RE: NORTH ESSEX AUTHORITIES LOCAL PLAN, SECTION 1

ADVICE ON EXD/079

INTRODUCTION

1. I am asked to advise on the potential state aid ("**SA**") issues arising in respect of Section 1 of the proposed North Essex Plan with reference to the proposed Garden Communities ("**GCs**"), with this prompted in particular by a letter from Homes England submitted by NEGC Ltd (EXD/079) which refers to potential State Aid compliant financing rates. My conclusions are, in summary:

   (a) The question of whether the GCs can be financed without reliance on SA is integral to the question of the viability of the plan;

   (b) Funds from the Housing Infrastructure Fund can only lawfully be applied in very limited circumstances in the context of specific new housing allocations such as those in the plan;

   (c) Neither the promoting authorities nor central government can "remedy" an unviable interest rate without violating the prohibition on SA; and

   (d) Even a wholly public-sector led delivery vehicle will not be immune from SA issues.

RELEVANT FACTS

2. This issue relates to the financing of the proposed Garden Communities projects ("**GCs**"). The question of whether the GCs can be adequately financed is relevant (and potentially determinative) to the question of whether the proposed Plan (or, at least, the GC aspects) are viable.

3. There is significant likelihood that NEGC Ltd or other developers may look to finance the GCs on a 100% debt basis and moreover this is also the financing structure shown in the Hyas viability analysis to which the Inspector's question related. NEGC Ltd, in submitting EXD/079, indicates in this context that it expects to borrow to finance the projects at a rate of 6% or below, although it has not clarified at all the sources from which it expects to obtain financing.

4. The rate at which the projects will be able to borrow is controversial. While NEGC Ltd asserts a figure of 6% (real) or below, a report by PricewaterhouseCoopers ("the PWC Report"), which is part of the Examination documents, indicates that a rate of 11% (nominal, equivalent to around 9% real) would likely be required. The analysis of Matthew O'Connell and William Sunnucks also reaches a conclusion that a rate of 9% (real) is a realistic scenario based on the Homes England letter. Similarly, an independent report by Ed Charlesworth (Managing Director of one of the world's largest alternative asset managers and Credit Risk Officer for funds managed on behalf of several large insurance companies) reaches the same conclusion.

5. Similarly, the structure of the delivery vehicle is not clear. At various points it has been suggested that the GC will be delivered by a wholly publicly owned vehicle, by a public-private partnership, and by wholly private developers. The structure of the delivery vehicle has, for obvious reasons, implications for SA.

6. Separately from broader financing considerations, a bid was made to and successfully awarded by HMG's Housing Infrastructure Fund ("**HIF**") in relation, and indeed directly linked, to TCBGC, and a similar bid in relation to CBBGC remains outstanding. The HIF is administered by Homes England and is intended to fund the construction of infrastructure that supports housing development (where such infrastructure cannot be provided by the market).

LAW

Basic Principles of State Aid

7. HMG describes SA as follows:

> "State aid is a Member State's financial aid to business which meets all the criteria in Article 107(1) of the Treaty on the Functioning of the European Union (The TFEU). Article 107(1)2 declares that State aid, in whatever form, which could distort competition and affect trade by favouring certain undertakings or the production of certain goods, is incompatible with the common market - unless the Treaty allows otherwise."[1]

8. The criteria in Article 107(1) are:

   (a) The aid is granted by the State or through State resources;

   (b) The aid favours certain undertakings or the production of certain goods (i.e. it selectively confers a competitive advantage);

   (c) The aid distorts or threatens to distort competition (almost all selective aid will have this effect);

   (d) It affects trade between Member States[2]

9. SA which meets all of the Art. 107(1) criteria may be acceptable if it:

   (a) Falls within one of the three classes identified in Art. 107(2) (social aid granted to individual consumers, aid to make good damage caused by natural disasters, or aid to areas of Germany affected by the 1945-89 division of Germany);

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[1] *The State Aid Guide: Guidance for Practitioners*, (June 2011), p. 2, available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/31700/11-1040-state-aid-guide.pdf (last accessed 20 February 2020)

[2] The applicability of this is extremely broad, as outlined in para 191 of C262/42, an appendix to this opinion: *"Public support can be considered capable of having an effect on trade between Member States even if the recipient is not directly involved in cross-border trade. For instance, the subsidy may make it more difficult for operators in other Member States to enter the market by maintaining or increasing local supply."*

(b) Is explicitly authorised by another provision in the TFEU or TEU;

(c) Falls within the classes identified in the General Block Exemption Regulation ("**GBER**");

(d) Falls within one of the classes in Art. 107(3) and is granted explicit prior authorisation by the Commission.

Indirect Aid

10. Aid which indirectly confers a selective competitive advantage is also considered SA and is, consequently, unlawful. The Commission's "Notice on the Application of Articles 87 and 88 of the EC Treaty [now Arts. 107 and 108 TFEU] to state aid in the form of guarantees" sets out the position in relation to state guarantees of private sector loans:

> "Article 87(1) of the EC Treaty states that 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 common market.
>
> These general criteria equally apply to guarantees. As for other forms of potential aid, guarantees given directly by the State, namely by central, regional or local authorities, as well as guarantees given through State resources by other State-controlled bodies such as undertakings and imputable to public authorities, may constitute State aid.
>
> In order to avoid any doubts, the notion of State resources should thus be clarified as regards State guarantees. The benefit of a State guarantee is that the risk associated with the guarantee is carried by the State. Such risk-carrying by the State should normally be remunerated by an appropriate premium. Where the State forgoes all or part of such a premium, there is both a benefit for the undertaking and a drain on the resources of the State. Thus, even if it turns out that no payments are ever made by the State under a guarantee, there may nevertheless be State aid under Article 87(1).

