I. Introduction

The Leipzig-Halle case is a significant case for EU State aid law in determining the parameters of when, and how, the State can legally finance infrastructure projects. The case confirmed a change in attitude developing in the Commission, of not assuming that publicly funded infrastructure projects were free of State aid. For this reason, the case may be seen as a significant milestone in the modernization of State aid practice. The subsequent application of the ruling by the Commission especially in guidance and legislation such as the GBER has led to criticisms that the case extended the competence and jurisdiction of the Commission (which continued to argue that each case should be assessed on its own facts and context), exposing the Member States’ choices in funding infrastructure projects to greater transparency, greater bureaucracy as well as opening up the possibility of challenges by third parties affected by the public policy choice.

The structure of the analysis of the case is as follows: Section II explains the Commission practice towards infrastructure funding prior to Leipzig-Halle. Section III provides a discussion of the facts of the case, the Commission Decision, and the judgments of the General Court (GC) and the CJEU. Section IV looks at the general response to the Leipzig-Halle ruling. Section V outlines the inclusion of infrastructure projects in the General Block Exemption Regulation. Section VI examines two cases on sports infrastructure. Section VII Examines the Commission Notice on the Notion of State aid. Section VIII examines the Greek Motorway project as a case study of a trans-European infrastructure project. Section IX

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assesses the impact of the *Leipzig-Halle* ruling on Commission practice and the effect on the Member States autonomy to fund infrastructure projects against the backdrop of EU policy.

**II. Commission Practice pre-*Leipzig-Halle***

Until the mid-1990s the funding of infrastructure projects, open to all potential users, was accepted by the European Commission as a legitimate part of State activity and was not an economic activity.¹

In the Aviation Guidelines 1994 the Commission set out the understanding 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 aids.²

One year later, in the *Brussels Airport* Decision 1995,³ the Commission found that airports could be undertakings, engaged in economic activities. This was followed by the CJEU ruling that the operation of an airport constituted an economic activity for the purposes of Article 102 TFEU in *Aeroports de Paris* (2002).⁴ State aid law was held to apply to the funding of airport facilities in the German Regional Airports Decision (2005)⁵ the Commission later also considered the State aid provisions to be applicable to the funding of airport facilities and was extended to other infrastructure projects for seaports,⁶ motorways⁷ and broadband networks.⁸

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The ruling of the CJEU in Leipzig-Halle consolidated the Commission’s practice, providing confidence to adopt legislation and guidelines, both generic and in specific sectors. This, in turn has altered the democratic balance between the EU and national sovereignty in the development of national and trans-national infrastructure development.

The reason for a change in direction on how finance for infrastructure projects is used makes sense when viewed against the political and economic changes taking place in the EU. There was a change in the mix of the involvement of the State in providing public goods and the potential for commercial exploitation to finance the costs and outlay of State projects. At the same time the Commission had pushed for a modernisation of State aid policy, guiding the direction through hard and soft law measures. This created new issues for regulation. Liberalization extended the potential for competition between providers and users of public infrastructure and funding gaps could be met either through commercial financing or matched funding from State or EU funds.9

In some situations, a Member State had to combine a bundle of services that contained profitable and unprofitable market segments. For example, in Colt Télécommunications France v Commission the GC accepted that geographic bundling of combined services may be necessary in the broadband roll-out in the areas around Paris.10 The issue also arises in the energy sector where a PSO may be necessary to ensure security of supply through diversification of energy sources.11

Gayger describes infrastructure as:

… a descriptive term for facilities that fulfil basic functions in the overall economic system, without being [a] direct part of either manufacturing or trade processes themselves.12

However, there is no tangible definition of infrastructure in EU primary or secondary law and this allows for evolution and experimentation at the national level. The ruling in Leipzig-Halle raises the possibility of a wide range of State interventions to be viewed through the lens of State aid law. Equally the evolutionary definition of Services of General Economic Interest (SGEI) and Services of General Interest (SGI) poses problems, not only for definition and interaction with the rules on

9 Art 170(1) TFEU entitles the Union to ‘… contribute to the establishment and development of trans-European networks in the areas of transport, telecommunications and energy structure.’ See the construction of the Greek Motorway discussed below in Section VIII.
11 The operator of the LNG terminal in Klaipeda Lithuania received investment aid that was assessed based on art 107(3)(c) TFEU and compensation for public service obligations compatible with art 106(2) TFEU. Case C-847/19 P Achemos Grupė UAB, Achema AB v European Commission, Republic of Lithuania, Klaipėdos Nafta AB [2021] EU:C:2021:343.
infrastructure, but whether there is market failure and the need for intervention, and the acceptable level of provision by private, non-state operators which may be in competition with each other and may operate at different profit levels. Many post-\textit{Leipzig-Halle} cases have involved the interaction between infrastructure projects that have a mixed use and may be covered by different sets of Guidelines or Treaty provisions.\textsuperscript{13} By throwing the Regional Aid Guidelines\textsuperscript{14} into the mix, infrastructure projects may be compatible with State aid rules.

