

Clarifications regarding State aid

Introduction

The aim of this note is to clarify certain issues regarding State aid, in particular in terms of whether self-financing (i.e. the portion of costs financed by the beneficiary and not through co-financed aid) in respect of a public operator should be considered as State aid. In the context of State aid schemes and therefore competition, the aim is to ensure that a public operator does not, owing to its status, have an advantage over a private operator which is liable to affect intra-Community trade.

It is important to note that this issue of how to categorise self-financing does not concern the rate of (co-financed) aid mentioned in rural development programmes.

Reminder of the general principles of State aid

Let us first review the principles that determine the scope of application of European State aid rules.

The concept of State aid is defined in Article 107(1) of the TFEU. For a project/activity to fall within the scope of State aid control, it must meet all of the following conditions:

- The project involves State resources (this notion covers not only direct grants but also the waiving of revenue which would otherwise have been paid to the State, for example, by providing facilities financed by the State either for free or at a reduced rate).
- The project grants an advantage to one or more undertakings (the notion of undertaking means any entity engaged in an economic activity, regardless of its legal status and the way in which it is financed). This in particular excludes from the scope of aid all activities falling under the exercise of public power, as well as the provision of certain services (or infrastructure) to the public free of charge. An advantage is also excluded if the State is acting as a prudent investor, requiring a return on its investment that is similar to that which would be expected by a private investor in the same circumstances (leaving aside any political or administrative considerations).
- The project is liable to distort competition and affect trade between Member States. This means that purely local activities, which do not have the potential to attract consumers from other countries or hinder the freedom of establishment or investment of foreign operators, are not subject to the State aid control regime.

When considering how to categorise public involvement under the rules on State aid, it is important to determine whether all of these conditions are met.

The Commission provided clarifications in its Notice on the notion of State aid as referred to in Article 107(1) of the Treaty on the Functioning of the European Union ('the Aid Notice')¹, which may be consulted for further information.

We should add that a measure that constitutes *de minimis* aid within the meaning of Regulation (EU) No 1407/2013², for industrial activities and the processing and marketing of agricultural products, or within the meaning of Regulation (EU) No 1408/2013³, in the case of the primary production of agricultural products, is excluded from State aid control. However, in the context of rural development policy, only Regulation (EU) No 1407/2013, for which the main criterion is that the total amount of aid does not exceed EUR 200 000 per undertaking over a period of three accounting years, is applicable.

1. Self-financing

Several regions have contacted the European Commission to enquire whether the portion of a public body's self-financing in a project must be taken into account when calculating the intensity of aid and if, as a result, a public operator of a project will always — strictly as regards State aid — have an aid intensity equal to 100 %. In other words, where public aid granted to a public body is regarded as State aid, the portion of self-financing should be re-categorised as State aid.

This interpretation requires clarification. According to the letter dated 14 October 2015 (D(2015)101), if the public beneficiary operates like a private investor and pursues the activity in question (investment and operation) in its own economic interests and acting as an undertaking, the self-financing portion may be regarded as 'own resources' which do not constitute State aid, the reason being that the public beneficiary is acting like a private investor under market conditions and therefore does not obtain any advantage which would not be available under normal market conditions. In such cases, it must nevertheless be possible to clearly identify this type of financing and separate it from other expenditure items in the public body's budget as an activity aimed at the objective market. This would usually require a business plan and activity accounts. Otherwise, it would be extremely difficult to make a clear distinction between the public body's normal task carried out in the public interest (i.e. non-economic activity) and this specific economic activity.

¹ OJ C 262, 19.7.2016, p. 1.

² OJ L 352, 24.12.2013, p. 1.

³ OJ L 352, 24.12.2013, p. 9

1.1. Economic investments generating revenue

The business plan and accounts showing that the return is similar to that which would be expected by a private investor in the same circumstances would be sufficient to show that the public operator is acting like a private operator.

1.2. Projects which do not generate revenue

Generally speaking, since competition is not a factor for these projects, they should not be subject to an aid regime. It is also important to note that the beneficiary within the meaning of Regulation (EU) No 1305/2013 does not always correspond to the beneficiary within the meaning of State aid regimes. For example, for measure 1 (Article 14 of Regulation (EU) No 1305/2013), the provider of training courses or other knowledge transfers and information actions is the beneficiary under Regulation (EU) No 1305/2013. For the purposes of State aid regimes, the beneficiary is whoever takes the training course or benefits from the knowledge transfers and information actions. If the services are provided in normal market conditions, the service provider is not deemed to be a beneficiary of any State aid. For further information, please refer to Article 21 of Regulation (EU) No 702/2014.