> The aid is granted at the moment when the guarantee is given, not the moment at which the guarantee is invoked or the moment at which payments are made under the terms of the guarantee. Whether or not a guarantee constitutes State aid, and, if so, what the amount of that State aid may be, must be assessed at the moment the guarantee is given. [3]

11. Although a state guarantee of a loan may be considered lawful under SA rules, this will only be the case where the borrower pays a market premium for the guarantee.

State Aid in Project Finance

12. Lending, from state resources, to finance infrastructure or building projects will constitute unlawful SA unless the terms of the lending comply with the Market Economy Operator Principle ("**MEOP**"). Simply put, this means that the state can only lend to support project finance if it lends on the same terms that a private investor would lend to that project. In such a case, the state is not conferring a selective advantage because it is merely acting in the same way that any other investor would act in a free market.[4]

13. Where state funds are used to support public infrastructure projects (such as public roads which are free of charge to all users and benefit the entire population), this will generally not be considered SA. If, however, the infrastructure is built with the intention of supporting an economic undertaking, then state support for the project will be SA. This will only be the case where the public infrastructure project was developed specifically to

3 Commission Notice on the application of Articles 87 and 88 of the EC Treaty to State aid in the form of guarantees (05.2008), p. 4, §2.1

4 Commission Notice on the notion of State aid as referred to in Article 107(1) of the Treaty on the Functioning of the European Union (2016/C 262/01), pp. 17-26

support a private undertaking. If the benefit to private undertakings is purely incidental, then state support is not SA.[5]

State Aid After Brexit

14. The effect of Art. 107 is saved in UK law after Brexit by section 3 of the European Union (Withdrawal) Act 2018. Until further legislation is passed, therefore, the prohibition of SA remains in place in, essentially, the same way that it did before Brexit. The State Aid Regulations 2019 envisage the Competition and Markets Authority taking over from the Commission as the body regulating SA after the expiry of the transition period but these have not yet been approved by Parliament. The EU has made it clear that it expects the retention of SA rules in substantially the same form as they currently exist to be integral to any future trade agreement between the UK and EU.[6]

15. Beyond the EU regime, state action which distorts the market by favouring one undertaking ahead of others is widely prohibited:

    (a) The WTO agreement on Subsidies and Countervailing Measures prohibits certain subsidies outright and, in respect of others, permits other states to take retaliatory action.

    (b) Ad hoc trade and investment agreements ("**TIA**") (which HMG has indicated it will seek to agree quickly with third states) generally prohibit state subsidies in the sectors that fall within the ambit of the agreement. Further, most TIA contain provisions that permit international investors to bring private actions against governments where the actions of those governments impact on their investments. A subsidy to an infrastructure or development project could fall within this class because it would

[5] *Leipzig-Halle*, CJEU, Case C88/11-p
[6] Financial Times, "Brussels to Fight Tough on State Aid…", 27 January 2020, available at https://www.ft.com/content/24d3c604-3ed1-11ea-a01a-bae547046735 (last accessed 20 February 2020)

impact on the value of other investments in real property or competing projects.

ANALYSIS

Clarity on State Aid is essential to the question of viability

16. It is essential to clarify the state aid implications of proposed delivery mechanisms, whatever they may be, because, if the GCs cannot be financed lawfully then they cannot rationally be found to be viable as required under the NPPF. While it may not have previously been common to consider SA issues at this stage of the plan process, the GC proposals are of a substantially larger scale and complexity than housing in previous, equivalent plans. There are, therefore, substantially more significant questions to answer in respect of its financing. Were the financing for the GCs simple or unchallenged, it is unlikely that SA issues would arise. Given, however, that it is not at all clear how an interest rate of 6% or below (as indicated by NEGC Ltd) is to be achieved, it is necessary to be sure that, whatever delivery method will eventually be relied on to secure financing will be lawful.

17. Further, it is trite that the decision in this instance must be made on the basis of the facts relevant to the instant proposed plan. The fact that different issues arose in relation to other plans is an irrelevant consideration. All that matters is that questions have been raised in relation to the financing of the GCs in this plan. If those questions cannot be satisfactorily answered in respect of this plan, then this plan cannot be considered viable as required under the NPPF.

18. As the law stands, unlawful SA must be returned by the recipient. This means it is essential to ensure that all questions of SA must be settled at the outset. If a developer were to be obliged to return substantial sums of money after a project has begun, there would obviously be a high risk of a project default unless the sums returned could be lawfully financed at similar interest rates

elsewhere. This therefore directly impacts deliverability from an NPPF perspective.

19. Finance for the GCs is at risk of being considered unlawful SA because it would meet the four required tests:

    (a) Finance or (or guarantees to support private sector finance) may come from state bodies, such as central and local government;

    (b) Such finance or guarantees would privilege the GC projects ahead of other, non-GC, development;

    (c) Action that privileged particular development would distort the market by giving the GC developers a competitive advantage ahead of developers on other projects which would be viable without benefiting from low cost financing from state bodies;

    (d) This would impact trade across the EU because investment in real estate, development and infrastructure is a global market.