### III. The Facts: \textit{Leipzig-Halle}

Leipzig-Halle airport was owned by two public corporations, Mitteldeutsche Flughafen (MF) and Flughafen Leipzig Halle (FLH). The public shareholders of Mitteldeutsche Flughafen intended to make a capital contribution of €350m to Leipzig Halle airport for the construction of a new southern runway because DHL was interested in relocating express parcel services to Leipzig Halle airport from Brussels. A framework agreement between FLH, MF and DHL on 21 September 2005, set out the terms of the construction of the runway, providing unrestricted access on the new runway 24/7, ensuring 90% access to all air carriers operating on behalf of DHL. Land Sachsen issued a comfort letter to DHL guaranteeing FLH financial viability for the duration of the project. DHL had the right to compensation if the agreement was not adhered to.

Germany considered the arrangements to be compliant with EU State aid law but notified the framework agreement and the comfort letter to the Commission in April 2006, to ensure legal certainty: that the market economy investor (MEI) test was satisfied. This gave the Commission the opportunity to reassess how the airport sector had changed from the position where the development of airports was determined by purely territorial considerations or, in some cases, military requirements. The operation of airports was more like a commercial undertaking. Competition between airports and airport operators was also limited. The liberalization of the market for airport transport services has also meant that there were more airlines flying to more airports, increasing competition between airports. The Commission identifies the processes of liberalization and privatization as leading to the active interest of private investors in the airport sector.

The Commission conducted an in-depth investigation and found that the capital contribution did not meet the MEI test because the financial forecasts submitted by Germany did not show that they would generate a reasonable commercial return in the long term, nor would the investment break even. The Commission

\textsuperscript{13} SA.30931 Support for Small Regional Airports in Romania.

rejected the German Government’s submission that the development of transport infrastructure of this kind had no private sector benchmark.

However, the European Commission found the aid to be compatible with the internal market in accordance with Article 107(3)(c) TFEU: “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;”.15

With a sting in the tail, the Commission also concluded that certain benefits to DHL, especially the comfort letter, were incompatible State aid and should be recovered. In revisiting the case, one of the earliest commentators on the Leipzig-Halle ruling argued that this aspect made it ‘… more of a legal curiosity than a landmark case.’16 The principle is that where a selective advantage through the grant of State resources is established, the unlawfulness, or invalidity of the measure, is not sufficient to prevent the categorization of the measure as State aid. In the situation of Leipzig-Halle, DHL could not enforce the contract, and this created the contradictory position that DHL received no advantage from the illegal State aid. Similar problems could occur where State guarantees, warranties and indemnities are found to be State aid.

Freistaat Sachsen, Land Sachsen-Anhalt, MF and FLH brought actions for annulment of Article 1 of the Decision to the GC. The case invited a discussion of several fundamental elements of State aid law.

A first point raised by MF and FLH was that there was no undertaking engaged in economic activity for the purposes of the application of Article 107(1) TFEU. Airports per se, were not engaged in economic activity, even if there was competition between airports, and for this airport there was no objective of making a profit. Article 107(1) TFEU did not apply to regional airports where financing of infrastructure was involved and, in this case, the construction of a new runway was not an economic activity because it was not being implemented by a private investor.

The GC dismissed these arguments by relying upon the conventional tenets of EU competition law: the determination of an undertaking was not based upon legal status or the way in which it is financed or whether it was a profit-making entity. Referring to Aeroport de Paris17 and Ryanair v Commission18 the GC found that the management of an airport infrastructure is an economic activity. The fact that FLH managed a regional, as opposed to an international airport, was irrele-

15 This finding, confirmed by the European Courts, was reflected in the 2014 Aviation Guidelines in paras 27–28: [2014] OJ C-99/03.
16 D Harrison ‘The Curious Contractual Consequences of a Finding of Unlawful State Aid’ (2017) 16(3) EStAL 487.
vant. FLH offered services for remuneration and was in competition with other regional airports. This was a change in direction for the Commission from the Manchester Airport Decision\(^\text{19}\) where it had concluded that where the public infrastructure was publicly owned there would not be any economic activity.

The GC held that the new runway, as part of the airport infrastructure, would be exploited commercially, for example, through the payment of airport fees, and would strengthen the economic position of FLH. It was not a public good, free to all users without charge. The construction of the runway could not be separated from the commercial exploitation of the services it would provide. This was an expansion of the subsequent use test from the presumption test hitherto used in procurement issues.

A second argument put forward to challenge the Commission Decision was that the construction of airport infrastructure was a measure within a Member State’s transport, economic and regional policies. The GC dismissed this argument by ruling that Article 107(1) TFEU did not distinguish between causes or objectives of State financing. An injection of capital must be examined in the light of the MEI, not the Member State’s social, regional or sectoral policy considerations. The argument that private investors would not engage in airport construction because it is not profitable, was irrelevant.

The CJEU dismissed the appeal. However, it did leave open the possibility that not all State-operated infrastructure which has the potential for commercial exploitation automatically falls within the State aid rules [paragraphs 47 and 48]; the CJEU focusing upon the operation of the infrastructure [paragraphs 46 and 49]. This difference in approach, with the CJEU not confirming the Commission and GC subsequent use test but using a separability test appears to have been lost in subsequent Commission practice.

IV. The Response to Leipzig-Halle

The ruling opened the way for the Commission to scrutinize all forms of infrastructure finance, automatically linking the ownership and development of the infrastructure with the commercialization of its use. Unsurprisingly, the Commission welcomed the ruling, stating that it did not create any new law but reflected the understanding the Commission already had of the law. The Commission saw the generic potential of the ruling and in a Note to DG REGIO the Commission stated that the Court’s ruling was not restricted to airport infrastructure but to all State-owned infrastructure capable of commercial exploitation.\(^\text{20}\) The approach of Leipzig-Halle was widened to cover many areas where infrastructure was being

\(^{19}\) Case NN 109/98, No 2000/393/EC.