2. Size of the body when it is classed as an enterprise

In order to determine the size of the body when it is classed as an enterprise we must refer to Article 3(4) and (2) of Commission Recommendation of 6 May 2003 (L 124/36) (see also Regulation (EU) No 651/2014 (GBER) and Regulation (EU) No 702/2014 (ABER)). For more information, please refer to point 5 for the extract from the Recommendation.

3. Specific cases

The following cases are examples provided by the French authorities for the purpose of discussion. As the information provided here is limited, the Commission cannot provide a definitive opinion on how to categorise the projects under State aid rules. The responses given are simply areas for reflection given the information provided.

For each example, the first step is to check whether all the criteria defining State aid, listed above, have been met. If one of the conditions is not fulfilled, the State aid rules do not apply and, therefore, how to categorise self-financing is not an issue.

Example 1: A group of communes provides infrastructure on the banks of a river to facilitate walks (bridges, pathways, picnic areas, etc.). Management of the infrastructure (maintenance and ticket sales) is conferred free of charge by the group to a private

entity. The investment made by the group of communes is financed from the main budget (€ 200 000 without borrowing).

Comments: Apparently this activity should not distort trade between Member States; the location — how near it is to a border — must be taken into consideration when examining this criterion. However, if it were decided that the activity affects trade between Member States, the beneficiary of the State aid would have to be identified (not necessarily the same as the beneficiary within the meaning of Regulation (EU) No 1305/2013). Based on the above, the beneficiary for the purposes of State aid would be, in this case, the private entity making use of the infrastructure free of charge. In any case, given the amounts invested, it is highly likely that the aid (defined as the value of the ‘amount not paid’ by the private entity compared with the amount that would have been paid in normal market conditions, taking into account any obligations that fall to it in terms of maintenance, etc.) would be below the threshold set in Regulation (EU) No 1407/2013 (*de minimis*) and would therefore not constitute State aid.

Example 2: a group of communes that owns an equestrian centre carried out extension work so as to be able to offer new activities and host additional equestrian events (€ 500 000). If State aid rules apply, the framework for granting aid is the sporting and recreational infrastructure regime (SA 43197), under which a project can be financed up to 80 % where the total amount of aid is less than or equal to € 1 million, and measure 7.5.2 of the Rural Development Programme, which provides for an aid rate of 80 %. Self-financing (20 %) comes from the group’s own funds (main budget, without borrowing).

Comments: The first three conditions for determining State aid seem to be met. All that remains to be determined is whether the activity affects trade between Member States. In this regard, the location of the activity — how near it is to a border with another Member State — may be a key factor. If the activity does not affect trade between Member States, then it is not subject to a State aid regime and, therefore, the issue of whether to re-categorise the 20 % of self-financing as State aid is not relevant. If all the conditions making it a project that is subject to State aid rules are met, then we must determine whether the public beneficiary operates like a private investor and pursues the activity in question (investment and operation) in its own economic interests by acting as an enterprise (see point 1.1). For information, the following is a link to a decision concerning an equestrian centre that establishes that trade is not affected in respect of a similar facility.

http://ec.europa.eu/competition/state_aid/cases/246164/246164_1374343_42_2.pdf.

Example 3: a group of communes builds a multi-media centre (€ 800 000 eligible), with the investment made using the group’s general budget and management/operation of the centre carried out by agents of the group. If State aid rules apply, the framework for granting aid is the culture and heritage conservation regime (SA.43783 (2015/N) ‘Aid for basic services and village renewal in rural areas’), under which a project can be financed up to

80 % where the total amount of aid is less than or equal to € 1 million, and measure 7.4 of the Rural Development Programme, which provides for an aid rate of 70 %.

Comments: The first question that comes to mind is whether it is an economic activity or a cultural activity (see point 2.6 of the Aid Notice). If it is an economic activity, it seems a priori unlikely that it could affect trade between Member States (see point 197(b) of the Aid Notice).

Example 4: a commune builds a multidisciplinary health centre (eligible investment of € 1.2 million). The investment comes from the commune's main budget (own funds and loan). The commune will receive rent from the medical professionals practising in the centre (net revenue). The framework for granting aid is the notified scheme 'Aid for basic services and village renewal in rural areas' (SA.43783 (2015/N)), under which a project can be financed up to 100 %, less revenue (calculated according to the rules stated in Article 61 of Regulation (EU) No 1303/2013), and measure 7.4 of the Rural Development Programme, which allows an aid rate of 70 %.

