they are complete. An undertaking constructs a toll road and in exchange is given the right to collect and retain tolls paid by users when the infrastructure is in operation. The question might arise whether we can talk in this situation about the transfer of State resources which can be imputable to State. The fact is that State aid can take a variety of forms. In that case, the Member State, owner of the infrastructure, renounces to directly collect the toll revenues during the concession contract when it could keep the assets in State hands and exploit them commercially. This is considered as a waiving of State resources to the benefit of private operators (for a further discussion on the criterion 'transfer of State resources', see Werner & Caramazza, 2019).

This article provides a framework for the assessment of State aid existence in concession agreements for roads construction and operation. The construction of infrastructural projects designed to provide benefits for society at large has traditionally been perceived as a general measure of economic policy. However, considering the decisional practice of EU courts and the European Commission, there are a couple of issues to be taken into account to determine whether a given project, in fact, falls beyond State aid regime. First of all, State aid rules apply only to economic activities, but these cannot be excluded when a given infrastructure is to be commercially exploited. Therefore, the assessment must be carried out in the light of its future intended use. Secondly, of relevance is whether a project may have an impact on competition and trade between Member States. Such an impact can be ruled out only when the operation of an infrastructure is performed under legal monopoly. However, as it has been argued, it is not sufficient that there is no competition on the market, due to granting to an operator exclusive rights, but there should not be competition for the market, i.e. to become the exclusive provider of the operation of an infrastructure. Thirdly, there is an issue whether the transaction with an operator corresponds to market terms, (which implies that the project does not confer a selective advantage to an operator). As the application of the Market Economy Operator Principle is in practice a complex economic endeavour, it is assumed that when a bundled construction and operation of a road infrastructure is tendered out together

properly, the transaction is in line with market conditions. It can be argued that State aid and public procurement regulation are mutually exclusive. Bovis (2014, p. 162) describes it aptly: “The latter serves as negation agent to the former”. When public procurement rules are followed, the transfer of State resources to a private undertaking is not deemed as State aid.

However, as it has been illustrated on the example of the Autostrada Wielkopolska S.A., certain circumstances may appear that could not have been foreseen at the time of awarding the concession which can lead to the modification of the initial agreement. In that situation, two critical issues should be taken into account in order to exclude State aid. First, who assumes the risk for the event as the risk division between the public and private party is one of the characteristic features of a concession. Transferring the risk on State may be regarded as an improvement of the concession holder’s situation, which constitutes an economic advantage. Second, if it is a State who assumes a given risk (e.g., a change in law), a State can financially compensate a loss of revenues of the concession holder that involves the adaptation of the concession agreement to the new circumstances without a new award procedure. Nevertheless, the compensation cannot exceed the loss suffered by a concession holder due to the change for which State is responsible.

In the AW S.A. case, it has been concluded that the concession holder received an economic advantage from the compensation as the support received from State exceeded the loss suffered by a concession holder due to the legislative change. A point of contention was the study that served as a benchmark to keep the internal rate of return of the investment at the same level as it would have been without the change in law. The Commission reasoning, upheld by the General Court, rests on the assumption that the compensation should restore the concession holder’s situation just before the change in law and be based on the latest available traffic and revenue forecast. The IRR at the beginning of the concession is not relevant, because the concession agreement does not guarantee any level of the IRR during the term of the concession. On the contrary, it transfers the market and financial risks as well as opportunities on the concession holder. Hence, what is significant in assessing a modified concession contract is whether the divisions of risks between the parties remains the same. The way the compensation was calculated in the AW S.A. case resulted in taking over by State some traffic (and revenue) risks and ultimately be found as constituting State aid. Irrelevant, in this regard, are the IRR found for other motorway projects in an attempt to demonstrate that the improvements of the AW S.A.

financial situation were reasonable and in line with market price (General Court Judgement in *Autostrada Wielkopolska S.A. v. European Commission* [2019], para. 92).

However, when State aid is identified in a project, the aid can still be found compatible with the internal market and hence be admissible. Article 107(3) (c) of the TFEU provides such an exemption to the general prohibition of State aid by stipulating that “aid to facilitate the development of certain economic activities or of certain economic areas, where such aid does not adversely affect trading conditions to an extent contrary to the common interest”, may be considered to be compatible with the internal market. Moreover, the said motorway section is located in the area in a region covered by the derogation set out in Article 107(3)(a) of the TFEU. As there is no State aid guidelines directly applicable to motorway construction and operation, of significance is whether the support granted to the concession holder in the AW S.A. case can be classified as investment or operating aid. While the former one is more favourably assessed by the EU, the latter one is admissible only in exceptional situations, for instance, when the aid is granted in the deprived regions, those eligible under the said Article 107(3)(a) of the TFEU, is justified in terms of its contribution to regional development and proportional to the handicaps it seeks to alleviate. Nevertheless, in the Commission’s view, upheld by the General Court, the compensation was considered as being an operational aid which resulted only in an increase in the internal rate of return of the project for investors and did not contribute to regional development as such. Thus, it was found as incompatible with the internal market.

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