\(^{20}\) Note to DG REGIO Subject: Application of State aid rules to infrastructure investment projects, Brussels, COMP/03/2011.
developed. Commentators have argued that the Commission engaged in an ‘unwarranted generalization of the CJ’s rationale in its Leipzig-Halle judgment.' With the Commission not engaging in the specific assessments, despite the approach taken in the original Decision and in the CJEU judgment.

Leipzig-Halle made the distinction between economic and non-economic activities a crucial aspect of examining the legality of infrastructure funding. It also contributed to a restrictive approach towards when, and where, the State can exercise public authority. Following from Leipzig-Halle the definition of public authority expenses was restricted to areas such as security and police functions, fire protection measures, public security measures (eg meteorological services and air traffic control). But the funding of the construction of infrastructure itself was not a public duty. The Commission attempted to clarify the differences between economic and non-economic activities, ancillary activities and traditional State action through legislation and soft law guidance, explaining the implications for different sectors.

V. The General Block Exemption Regulation

In May 2014 the Commission adopted a new General Block Exemption Regulation (GBER). The modified GBER introduced new categories of State aid affecting infrastructure projects: broadband infrastructure, sport and multi-functional recreational facilities and local infrastructure. The Regulation sets out the method for calculating permissible aid and the treatment of the owner/manager of infrastructure towards users. The method of using aid for infrastructure projects uses the ‘funding gap method’ to calculate acceptable levels of public funding: the difference between the initial investment cost and the discounted operating profit or net revenue. This shows the public authority does not act as a private investor

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21 See: Analytical Grids on the application of State aid rules to the financing of infrastructure projects. Nine areas were addressed: broadband, airports, ports, research development and innovation, culture, sport, multifunctional recreational infrastructures, energy, waste management, rail, metro and local transport.


with a view to making a profit. It is also used to determine the proportionality of a measure.

In 2015 the Commission expanded upon the GBER by publishing a set of Grids explaining how different kinds of infrastructure projects can ensure compliance with the State aid rules.26

### 1. Small Investments in Small Ports and Airports

The Commission asked for time to decide if airports and ports infrastructure could be brought within the GBER. It was not until 17 May 2017, after two public consultations, that the Commission adopted new State aid rules exempting certain public support measures for ports and airports.27

In relation to airports, a kind of *de minimis* approach was taken, where the aid is only for a small local airport that will not affect trade or competition.28 The 2017 Regulation allows smaller airports to invest in infrastructure and operating costs without the need for prior notification to the Commission. Public investments in regional airports handling up to 3 million passengers per year and operating costs of small airports handling up to 200,000 passengers per year are exempted from notification.

A number of requirements are attached to the rules, for example, aid should not be granted to airports located in the catchment area (100 km distance or 60 minutes of travel time) of another airport; the funded infrastructure should be fully used in the future and will not be larger than expected demand; the aid does not go beyond what is necessary to trigger the investment, taking into account future revenues from the investment (ie aid can only cover the funding gap); only a certain percentage of the investment costs can be subsidised (depending on the size of the airport and on whether the airport is located in a remote region).

It may be possible to fund small or remote airports using other provisions, for example, Article 107(3)(c) TFEU.29 Romania notified an aid scheme to the Commission providing public support for small regional airports. The Commission found that the scheme did not fall within the SGEI rules because Romania had

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26 See n 21.


28 Note the GC in 2018 took the same broad approach as Leipzig-Halle in Brussels Airport, confirming that investment in an instrument landing system and a ground approach system was an economic activity attracting the State aid rules, because ‘it contributes to the delivery of the services offered by a civil airport in a competitive context to airlines within the framework of its general activity, which is an economic activity.’ [para 102].

29 SA. 30931.
not shown that the compensation had been set on the basis of an analysis of the
costs of a typical airport operator, well run and adequately provided with finance to
provide a public service. Also the fourth Altmark criterion was not satisfied because
a public tender procedure had not been used.

Member States may make public investments of up to €150 million in sea
ports and up to €50 million in inland ports with full legal certainty and without
prior control by the Commission. Public authorities may also cover the costs of
dredging ports and access waterways.

There is a limit to the aid. The aid cannot exceed an absolute threshold (between
€40 million and €150 million), depending on whether the project concerns a
maritime port or an inland port and whether the port is included in a core net-
work corridor under the TEN-T Regulation; the aid does not go beyond what is
necessary to trigger the investment, taking into account future revenues from the
investment (ie aid can only cover the funding gap); only a certain percentage of
the investment costs can be subsidised (depending on the size and the nature of
the investment and on whether the port is located in a remote region); only invest-
ment costs are eligible for aid (with the exception of dredging, for which both
investment and maintenance costs are eligible for aid). Concessions to third par-
ties for the construction, upgrade, operation or rent of port infrastructures must
be assigned on a competitive, transparent, non-discriminatory and unconditional
basis. For small projects in ports, the Regulation lays down more flexible rules
for investment aid.