20. There is no indication that any aspect of the proposed GCs would fall into any of the exemptions to the prohibition on SA.

Finance from the HIF can only be used in limited circumstances

21. It is proposed that part of the funding for infrastructure directly relating to TCBGC and potentially part of the funding for infrastructure directly relating to CBBGC will come from the HIF. Two points arise in this context.

22. The first is that Homes England places the burden on the prospective recipient to demonstrate that the funding applied for will be SA compliant. If this cannot be demonstrated in advance, therefore, HIF finance cannot be relied on in respect of the proposed plan.

23. The second is that HIF finance can only be applied to (a) infrastructure that is (b) for free public use, and (c) is not intended to facilitate a private undertaking. Consequently:

    (a) The HIF finance must be strictly confined to infrastructure (in this case the proposed roads);

    (b) It can only be SA compliant if the roads funded are not intended to facilitate private development. It is relevant to ask, therefore: would the proposed roads still be built if the GC were removed from the plan?

    (c) It cannot be used to finance access roads to the GC.

Public bodies cannot "remedy" an unviable cost of borrowing

24. In the event that the delivery vehicle is not able to obtain finance at a viable interest rate, the state cannot step in to cover the gap, either by providing finance itself, or by guaranteeing private sector loans. The former would be a paradigmatic instance of direct SA. The second would be a similarly paradigmatic instance of indirect SA.

25. This is particularly relevant to a delivery mechanism that is reliant on public-private partnership or solely private sector delivery. It was stated at the Matter 5 hearing that, if a public-private partnership is used, the private sector partner would be expected to provide the lion's share of the finance. In such an event, the private sector partner could not rely on the public sector partner to guarantee loans, nor could it rely on the fact that it has a public-sector partner in order to secure preferential rates (even in the absence of an explicit guarantee from the public sector partner). Similarly, the NEAs cannot seek to attract private sector developers by assisting them in obtaining finance.

A wholly public-sector delivery vehicle operating similarly to a private-sector or public-private developer would still face State Aid issues

26. Given there are private sector developers looking to develop the GC sites as well as many other competing sites in the North Essex area, there could be no argument that development of the GCs did not comprise "economic" activity, such that SA would be equally applicable to a wholly public sector developer as it would be for a private sector developer in a similar context. The tests under Article 107 (1) would still be met in the same way, with sub-market state or state linked financing or guarantees distorting the market and affecting trade between Member States in the areas of real estate, development and infrastructure investment.

CONCLUSIONS

27. It is impossible to list all of the potential SA implications for the proposed GCs because the NEAs or NEGC Ltd have not provided clarity as to the delivery and finance mechanisms. The analysis herein demonstrates a number of potential issues but, perhaps more importantly, that SA is a real concern when considering viability and deliverability, and therefore legal soundness under the NPPF. It is for the promoters of the GCs to demonstrate that the GCs can be delivered lawfully. The mere assertion that SA issues will be sorted out at a later date is not sufficient. Given the issues raised, it is difficult to see how a rational finding of viability can be reached in the absence of clarity as to how the proposed GC will be delivered, and financed, without reliance on unlawful SA.

SAM FOWLES
Cornerstone Barristers
20 February 2020

The documents relied on in the arguments set out above are exhibited in the appendix to this note.

UK Planning Law Blog
Real opinions on the alphabet soup of planning and development from s106 agreements to CIL, PDR to DCO, BIDs to UBR, viability to profits for everyone

State aid risks

Posted on 2015/07/08 By **Mark Bassett**
Categories: **Best Consideration**, **Judicial Review**, **Local Authority Land**, **Procurement**, **State Aid**
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A recent case in the EU General Court serves as a reminder that all parties involved in the development of public sector land need to be aware of the risks associated with State aid.

The case *the Netherlands v the European Commission* (30 June 2015) involved an appeal against a Commission Decision that the renegotiation of a PPP agreement involved unlawful State aid by reason of the price of the land value being reduced considerably (as compared to the contractual agreed position) and certain agreed fees being waived.

The Court found that the Commission's analysis of the land valuation was deficient insofar that it had failed to take account of the actual value of the land at the point at which the renegotiation occurred (the actual land value had declined considerably). The Court also decided that the Commission had not adequately assessed the legal position of the municipality involved in the transaction correctly. In assessing whether there was aid the Commission applied the usual approach of considering how a hypothetical private market investor would have conducted itself in the same circumstances. The Court ruled that a private market investor would have had regard to issues such as the complexity of the scheme, the strong contractual position enjoyed by the PPP partner, the risk associated with litigation, and the potential return from delivering the scheme sooner (albeit with some waived fees). It was also significant that if the opportunity was to be retendered, the lower land value may have meant that no better commercial offer was available in the market place anyway. As a consequence the Court found that there was no unlawful State aid.

How to ensure that a transaction is compliant with the State aid rules

The first point of reference should always be the Commission's "Communication on State aid elements in sales of land and buildings by public authorities". This document provides general guidance about how public authorities can ensure that their disposals of land comply with the State aid rules. In general the communication provides two mechanisms to ensure compliance. Firstly, through holding a well publicised and unconditional bidding procedure. Secondly, market value can be

established by means of an independent expert's report. In practice most local authorities will obtain a valuation prior to any disposal in order to be certain that they have obtained "best consideration" in accordance with their Section 123 duty (under the Local Government Act 1972).