Comments: Given that these are basic services in a rural area, we can assume that the medical centre is built in a remote village that suffers from a lack of doctors. In these circumstances, it is unlikely (even if the other criteria for determining State aid are met) that this measure could affect trade. However, if we were to conclude that all the conditions for categorising it as State aid were met, the State aid regime No SA.43783 (2015/N) provides for an aid rate of up to 100 %. As a result, re-categorising the self-financing as State aid would not be an issue.

For information, the following is a link to a decision concerning a health centre that establishes that trade is not affected.

http://ec.europa.eu/competition/state_aid/cases/255736/255736_1654238_57_2.pdf

Example 5: a commune renovates a building in order to set up a public service centre and remote office space (work space for businesses and employees with related services). The € 1 million investment is taken from the commune's main budget without borrowing. The project does not generate net income.

Comments: We must first establish the extent to which the building will be used for economic purposes. If part of the infrastructure — as the question implies — is used for non-economic public services (see point 17 of the Aid Notice), the funds invested in the renovation work fall outside the scope of State aid in respect of that part. If another part (the remote office space) is used for economic purposes (by offering services for which there is a market), we must then determine whether this use exceeds 20 % of the building's total capacity. Where this is not the case, this economic use is considered subsidiary to the non-economic use and all the financing falls outside the scope of State aid rules (point 207 and footnote 305 of the Aid Notice). If no rent is charged (or if the rent is lower than market rates), the businesses or self-employed persons using the remote office space services would

be considered to be the State aid beneficiaries, provided that all the conditions for determining State aid are met. There would, however, be strong grounds to believe that the measure would be unlikely to affect intra-Community trade. We would also need to determine whether the advantage that might be conferred (in the form of reduced rent) falls under the de minimis Regulation.

Example 6: An approved joint collecting body (*organisme paritaire collecteur agréé*, OPCA) organises a training programme within the framework of measure 1.1. The body is a recognised public body. The training courses must be offered free of charge if the aid rate is 100 %.

The framework for granting aid is the framework regime exempt from notification No SA.40207 relating to aid for training for the 2014-2020 period.

Comments: The beneficiary within the meaning of State aid rules is anyone who takes the training course. If the services are provided in normal market conditions, the service provider is not deemed beneficiary of any State aid. Therefore, the issue of how to categorise the self-financing of the service provider (in this case the OPCA) is not relevant.

Example 7: Holiday villages: tourist accommodation and activities aimed at families. The price system clearly aims to facilitate access for all families as the price charged depends on their level of taxation (social diversity is also an objective).

- The infrastructure usually belongs to a group (a group of communes for example) and is managed by a private operator selected on the basis of a competitive tender procedure (public service delegation in France).
- The customers are almost exclusively French (especially in Auvergne), especially because what is on offer does not meet the needs of foreign customers and advertising does not target foreign customers.
- No foreign investors are involved in this kind of project, particularly because the profitability of the infrastructure itself is low or even non-existent. However, the impact on the local economy is significant: the employees are local, local businesses are called on for works and maintenance, and catering supplies are sourced from local shops. In addition, the infrastructure may be partially accessible to locals: for example the dining hall which is used as a canteen outside school holidays or the swimming pool which is open to local residents at certain times.
- We should specify that these facilities are completely different from the much more high-end all-inclusive tourist resorts, both in terms of service — comfort, activities, location — and in terms of the target customers and prices.

Comments: In this case, based on the Aid Notice, the information would suggest that it is likely that the facility is not subject to the State aid regime as trade between Member States is not affected. For information, the following is a link to a decision concerning a health centre that establishes that trade is not affected.

Example 8: Centres for children and teenagers: these are centres that offer holiday camps for young people during school holidays and various classes during term time. Sometimes, to maximise use, the infrastructure is also rented out to private groups (for weddings, family reunions, etc.).

- Generally the equipment is managed by an association. The owner of the infrastructure is either the association or a group (commune or group of communes).
- The price of services also depends on the parents' level of taxation (in order to ensure diversity).
- Some centres work directly with social services or social support services to ensure access to holiday camps.
- The children (and even the secondary clientele) are almost exclusively French.
- There are no foreign investors for activities which are mostly by their very nature not profitable (association status).

Comments: In this case, based on the Aid Notice, the information would suggest that it is likely that the operation is not subject to the State aid regime as trade between Member States is unlikely to be affected.

In addition, if the centres are made available to the organisers of free or very cheap holiday camps, the beneficiaries would be the families and therefore this would not be an economic activity and the financing would not constitute State aid.