An example of compatible aid to a small port is found in the investment aid
grant of €27.4 million to the Port of Galati in Romania.\footnote{SA. 40926.} The project consisted
of building a new multimodal platform with a capacity of 150,000 TEU/year in
the Port Bazinul Nou, with a total investment cost of €89.9 million. The project
involved upgrading of the quay and the building of the required infrastructure for
a modern intermodal terminal. The newly created logistic node would promote
the shift from road transport to railway and inland waterways/maritime transport
on the Rhine-Danube Trans-European Transport corridor, fulfilling an objective of
EU common interest. The project was co-financed by the Romanian State, regional
funds allocated via the Large Infrastructure Operational Programme (LIOPIP) and
private money coming from concessionaires of the platform, as well as directly
by the Connecting Europe Facility, an EU funding instrument. The Commission
found that the aid was necessary, proportionate and that the distortion of com-
petition limited, given the relatively small-to-medium size of the Port of Galați,
with limited transport volumes at EU level. According to traffic growth forecasts,
the slight capacity increase created by the project would be offset by the increase
in demand, mainly stemming from other road-based flows transport routes on the Rhine-Danube territory.

The amendment of the GBER was an important development in creating a clearer legal framework for public support of infrastructure. However, in practice the different elements of a large complex infrastructure project do not always dovetail. Challenges have been made to larger infrastructure investments and the Commission has been asked for guidance or received complaints in several projects.

VI. Sports Infrastructure

There are areas where guidance has not been clear, or where there are no Guidelines. Two case studies reveal that in sport infrastructure the Commission has taken a mixed stance. The first application of the 2014 GBER to sport infrastructure concerned a concession for the redevelopment of a swimming pool into a spa, fitness, and wellness centre in Germany. The local Municipality granted a construction and operating concession for twenty-five years using an EU public procurement procedure. In December 2011 Bavaria awarded the Municipality a direct investment grant of €2.4 million. One of the conditions of the concession was to maintain entrance fees to swimming pools (but not to spa and sauna facilities) at socially acceptable prices and offer reduced fees for certain social groups and associations, as well as free entrance for local schools and kindergartens. To achieve these conditions the concessionaire would receive from the Municipality compensation of €0.1 million per year for a period of 23 years.

Following conventional case law, the Commission found that the new sports complex was an undertaking. It rejected the argument of the German authorities that the investment decision conformed with the MEI principle. The Commission found that the public funding provided by local and regional authorities conferred an economic advantage on the new sports complex. The investment in the economic activity of new complex would not have been financed on market terms, therefore, it was assumed that the investment project would not yield an acceptable rate of return over the reference period of 25 years, the duration of the concession.

This appears to be a tougher stance compared with earlier cases, concerning ports, where the Commission found that the use of concession contracts awarded after a competitive selection excluded or minimised any State aid.

In another Decision concerning the renovation of an ice arena in a region in The Netherlands eligible for assistance under Article 107(3)(c) we see a softer

31 SA.33045.
32 See SA.38302 Port of Salerno. Cf art 55 GBER.
approach. The operator of the ice arena was a private limited liability company, 100% government owned. The Dutch authorities argued that there was a market failure in that it was expensive to maintain ice arenas and the expenses could not be met by user fees. This justified a grant of 100% of the costs to carry out the renovation. The renovator would be chosen through a restricted competitive selection process. Nevertheless, the Commission decided that:

… although the procurement procedure minimises any potential advantage to the selected operator, the facts of the case do not allow the Commission to ensure that the operator will pay a consideration comparable to what would apply on normal market terms. An advantage to the operator of the renovated ice arena cannot be excluded [paragraph 48].

The Commission made a distinction between professional and non-professional users of the ice arena finding that professional users would be undertakings, because they engage in commercial activities by organising competitions, selling broadcasting rights, and make sponsorship agreements for professional events. The users may also receive aid if the rent they paid to use the arena was below the level that would apply for the use of similar facilities on normal market terms [paragraph 49]. However, the obligations imposed upon the operating company ensured that several types of users would be able to benefit from the ice-skating facilities, benefitting not only professional users but amateur skaters and the public and this would make the aid compatible with the internal market under Article 107(2) or (3) TFEU.

The Commission accepted that the aid was necessary to address the specific problem of under-investment in sports infrastructure. The exploitation of ice arenas was not possible without public funding. Ice skating facilities had become outdated and private investors were not willing to take the risks with renovating and exploiting ice arenas [paragraph 58]. The proportionality test was met by using the EU restricted procurement procedures. Usage obligations encouraged the operating company to aim for revenue maximisation, using an exploitation fee based on market rates. Competition would not be distorted as the renovated ice arena would complement other sports activities in the area [paragraph 61].

An amendment to the 2014 GBER in 2017 increased the upper limit for aid to multi-purpose sports arenas. In its Explanatory Memorandum the Commission states:

33 SA.37373.

Public support in these areas is rarely state aid, since they do not usually involve economic activities, and where aid is involved, it does not pose a threat to competition, if the criteria in the Regulation are met.35

VII. Commission Notice on the Notion of State Aid

Disagreements over the scope and interpretation of the Leipzig-Halle judgment delayed the adoption of the Commission Notice on the notion of State aid.36 The Notice addresses several areas pertinent to the application of the Leipzig-Halle judgment: the notion of an undertaking, economic activity, de minimis aid, the effect on trade between Member States. There were few European Court judgments on infrastructure on which the Commission could base its definitions, and the Notice reflects the Commission's thinking in the area, using the Leipzig-Halle judgment to add some of its own policy ideas to refine the key concepts.