Where the parties are contemplating a renegotiation, an important lesson from the case is that (A) the State aid rules should be carefully considered before proceeding with any change and (B) that the actual valuation in the market of the land concerned, at the point in time that the change is made is likely to be a highly relevant factor when considering the risk associated with the change.

A further consideration, where the arrangement in question has been procured in accordance with the Public Contracts Regulations 2015, is whether the change is "material" for the purposes of procurement law (see the recent *Winchester* case).

What are the risks?

If a transaction is found to be unlawful as a result of State aid there is the possibility that it could be challenged in the UK Courts by way of judicial review. A low-cost option for parties aggrieved by the transaction is to alert the Commission to the possibility of there being unlawful aid and request that they investigate. If the Commission determines that there has been unlawful aid, then it can require the Member State to recover any unlawful aid from the recipient. In the context of a land transaction at a below market price, this could mean that a local authority seeks to recover a sum equal to the amount by which the disposal was undervalue.

Power to the people?

Flexibility for public sector development agreements?

IV

(Notices)

NOTICES FROM EUROPEAN UNION INSTITUTIONS, BODIES, OFFICES AND AGENCIES

EUROPEAN COMMISSION

Commission Notice on the notion of State aid as referred to in Article 107(1) of the Treaty on the Functioning of the European Union

(2016/C 262/01)

TABLE OF CONTENTS

1. INTRODUCTION

1. In the context of the State aid modernisation, the Commission wishes to provide further clarification on the key concepts relating to the notion of State aid as referred to in Article 107(1) of the Treaty on the Functioning of the European Union, with a view to contributing to an easier, more transparent and more consistent application of this notion across the Union.

2. This Notice only concerns the notion of State aid as referred to in Article 107(1) of the Treaty, which both the Commission and national authorities (including national courts) have to apply in conjunction with the notification and standstill obligations provided for in Article 108(3) of the Treaty. It does not concern the compatibility of State aid with the internal market pursuant to Article 107(2) and (3) and Article 106(2) of the Treaty, which is for the Commission to assess.

3. Given that the notion of State aid is an objective and legal concept defined directly by the Treaty, ([1]) this Notice clarifies the Commission's understanding of Article 107(1) of the Treaty, as interpreted by the Court of Justice and the General Court ('the Union Courts'). On issues that have not yet been considered by the Union Courts, the Commission will set out how it considers that the notion of State aid should be construed. The views set out in this Notice are without prejudice to the interpretation of the notion of State aid by the Union Courts ([2]); the primary reference for interpreting the Treaty is always the case–law of the Union Courts.

4. It should be stressed that the Commission is bound by this objective notion and enjoys only a limited margin of discretion in applying it, namely where the appraisals by the Commission are technical or complex in nature, in particular in situations involving complex economic assessments. ([3])

5. Article 107(1) of the Treaty defines State aid as '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 […], in so far as it affects trade between Member States' ([4]). This Notice will clarify the different constituent elements of the notion of State aid: the existence of an undertaking, the imputability of the measure to the State, its financing through State resources, the granting of an advantage, the selectivity of the measure and its effect on competition and trade between Member States. In addition, given the need for specific guidance expressed by Member States, this Notice provides specific clarification with respect to public funding of infrastructure.

2. NOTION OF UNDERTAKING AND ECONOMIC ACTIVITY

6. The State aid rules only apply where the beneficiary of a measure is an 'undertaking'.

2.1. General principles

7. The Court of Justice has consistently defined undertakings as entities engaged in an economic activity, regardless of their legal status and the way in which they are financed. ([5]) The classification of a particular entity as an undertaking thus depends entirely on the nature of its activities. This general principle has three important consequences.

([1]) See Judgment of the Court of Justice of 22 December 2008, *British Aggregates* v *Commission*, C-487/06 P, ECLI:EU:C:2008:757, paragraph 111.

([2]) See Judgment of the Court of Justice of 21 July 2011, *Alcoa Trasformazioni* v *Commission*, C-194/09 P, ECLI:EU:C:2011:497, paragraph 125.

([3]) See Judgment of the Court of Justice of 22 December 2008, *British Aggregates* v *Commission*, C-487/06 P, ECLI:EU:C:2008:757, paragraph 114, and Judgment of the Court of Justice of 2 September 2010, *Commission* v *Scott*, C-290/07 P, ECLI:EU:C:2010:480, paragraph 66.

([4]) The rules on State aid apply to production of and trade in agricultural products, which under Article 38(1) of the Treaty include fisheries products, only to the extent determined by the European Parliament and the Council (Article 42 of the Treaty).

([5]) Judgment of the Court of Justice of 12 September 2000, *Pavlov and Others*, Joined Cases C-180/98 to C-184/98, ECLI:EU:C:2000:428, paragraph 74; Judgment of the Court of Justice of 10 January 2006, *Cassa di Risparmio di Firenze SpA and Others*, C-222/04, ECLI:EU:C:2006:8, paragraph 107.

8. First, the status of the entity under national law is not decisive. For example, an entity that is classified as an association or a sports club under national law may nevertheless have to be regarded as an undertaking within the meaning of Article 107(1) of the Treaty. The same applies to an entity that is formally part of the public administration. The only relevant criterion is whether it carries out an economic activity.

9. Second, the application of the State aid rules does not depend on whether the entity is set up to generate profits. Non-profit entities can also offer goods and services on a market. ([6]) Where this is not the case, non-profit entities remain outside the scope of State aid control.