As regards renting the infrastructure to private groups, we would also need to determine whether this is a subsidiary activity (point 207 and footnote on page 305 of the Aid Notice) as, where this is the case, the issue of State aid becomes irrelevant.

Example 9: a body has solar panels installed on its buildings. This activity generates revenue through the sale of surplus electricity. How then should we categorise the portion of the investment covered by the self-financing of the public body?

Comments: We would need to determine if the energy is produced in order to cover the needs of the municipality and if only the unused amount is sold to the network. The electricity used by the municipality is not sold on the market and therefore cannot be considered to be an economic activity. Any surplus electricity which is not used but injected into the network could be deemed a subsidiary economic activity that does not affect the general non-economic nature of the activity. However, this is the case only if the facility has

been designed to cover the needs of the municipality and if the amount injected into the network is only marginal.

4. Useful links

http://ec.europa.eu/competition/state_aid/register/

http://europa.eu/rapid/press-release_IP-16-3141_en.htm

http://europa.eu/rapid/press-release_IP-15-4889_en.htm

<http://ec.europa.eu/competition/elojade/isef/>

5. Extract from Commission Recommendation of 6 May 2003 (see also Regulation (EU) No 651/2014 (GBER) and Regulation (EU) No 702/2014 (ABER))

Article 3

Types of enterprise taken into consideration in calculating staff numbers and financial amounts

1. An ‘autonomous enterprise’ is any enterprise which is not classified as a partner enterprise within the meaning of paragraph 2 or as a linked enterprise within the meaning of paragraph 3.

2. ‘Partner enterprises’ are all enterprises which are not classified as linked enterprises within the meaning of paragraph 3 and between which there is the following relationship: an enterprise (upstream enterprise) holds, either solely or jointly with one or more linked enterprises within the meaning of paragraph 3, 25 % or more of the capital or voting rights of another enterprise (downstream enterprise).

However, an enterprise may be ranked as autonomous, and thus as not having any partner enterprises, even if this 25 % threshold is reached or exceeded by the following investors, provided that those investors are not linked, within the meaning of paragraph 3, either individually or jointly to the enterprise in question:

a) public investment corporations, venture capital companies, individuals or groups of individuals with a regular venture capital investment activity who invest equity capital in unquoted businesses (business angels), provided the total investment of those business angels in the same enterprise is less than EUR 1,250,000;

b) universities or non-profit research centres;

c) institutional investors, including regional development funds;

d) autonomous local authorities with an annual budget of less than EUR 10 million and less than 5 000 inhabitants.

3. 'Linked enterprises' are enterprises which have any of the following relationships with each other:

a) an enterprise has a majority of the shareholders' or members' voting rights in another enterprise;

b) an enterprise has the right to appoint or remove a majority of the members of the administrative, management or supervisory body of another enterprise;

c) an enterprise has the right to exercise a dominant influence over another enterprise pursuant to a contract entered into with that enterprise or to a provision in its memorandum or articles of association;

d) an enterprise, which is a shareholder in or member of another enterprise, controls alone, pursuant to an agreement with other shareholders in or members of that enterprise, a majority of shareholders' or members' voting rights in that enterprise.

There is a presumption that no dominant influence exists if the investors listed in the second subparagraph of paragraph 2 are not involving themselves directly or indirectly in the management of the enterprise in question, without prejudice to their rights as stakeholders.

Enterprises having any of the relationships described in the first subparagraph through one or more other enterprises, or any one of the investors mentioned in paragraph 2, are also considered to be linked.

Enterprises which have one or other of such relationships through a natural person or group of natural persons acting jointly are also considered linked enterprises if they engage in their activity or in part of their activity in the same relevant market or in adjacent markets.

An 'adjacent market' is considered to be the market for a product or service situated directly upstream or downstream of the relevant market.

4. Except in the cases set out in paragraph 2, second subparagraph, an enterprise cannot be considered an SME if 25 % or more of the capital or voting rights are directly or indirectly controlled, jointly or individually, by one or more public bodies.

5. Enterprises may make a declaration of status as an autonomous enterprise, partner enterprise or linked enterprise, including the data regarding the thresholds set out in Article 2. The declaration may be made even if the capital is spread in such a way that it is not possible to determine exactly by whom it is held, in which case the enterprise may declare in good faith that it can legitimately presume that it is not owned as to 25 % or more by one

enterprise or jointly by enterprises linked to one another. Such declarations are made without prejudice to the checks and investigations provided for by national or Community rules.