Section 7 of the Notice addresses State aid to infrastructure owners, operators, and users. In relation to infrastructure owners, the Notice reiterates the Leipzig-Halle principle that infrastructure that is inseparably linked to economic activity is economic in nature, but infrastructure used by the State to carry out its official functions is not economic in nature [203].

Belgian Sea Ports was an action for annulment introduced by the port authorities of Antwerp and Bruges against a Commission Decision which found that Belgian port operators had benefited from incompatible State aid through an exemption from corporation tax.37 The case reveals the difficulties of establishing that an entity is not an undertaking in situations where it performs mixed activities which are both economic and non-economic in nature.

The two ports argued that they did not carry out economic activities because their tasks consisted mainly of an SGI where they exercised public powers and privileges (port management, environmental inspection services). The GC rejected the argument, reiterating the classic definition of an undertaking [paragraphs 46-47] stating that the concept of economic activity is dependent upon factual evidence, notably the existence of a market and is not dependent upon national choices or considerations [paragraph 56]. The fact that an SGI had been assigned to the ports was not sufficient to prevent their categorisation as undertakings if they also carried out economic activities [paragraph 55].

The ports argued that it was necessary to distinguish between the management of port infrastructure and the commercial activities of users of the port. The GC compared ports and airports. For airports it had long been held that both the management of the infrastructure and the provision of services at airports were economic in nature. The GC concluded that there was no fundamental difference between granting access to airport infrastructure against a fee and providing access to port infrastructure against a fee. The GC pointed out that ports exploited port infrastructure when providing access to the infrastructure or when renting out facilities [paragraphs 70–72].

The GC gave short shrift to the ports’ contention that they did not carry out economic activities because of their pricing practices: they did not seek to make a profit. Referring to the established case law the GC states that services normally provided for remuneration must be classified as economic activities. The essential characteristic of remuneration is the fact that it constitutes consideration for the service in question, a critical element in establishing the existence of economic activity [paragraphs 75–76]. The fact that port charges had been designated as a fee by the Belgian Constitutional Court did not detract from the fact that the fees were the financial consideration for services [paragraph 77].

The GC held that when a public body provides products or services linked to its exercise of public-law prerogatives at a fee fixed by law, and not by itself, cannot justify the classification of the activity as economic or that body as an undertaking. That fact was not sufficient to preclude the characterisation of the activity as economic [paragraph 78]. The characteristics of the prices applied by ports such as publicity, non-discrimination, were similar to those of an SGEI which are economic activities and are subject to State aid rules [paragraph 79].

In response to the argument that ports did not follow a commercial logic in setting their fees but only aimed to fulfil their public service tasks, the GC observed that the fact that the supply of goods and services was not for profit did not mean that the operator carrying out such activities on the market and could not be regarded as an undertaking, if it competed with other undertakings pursuing profit [paragraph 80]. Regardless of the status and objectives of an entity, if it competes with profit-seeking entities, it becomes an undertaking.

It was a common practice that port and concession fees levied by ports covered most of the costs incurred in offering their services on the market. In the case of the Port of Antwerp the revenues exceeded its total expenditure in 2015. The fact that such revenues could also finance some non-economic activities did not undermine the fact that those revenues were collected in return for economic activities, such as the provision of port infrastructure or the provision of access to port infrastructure [paragraph 82].

The Notice addresses the situation where the use of infrastructure that is not initially intended for commercial purposes is subsequently used for economic activities.
Where an infrastructure originally used for non-economic activities is later re-assigned to economic use (for example where a military airport is converted to civilian use), only the costs incurred for the conversion of the infrastructure to economic use will be taken into account for the assessment under the State aid rules. [205]

When a public authority uses the infrastructure for commercial purposes it becomes an undertaking. The benefit that the undertaking derives is not only the funding of conversion costs. It is also the value of the infrastructure that it is put to economic use for free. This is the original construction cost, minus depreciation. For fully depreciated infrastructure, the value is the revenue it can generate from its commercial use.

The Commission developed the concept of ancillary activities to address situations where infrastructure is used for mixed activities, but the commercial use activities are marginal. Where the infrastructure is subject to a mixed use which is mainly non-economic, the funding of infrastructure in its entirety is not caught by Article 107 TFEU provided that the economic use remains purely ancillary:

If the infrastructure is used almost exclusively for a non-economic activity, the Commission considers that its funding may fall outside the State aid rules in its entirety, provided the economic use remains purely ancillary, that is to say an activity which is directly related to and necessary for the operation of the infrastructure, or intrinsically linked to its main non-economic use. This should be considered to be the case when the economic activities consume the same inputs as the primary non-economic activities, for example material, equipment, labour or fixed capital. Ancillary economic activities must remain limited in scope, as regards the capacity of the infrastructure. […] The Commission also considers that public financing provided to customary amenities (such as restaurants, shops or paid parking) of infrastructures that are almost exclusively used for a non-economic activity normally has no effect on trade between Member States since those customary amenities are unlikely to attract customers from other Member States and their financing is unlikely to have a more than marginal effect on cross-border investment or establishment. [207]

Footnote 305 of the Notice defines a threshold of 20% as a measure of ancillary activities. The Notice reflects the approach taken by the Commission and the GC, but not the CJEU.