10. Third, the classification of an entity as an undertaking is always relative to a specific activity. An entity that carries out both economic and non-economic activities is to be regarded as an undertaking only with regard to the former. ([7])

11. Several separate legal entities may be considered to form one economic unit for the purposes of the application of State aid rules. That economic unit is then considered to be the relevant undertaking. In this respect, the Court of Justice considers the existence of a controlling share and other functional, economic and organic links to be relevant. ([8])

12. To clarify the distinction between economic and non-economic activities, the Court of Justice has consistently held that any activity consisting in offering goods and services on a market is an economic activity. ([9])

13. The question whether a market exists for certain services may depend on the way those services are organised in the Member State concerned ([10]) and may thus vary from one Member State to another. Moreover, due to political choice or economic developments, the classification of a given activity can change over time. What is not an economic activity today may become one in the future, and vice versa.

14. The decision of a public authority not to allow third parties to provide a certain service (for example, because it wishes to provide the service in-house) does not rule out the existence of an economic activity. In spite of such market closure, an economic activity can exist where other operators would be willing and able to provide the service in the market concerned. More generally, the fact that a particular service is provided in-house has no relevance for the economic nature of the activity. ([11])

15. Since the distinction between economic and non-economic activities depends to some extent on political choices and economic developments in a given Member State, it is not possible to draw up an exhaustive list of activities that a priori would never be economic. Such a list would not provide genuine legal certainty and would thus be of little use. Paragraphs 17 to 37 instead seek to clarify the distinction with respect to a number of important areas.

16. The simple fact that an entity holds shares, even a majority shareholding, in an undertaking providing goods or services on a market does not mean that that entity should automatically be considered an undertaking for the

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([6]) Judgment of the Court of Justice of 29 October 1980, *Van Landewyck*, Joined Cases 209/78 to 215/78 and 218/78, ECLI:EU:C:1980:248, paragraph 88; Judgment of the Court of Justice of 16 November 1995, *FFSA and Others*, C-244/94, ECLI:EU:C:1995:392, paragraph 21; Judgment of the Court of Justice of 1 July 2008, *MOTOE*, C-49/07, ECLI:EU:C:2008:376, paragraphs 27 and 28.

([7]) Judgment of the General Court of 12 December 2000, *Aéroports de Paris* v *Commission*, T-128/98, ECLI:EU:T:2000:290, paragraph 108.

([8]) Judgment of the Court of Justice of 16 December 2010, *AceaElectrabel Produzione SpA* v *Commission*, C-480/09 P, ECLI:EU:C:2010:787, paragraphs 47 to 55; Judgment of the Court of Justice of 10 January 2006, *Cassa di Risparmio di Firenze SpA and Others*, C-222/04, ECLI:EU:C:2006:8, paragraph 112.

([9]) See Judgment of the Court of Justice of 16 June 1987, *Commission* v *Italy*, 118/85, ECLI:EU:C:1987:283, paragraph 7; Judgment of the Court of Justice of 18 June 1998, *Commission* v *Italy*, C-35/96, ECLI:EU:C:1998:303, paragraph 36; Judgment of the Court of Justice of 12 September 2000, *Pavlov and Others*, Joined Cases C-180/98 to C-184/98, ECLI:EU:C:2000:428, paragraph 75.

([10]) Judgment of the Court of Justice of 17 February 1993, *Poucet and Pistre*, Joined Cases C-159/91 and C-160/91, ECLI:EU:C:1993:63, paragraphs 16 to 20.

([11]) See Opinion of Advocate General Geelhoed of 28 September 2006, *Asociación Nacional de Empresas Forestales (Asemfo)*, C-295/05, ECLI:EU:C:2006:619, paragraphs 110 to 116; Regulation (EC) No 1370/2007 of the European Parliament and of the Council of 23 October 2007 on public passenger transport services by rail and by road and repealing Council Regulations (EEC) Nos 1191/69 and 1107/70 (OJ L 315, 3.12.2007, p. 1), Articles 5(2) and 6(1); Commission Decision 2011/501/EU of 23 February 2011 on State aid C-58/06 (ex NN 98/05) implemented by Germany for Bahnen der Stadt Monheim (BSM) and Rheinische Bahngesellschaft (RBG) in the Verkehrsverbund Rhein-Ruhr (OJ L 210, 17.8.2011, p. 1) recitals 208 and 209.

purposes of Article 107(1) of the Treaty. Where that shareholding only gives rise to the exercise of rights attached to the status of shareholder as well as, if appropriate, the receipt of dividends, which are merely the fruits of the ownership of an asset, that entity will not be considered an undertaking if it does not itself provide goods or services on a market. ([12])

2.2. **Exercise of public powers**

17. Article 107(1) of the Treaty does not apply where the State acts 'by exercising public power' ([13]) or where public entities act 'in their capacity as public authorities'. ([14]) An entity may be deemed to act by exercising public power where the activity in question forms part of the essential functions of the State or is connected with those functions by its nature, its aim and the rules to which it is subject. ([15]) Generally speaking, unless the Member State concerned has decided to introduce market mechanisms, activities that intrinsically form part of the prerogatives of official authority and are performed by the State do not constitute economic activities. Examples of such activities are the following:

(a) the army or the police; ([16])

(b) air navigation safety and control; ([17])

(c) maritime traffic control and safety; ([18])

(d) anti-pollution surveillance; ([19])

(e) the organisation, financing and enforcement of prison sentences; ([20])

(f) the development and revitalization of public land by public authorities; ([21]) and

(g) the collection of data to be used for public purposes on the basis of a statutory obligation imposed on the undertakings concerned to disclose such data. ([22])

18. In so far as a public entity exercises an economic activity which can be separated from the exercise of public powers, that entity acts as an undertaking in relation to that activity. In contrast, if that economic activity cannot be separated from the exercise of public powers, the activities exercised by that entity as a whole remain connected with the exercise of those public powers and therefore fall outside the notion of undertaking. ([23])

([12]) Judgment of the Court of Justice of 10 January 2006, *Cassa di Risparmio di Firenze SpA and Others*, C-222/04, ECLI:EU:C:2006:8, paragraphs 107 to 118 and 125.

([13]) Judgment of the Court of Justice of 16 June 1987, *Commission* v *Italy*, 118/85, ECLI:EU:C:1987:283, paragraphs 7 and 8.

([14]) Judgment of the Court of Justice of 4 May 1988, *Bodson*, 30/87, ECLI:EU:C:1988:225, paragraph 18.

([15]) See, in particular, Judgment of the Court of Justice of 19 January 1994, *SAT/Eurocontrol*, C-364/92, ECLI:EU:C:1994:7, paragraph 30 and Judgment of the Court of Justice of 18 March 1997, *Calì & Figli*, C-343/95, ECLI:EU:C:1997:160, paragraphs 22 and 23.

([16]) Commission Decision of 7 December 2011 on State aid SA.32820 (2011/NN) — United Kingdom –Aid to Forensic Science Services (OJ C 29, 2.2.2012, p. 4), paragraph 8.

([17]) Judgment of the Court of Justice of 19 January 1994, *SAT/Eurocontrol*, C-364/92, ECLI:EU:C:1994:7, paragraph 27; Judgment of the Court of Justice of 26 March 2009, *Selex Sistemi Integrati* v *Commission*, C-113/07 P, ECLI:EU:C:2009:191, paragraph 71.

([18]) Commission Decision of 16 October 2002 on State aid N 438/02 — Belgium — Aid to port authorities, (OJ C 284, 21.11.2002, p. 2).

([19]) Judgment of the Court of Justice of 18 March 1997, *Calì & Figli*, C-343/95, ECLI:EU:C:1997:160, paragraph 22.

([20]) Commission Decision of 19 July 2006 on State aid N 140/06 — Lithuania — Allotment of subsidies to the State Enterprises at the Correction Houses (OJ C 244, 11.10.2006, p. 12).

([21]) Commission decision of 27 March 2014 on State aid SA.36346 — Germany — GRW land development scheme for industrial and commercial use (OJ C 141, 9.5.2014, p. 1). In the context of a measure that supported the revitalisation (including decontamination) of public land by local authorities, the Commission found that making public terrain ready to build upon and ensuring that it is connected to utilities (water, gas, sewage and electricity) and transport networks (rail and roads) did not constitute an economic activity, but was part of the public tasks of the State, namely the provision and supervision of land in line with local urban and spatial development plans.

([22]) Judgment of the Court of Justice of 12 July 2012, *Compass-Datenbank GmbH*, C-138/11, ECLI:EU:C:2012:449, paragraph 40.

([23]) Judgment of the Court of Justice of 12 July 2012, *Compass-Datenbank GmbH*, C-138/11, ECLI:EU:C:2012:449, paragraph 38, and Judgment of the Court of Justice of 26 March 2009, *Selex Sistemi Integrati* v *Commission*, C-113/07 P, ECLI:EU:C:2009:191, paragraphs 72 et seq.

2.3. **Social security**

19. Whether schemes in the area of social security are to be classified as involving an economic activity depends on the way they are set up and structured. In essence, the case-law distinguishes between schemes based on the principle of solidarity and economic schemes.

20. Solidarity-based social security schemes that do not involve an economic activity typically have the following characteristics:

(a) affiliation with the scheme is compulsory; ([24])

(b) the scheme pursues an exclusively social purpose; ([25])

(c) the scheme is non-profit; ([26])

(d) the benefits are independent of the contributions made; ([27])

(e) the benefits paid are not necessarily proportionate to the earnings of the person insured; ([28]) and

(f) the scheme is supervised by the State. ([29])

21. Such solidarity-based schemes must be distinguished from schemes that involve an economic activity. ([30]) The latter are regularly characterised by:

(a) optional membership; ([31])

(b) the principle of capitalisation (dependency of entitlements on the contributions paid and the financial results of the scheme); ([32])

(c) their profit-making nature; ([33]) and

(d) the provision of entitlements which are supplementary to those under a basic scheme. ([34])