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38 SA.39177 Port of Baja.
40 In Case C-113/07 Selex [2009] EU:C:2009:191, para 79 the CJEU found that it was sufficient that the ancillary activity is merely ‘connected’ to the objective pursued by the main activity.
In *Belgian Ports*\(^41\) an argument was made that economic activities were *accessory or incidental* and therefore the aid did not fall within Article 107(1) TFEU. The GC stated that the fact that an entity carried out certain public tasks did not preclude it from being classified as an undertaking in respect of its economic activities, especially where a public body carries out an economic activity which can be separated from the exercise of its public powers, that entity, in respect of that activity, acts as an undertaking [paragraph 85]. If the economic activity is inextricably linked to the exercise of public authority, all the activities carried out by that entity remain activities related to the exercise of those powers [paragraph 86]. But the ports did not provide any evidence to show that the economic activities were inextricably linked to the exercise of public authority, such as security, control of maritime traffic or surveillance or surveillance to avoid pollution. The mere fact that there was an economic relationship between those activities, since the economic activities of ports allowed for the total, or partial financing, of their non-economic activities, was not sufficient to establish an inextricable link between those activities [paragraph 87]. The economic activities of ports were not made compulsory by reason of their non-economic activities of general interest, but the non-economic activities would not necessarily be deprived of their usefulness [paragraph 88]. This shows that the two links are important for determining if economic and non-economic activities can be inseparable, if they are necessary for the completion of the public service tasks.

The Notice also clarified when public funding of infrastructure would *not* be State aid because of an insignificant effect on trade [paragraphs 211 and 212] The effect on trade or distortion of competition is normally excluded in the construction of infrastructure where:

(i) an infrastructure typically faces no direct competition (eg natural monopolies);
(ii) private financing is insignificant in the sector and in the Member State;\(^42\)
(iii) the infrastructure is not designed to favour a specific undertaking or sector but the society at large; and
(iv) the public funding is not used to cross-subsidise or indirectly subsidise other economic activities (eg operation of the infrastructure).

The conditions are cumulative.

Cases have arisen where these conditions have been part of the analysis of whether the State aid rules are infringed post *Leipzig-Halle*. In relation to condition (i), an infrastructure typically faces no direct competition, this argument was raised in *Belgian Ports*.\(^43\) The ports claimed that there was no market in which they

\(^41\) See n 37.

\(^42\) Requirement (ii) was a new addition to the assessment of distortion of competition.

\(^43\) See n 37.
offered their services. The Court rejected this argument by stating that a body with a legal monopoly could offer goods and services on a market and therefore could be an undertaking. The existence of a market for the services does not depend on national choices or considerations. There was competition at EU level between various seaports to attract vessels or other service providers creating a market for port activities.

There are instances of where condition (iii), the infrastructure is not designed to favour a specific undertaking or sector but the society at large, has arisen. In Propapier the Commission found that the positive effects of German aid between 2007–2010 to one of the largest paper mills in Europe contributed to regional development and outweighed the negative effects on competition. An Irish competitor, Smurfit Kappa Group plc, challenged the Commission Decision not to open an investigation and the GC upheld the challenge.\(^4\) In a separate investigation the Commission found that a new waste water plant and surrounding infrastructure built by the German State did not involve State aid because it was public infrastructure and not specifically dedicated for Propapier’s use. The fees charged to Propapier covered the incremental cost.\(^5\)

Another Decision considers global competitiveness. After consideration of different global locations, Jaguar Land Rover invested €1.4 billion to build a car plant in the region of Nitra in Slovakia. Slovakia notified the Commission of its intention to invest €125 million of public support, the maximum allowed under the Guidelines on Regional Aid for 2014–2020. The Slovakian government would develop an industrial estate and transferred a plot of land for the car plant, sold at a market price. The Commission did not find that there was any selective advantage to Jaguar Land Rover. Commenting on the Decision, Margrethe Vestager stated:

Our investigation confirmed that Slovakia’s €125 million public support to Jaguar Land Rover for its project to build a new car plant in the region of Nitra is in line with our State aid rules. Our investigation revealed that the aid was necessary for Jaguar Land Rover to invest in Europe rather than in Mexico. We also found that the measure will contribute to job creation and to the economic development of a disadvantaged region without unduly distorting competition.\(^6\)

Access to infrastructure may be justified by practical considerations. Natural bottlenecks were often regarded as justifying commercial or public monopolies and were the subject of the essential facilities doctrine developing in the US, and to


some extent in the EU. State aid law may also be used to challenge monopolies created by the State. Naviera Armas provided ferry services between the Canary Islands and between the Canary Islands and mainland Spain. In 1994, Fred Olsen obtained a license to operate regular passenger and cargo transport services between Puerto de Las Nieves on Gran Canaria and the port of Santa Cruz on Tenerife. Fred Olesen was the only operator on that route. Naviera Armas and another ferry company, Trasmediterranea were repeatedly unsuccessful in obtaining a maritime licence to develop a fast ferry service for this route, on the ground that Puerto de las Nieves did not have sufficient capacity for the safe operation of vessels from two different companies.

Naviera Armas lodged a complaint with the Commission alleging that the exclusive licence of Fred Olsen was illegal State aid. The Commission rejected the complaint, finding that the port infrastructure was not designed or developed to benefit specifically Fred Oleson, it did not receive any advantage from fees because the fees were set at market level. The port operator used a non-discriminatory access policy and took reasonable measures to expand port capacity. The Commission also stated that public funding of the port before December 2000 [the date of Aéroports de Paris judgment] did not constitute State aid. The GC and the CJEU upheld an appeal against the Commission Decision, based upon procedural grounds. Both Courts regarded the fact that Olsen paid port taxes did not detract from the fact that it had exclusive use of a public port. Dismissing the argument that that the port authorities had not created the infrastructure specifically for Fred Olsen, the GC held that an advantage may be granted contrary to Article 107(1) TFEU, even when it was not specifically instituted to benefit a particular undertaking or undertakings [paragraph 87].

The Notice addresses cross-subsidisation: Public funding should not cross-subsidise other activities of the infrastructure owner. Cross-subsidisation can be excluded by ensuring that the infrastructure owner does not engage in any other economic activity or, if the infrastructure owner is engaged in any other economic activity, by keeping separate accounts, allocating costs and revenues in an appropriate way, and ensuring that any public funding does not benefit other activities [paragraph 212].

47 See n 4.
49 Case T-108/16 Naviera Armas, SA v Commission [2018] EU:T:2018:145; Case C-319/18 P Fred Olsen v Naviera Armas [2019] EU:C:2019:542. Cf Case C-518/13 Eventech [2015] EU:C:2015:9 relied upon by the Commission where the CJEU held that bus lanes in London were not constructed for the benefit of any specific undertaking or any particular category of undertakings, such as Black Cabs, or the suppliers of bus services, and were not allocated to them after their construction, but that they were constructed as part of the London road network and, primarily, with a view to facilitating public transportation by bus. Fred Olsen had been the first ferry company to apply for a licence, but the suggestion of the GC and CJEU is that there was now a need to modernise and allow for competition.
Operators of infrastructure obtain an economic advantage if they pay a price below the market rate for the right to exploit the infrastructure [paragraph 223]. But the Commission ducked the most difficult question, often raised in defence by the Member States: how can/should a market price be calculated where there is no similar infrastructure in the same area? The Notice provides guidance by stating that no economic advantage is conferred when the right to exploit the infrastructure is competitively put out to tender [paragraph 223].

The Notice also explains that there is no State aid present for the users of the infrastructure if the operator sets access prices or usage fees in accordance with the MEO [paragraph 225] or auctions the price of access [paragraph 226].

…the Commission considers that the MEO test can be satisfied for public funding of open infrastructures not dedicated to any specific user(s) where their users incrementally contribute, from an ex-ante viewpoint to the profitability of the project/operator. This is the case where the operator of the infrastructure establishes commercial arrangements with individual users that allow covering all costs stemming from such arrangements, including a reasonable profit margin on the basis of sound medium-term prospect. This assessment should take into account all incremental revenues and expected incremental costs incurred by the operator in relation to the activity of the specific user [paragraph 228].

An example of a project which was compatible with the State aid rules was a Rural Development Programme with the aim to provide grants to ten non-profit entities, to improve water quality and the water management infrastructure and to comply with the requirements of the EU Water Framework Directive and the EU Flood Risk Management Directive. The Commission found that the entities were not undertakings and the activities covered by the grants were not economic in nature. The Decision takes a robust approach to ensuring that undertakings in difficulty were included in the scheme and that there was a clear separation between economic and non-economic activities, in order to rule out cross-subsidisation. The beneficiaries had to use separate accounts for supported and non-supported activities, ensuring that costs were allocated, declared, verified, and reimbursed in an appropriate way in order to exclude that public funding benefits any economic activities in which beneficiaries may engage outside of the supported projects.

The Decision can be contrasted with the approach in Paris Water Treatment, where the measure constituted State aid because their purpose was to induce farmers to reduce the use of nitrites which would be discharged and pollute reservoirs.  

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50 SA.55183. Contrast with SA.54810, where the measure constituted State aid. The purpose of the French measure was to induce farmers to reduce the use of nitrites which would be discharged and pollute reservoirs. Lowering the amount of nitrates would lower the cost of drinking water treatment. The Commission found there was State aid because the beneficiaries were agricultural enterprises, but the aid was deemed compatible with art 107(3) (c) TFEU.
Lowering the amount of nitrates would lower the cost of drinking water treatment. The Commission found there was State aid because the beneficiaries were agricultural enterprises. However, the aid was deemed compatible with Article 107(3) (c) TFEU.\textsuperscript{51}

In *Irrigation Infrastructure in Bavaria*\textsuperscript{52} the aim of the finance was to create a natural monopoly. The Commission distinguished direct beneficiaries (local authorities, water, and soil associations) receiving aid for the establishment of an irrigation infrastructure. They were deemed to be public bodies, not engaged in economic activities according to established case law. Indirect beneficiaries were agricultural undertakings, the users of the irrigation infrastructure. However, they were found not to obtain an economic advantage from the new scheme, since the activities of the direct beneficiaries was deemed to be non-economic in nature.

Despite the attempts at guidance and clarification we see that cases have been appealed to the European Courts where the Commission has taken adverse Decisions or not opened an investigation.\textsuperscript{53}

\section*{VIII. European Projects}

European infrastructure projects present a different set of issues. A case study is the construction and operation of an additional section of the central motorway in Greece, which had been designated as E65 and is also part of the Trans-European Transport Network (TEN-T). From the start, the E65 Motorway was recognised as needing an ongoing State subsidy and was tendered out based on an availability of a subsidy payment the maximum amount of which was determined based on the first tender’s offer (€1,645 million). The project recognised there might be disruptions where antiquities needed to be protected and archaeological excavations undertaken, at the risk and expense of the Greek government. Even when built, an operating subsidy would be necessary to cover the difference between the anticipated traffic revenues and the actual costs of the operation/maintenance and financing of the motorway, including a return to the private investors. Greece notified three tranches of finance for the motorway project to the Commission.