([24]) Judgment of the Court of Justice of 17 February 1993, *Poucet and Pistre*, Joined Cases C-159/91 and C-160/91, ECLI:EU:C:1993:63, paragraph 13.
([25]) Judgment of the Court of Justice of 22 January 2002, *Cisal and INAIL*, C-218/00, ECLI:EU:C:2002:36, paragraph 45.
([26]) Judgment of the Court of Justice of 16 March 2004, *AOK Bundesverband*, Joined Cases C-264/01, C-306/01, C-354/01 and C-355/01, ECLI:EU:C:2004:150, paragraphs 47 to 55.
([27]) Judgment of the Court of Justice of 17 February 1993, *Poucet and Pistre*, Joined Cases C-159/91 and C-160/91, ECLI:EU:C:1993:63, paragraphs 15 to 18.
([28]) Judgment of the Court of Justice of 22 January 2002, *Cisal and INAIL*, C-218/00, ECLI:EU:C:2002:36, paragraph 40.
([29]) Judgment of the Court of Justice of 17 February 1993, *Poucet and Pistre*, Joined Cases C-159/91 and C-160/91, ECLI:EU:C:1993:63, paragraph 14; Judgment of the Court of Justice of 22 January 2002, *Cisal and INAIL*, C-218/00, ECLI:EU:C:2002:36, paragraphs 43 to 48; Judgment of the Court of Justice of 16 March 2004, *AOK Bundesverband*, Joined Cases C-264/01, C-306/01, C-354/01 and C-355/01, ECLI:EU:C:2004:150, paragraphs 51 to 55.
([30]) See, in particular, Judgment of the Court of Justice of 16 November 1995, *FFSA and Others*, C-244/94, ECLI:EU:C:1995:392, paragraph 19.
([31]) Judgment of the Court of Justice of 21 September 1999, *Albany*, C-67/96, ECLI:EU:C:1999:430, paragraphs 80 to 87.
([32]) Judgment of the Court of Justice of 16 November 1995, *FFSA and Others*, C-244/94, ECLI:EU:C:1995:392, paragraphs 9 and 17 to 20; Judgment of the Court of Justice of 21 September 1999, *Albany*, C-67/96, ECLI:EU:C:1999:430, paragraphs 81 to 85; see also Judgment of the Court of Justice of 21 September 1999, *Brentjens*, Joined Cases C-115/97 to C-117/97, ECLI:EU:C:1999:434 paragraphs 81 to 85; Judgment of the Court of Justice of 21 September 1999, *Drijvende Bokken*, C-219/97, ECLI:EU:C:1999:437, paragraphs 71 to 75, and Judgment of the Court of Justice of 12 September 2000, *Pavlov and Others*, Joined Cases C-180/98 to C-184/98, ECLI:EU:C:2000:428, paragraphs 114 and 115.
([33]) Judgment of the Court of Justice of 21 September 1999, *Brentjens*, Joined Cases C-115/97 to C-117/97, ECLI:EU:C:1999:434, paragraphs 74 to 85.
([34]) Judgment of the Court of Justice of 12 September 2000, *Pavlov and Others*, Joined Cases C-180/98 to C-184/98, ECLI:EU:C:2000:428, paragraphs 67 to 70.

22. Some schemes combine features of both categories. In such cases, the classification of the scheme depends on an analysis of different elements and their respective importance. ([35])

2.4. **Health care**

23. In the Union, health care systems differ significantly between Member States. Whether and to what degree different health care providers compete with each other depends on these national specificities.

24. In some Member States, public hospitals are an integral part of a national health service and are almost entirely based on the principle of solidarity. ([36]) Such hospitals are directly funded from social security contributions and other State resources and provide their services free of charge on the basis of universal coverage. ([37]) The Union Courts have confirmed that, where such a structure exists, the relevant organisations do not act as undertakings. ([38])

25. Where that structure exists, even activities that in themselves could be of an economic nature, but are carried out merely for the purpose of providing another non-economic service, are not of an economic nature. An organisation that purchases goods — even in large quantities — for the purpose of offering a non-economic service does not act as an undertaking simply because it is a purchaser in a given market. ([39])

26. In many other Member States, hospitals and other health care providers offer their services for remuneration, be it directly from patients or from their insurance. ([40]) In such systems, there is a certain degree of competition between hospitals concerning the provision of health care services. Where this is the case, the fact that a health service is provided by a public hospital is not sufficient for the activity to be classified as non-economic.

27. The Union Courts have also clarified that health care services which independent doctors and other private practitioners provide for remuneration at their own risk are to be regarded as an economic activity. ([41]) The same principles apply to pharmacies.

2.5. **Education and research activities**

28. Public education organised within the national educational system funded and supervised by the State may be considered as a non-economic activity. The Court of Justice held that the State: 'by establishing and maintaining such a system of public education and financed entirely or mainly by public funds and not by pupils or their parents […] does not intend to become involved in activities for remuneration, but carries out its task towards its population in the social, cultural and educational areas'. ([42])

([35]) Judgment of the Court of Justice of 5 March 2009, *Kattner Stahlbau*, C-350/07, ECLI:EU:C:2009:127, paragraphs 33 et seq.

([36]) A prominent example is the Spanish National Health System (see Judgment of the General Court of 4 March 2003, *FENIN*, T-319/99, ECLI:EU:T:2003:50 and Judgment of the Court of Justice of 11 July 2006, *FENIN*, C-205/03 P, ECLI:EU:C:2006:453, paragraphs 25 to 28).

([37]) Depending on the overall characteristics of the system, charges which only cover a small fraction of the true cost of the service may not affect its classification as non-economic.

([38]) Judgment of the General Court of 4 March 2003, *FENIN*, T-319/99, ECLI:EU:T:2003:50, paragraph 39; and Judgment of the Court of Justice of 11 July 2006, *FENIN*, C-205/03 P, ECLI:EU:C:2006:453, paragraphs 25 to 28.

([39]) Judgment of the General Court of 4 March 2003, *FENIN*, T-319/99, ECLI:EU:T:2003:50, paragraph 40.

([40]) See, for instance, Judgment of the Court of Justice of 12 July 2001, *Geraets-Smits and Others*, C-157/99, ECLI:EU:C:2001:404, paragraphs 53 to 58.