The Commission found that the selection of the concessionaire was carried out objectively based on the most economically advantageous offer and that the concessionaire bore all risk directly linked to the construction and operation of the

\begin{itemize}
  \item \textsuperscript{51} SA.54810.
  \item \textsuperscript{52} SA.54436.
\end{itemize}
motorway.\textsuperscript{54} Before awarding the contract, the Greek government compared the winning bidder’s offer with the results of the financial analysis of the project that had been undertaken by its independent advisor and concluded that not only the winning bid requested the lowest subsidy but that the requested amount was lower than that calculated by the advisor. In addition, the contract contained a claw-back clause whereby the Greek government would extract retroactively 85\% of all revenue above a certain benchmark. The concession involved no State aid because it was awarded competitively, it did not alleviate the concessionaire from commercial risk and because the concessionaire would not be able to make any excess profits.

The project was affected by the 2008 financial crisis with the concessionaire receiving less revenue (around 60\%) than anticipated. Work on the project came to a standstill. In 2013 the Commission allowed for State aid to be granted to cover the shortfall in revenue through a Reset of the original concession.\textsuperscript{55} The Commission recognised that a private investor would not have committed its own resources in the loss-making motorway, but found the measures compatible with the internal market because they covered the concessionaire’s funding gap.

A third tranche of aid was notified to the Commission in 2018.\textsuperscript{56} This was to cover the construction costs of the southern section of the motorway and for improvements to work already carried out. The aid was to be co-funded by EU structural funds. The Greek government argued that the finance was not State aid. The Commission found that the third tranche of funding involved a transfer of State resources that conferred a selective advantage to the concessionaire and would be liable to distort competition. Referring to the Notice on the notion of aid, the Commission noted that finance cannot be used to cross-subsidise or indirectly subsidise other economic activities. Here the concession of the bundled construction and operation of the E65 motorway was agreed following a competitive tender procedure, the features of the concession and the public contribution were modified in 2013 without a competitive tender. Even though approved by the Commission, it could not be excluded that the concessionaire obtained an advantage, given that the concessionaire’s shareholders were companies active in infrastructure works in several sectors and with an international presence. The possibility of an \textit{indirect} advantage arose.

However, the construction of a motorway was part of the EU TEN-T, a project in the common interest. Without State finance the project could not have taken place. The Commission noted that safeguards to ensure that the concessionaire’s financial advantages from the public funding of the southern section were mit-
igate and this satisfied the proportionality principle. There was a separation of revenue and costs of the southern section from the already completed section of the motorway to prevent cross-subsidisation. The estimated revenues that would be generated from the operation of the southern section of the motorway would not cover the estimated operation and maintenance costs. Therefore, no advantage was expected to stem from this phase of the project. The Greek authorities had a claw-back mechanism if the operation and maintenance of the southern section was to be profitable. The Commission accepted that the third tranche of funding was compatible with the internal market and that the use of public funds for expropriations, archaeological findings and relocation of public utility networks did not constitute State aid.

IX. Conclusions

Leipzig-Halle gave the Commission the confidence to take a broad interpretation of the ruling and to adapt the generic response to the changing nature of public funding for infrastructure. The case has allowed the Commission to take on a greater pre-emptive role in defining the parameters of compatible state aid, through the adoption of the analytic grids, legislation, and guidelines. But also enhanced the effectiveness and modernisation of procurement law and policy by allowing a review of projects against State aid norms.

Holdgaard et al57 argue that the Commission has taken an opportunistic wide reading of the case to place a narrower scope on the definition of the exercise of public authority. This approach was occurring anyway, seen for example in the wealth of soft law enactments around the definition of an undertaking, economic activity, and the role of SGEI in EU competition and free movement law. The case recognizes the commercial role of the State and subjects the State to a level playing field when engaging with private investors. The role of the Commission is of a fine balancing between encouraging investment in large, complicated, and challenging infrastructure projects to enable the EU economy to recover,58 integrate and expand with the use of State aid and procurement law to safeguard European principles of transparency, accountability, and non-discrimination.

The result brings mixed blessings. It has allowed greater scrutiny of the reasons why, and how, the State is investing in infrastructure and the beneficiaries of such investment. The State must defend its policy choices using EU principles and the concepts of proportionality and necessity. This allows for greater transparency, accountability and allows the possibility for affected third parties (competitors, consumers, and public interest groups, particularly in the environmental arena)

57 See n 22.
to challenge the policy choices of the State. This may offend principles of local autonomy and open democracy. Initially, it was not clear whether the Commission was encouraging open access to infrastructure as a preferred policy choice. The economic backdrop after the financial crisis, exacerbated by COVID-19, has left Member State public finances with less flexibility to engage in large scale projects, without EU funding, private investment, or fees and concessions. *Leipzig-Halle* is a pioneering ruling in creating the framework for the transition from State fully owned and operated infrastructure to realistic fair funding and commercial use of infrastructure. But, by bringing a Member State’s policy choices within the remit of EU State aid law scrutiny will, inevitably, result in delays – seen in the *Leipzig-Halle* case – while the Member State seeks legal advice from the Commission on the compatibility of the aid. This provides the opportunity for obstruction of major projects, some having a trans-national impact, as third parties are given access to the State aid procedures and remedies as a means of challenging a public policy choice for investment.