([41]) See Judgment of the Court of Justice of 12 September 2000, *Pavlov and Others*, Joined Cases C-180/98 to C-184/98, ECLI:EU:C:2000:428, paragraphs 75 and 77.

([42]) Judgment of the Court of Justice of 11 September 2007, *Commission* v *Germany*, C-318/05, ECLI:EU:C:2007:495, paragraph 68. See also Commission Decision of 25 April 2001 on State aid N 118/00 Subvention publiques aux clubs sportifs professionnels (OJ C 333 28.11.2001, p. 6).

29. The non-economic nature of public education is in principle not affected by the fact that pupils or their parents sometimes have to pay tuition or enrolment fees which contribute to the operating expenses of the system. Such financial contributions often only cover a fraction of the true costs of the service and can thus not be considered as remuneration for the service provided. They therefore do not alter the non-economic nature of a general education service predominantly funded by the public purse. ([43]) These principles can cover public educational services such as vocational training, ([44]) private and public primary schools ([45]) and kindergartens, ([46]) secondary teaching activities in universities ([47]) and the provision of education in universities. ([48])

30. Such public education services must be distinguished from services financed predominantly by parents or pupils or commercial revenues. For example, higher education financed entirely by students clearly fall within the latter category. In certain Member States public entities can also offer educational services which, due to their nature, financing structure and the existence of competing private organisations, are to be regarded as economic.

31. In the light of the principles set out in paragraphs 28, 29 and 30, the Commission considers that certain activities of universities and research organisations fall outside the scope of the State aid rules. This concerns their primary activities, namely:

(a) education for more and better skilled human resources;

(b) the conduct of independent research and development for more knowledge and better understanding, including collaborative research and development;

(c) the dissemination of research results.

32. The Commission considers that knowledge transfer activities (licensing, creation of spin-off, or other forms of management of knowledge created by the research organisation or infrastructure) are non-economic where they are conducted either by the research organisation or research infrastructure (including their departments or subsidiaries) or jointly with, or on behalf of other such entities, and all income from those activities is reinvested in the primary activities of the research organisations or infrastructures concerned. ([49])

2.6. **Culture and heritage conservation, including nature conservation**

33. Culture is a vehicle of identities, values and meanings that mirror and shape the Union's societies. The area of culture and heritage conservation covers a vast array of purposes and activities, inter alia, museums, archives, libraries, artistic and cultural centres or spaces, theatres, opera houses, concert halls, archaeological sites, monuments, historical sites and buildings, traditional customs and crafts, festivals and exhibitions, as well as cultural and artistic education activities. Europe's rich natural heritage, including conservation of biodiversity, habitats and species further provides valuable benefits for societies in the Union.

34. Taking into account their particular nature, certain activities related to culture, heritage and nature conservation may be organised in a non-commercial way and thus be non-economic in nature. Public funding thereof may therefore not constitute State aid. The Commission considers that public funding of a cultural or heritage

([43]) Judgment of the EFTA Court of 21 February 2008 in Case E-5/07 *Private Barnehagers Landsforbund* v *EFTA Surveillance Authority* EFTA Ct. Rep [2008] p. 62, paragraph 83.
([44]) Judgment of the Court of Justice of 27 September 1988, *Humbel*, 263/86, ECLI:EU:C:1988:451, paragraph 18.
([45]) Judgment of the Court of Justice of 11 September 2007, *Commission* v *Germany*, C-318/05, ECLI:EU:C:2007:495, paragraphs 65 to 71; Judgment of the Court of Justice of 11 September 2007, *Schwarz*, C-76/05, ECLI:EU:C:2007:492, paragraphs 37 to 47.
([46]) Judgment of the EFTA Court of 21 February 2008 in Case E-5/07 *Private Barnehagers Landsforbund* v *EFTA Surveillance Authority* EFTA Ct. Rep [2008] p. 62.
([47]) Judgment of the Court of Justice of 18 December 2007, *Jundt*, C-281/06, ECLI:EU:C:2007:816, paragraphs 28 to 39.
([48]) Judgment of the Court of Justice of 7 December 1993, *Wirth*, C-109/92, ECLI:EU:C:1993:916, paragraphs 14 to 22.
([49]) See point 19 of the Framework for State aid for research and development and innovation (OJ C 198, 27.6.2014, p. 1).

conservation activity accessible to the general public free of charge fulfils a purely social and cultural purpose which is non-economic in nature. In the same vein, the fact that visitors of a cultural institution or participants in a cultural or heritage conservation activity, including nature conservation, open to the general public are required to pay a monetary contribution that only covers a fraction of the true costs does not alter the non-economic nature of that activity, as it cannot be considered genuine remuneration for the service provided.

35. In contrast, cultural or heritage conservation activities (including nature conservation) predominantly financed by visitor or user fees or by other commercial means (for example, commercial exhibitions, cinemas, commercial music performances and festivals and arts schools predominantly financed from tuition fees) should be qualified as economic in nature. Similarly, heritage conservation or cultural activities benefitting exclusively certain undertakings rather than the general public (for example, the restoration of a historical building used by a private company) should normally be qualified as economic in nature.

36. Moreover, many cultural or heritage conservation activities are objectively non-substitutable (for example, keeping public archives holding unique documents) and thus exclude the existence of a genuine market. In the Commission's view, such activities would also qualify as non-economic in nature.

37. In cases where an entity carries out cultural or heritage conservation activities, some of which are non-economic activities as set out in paragraphs 34 and 36 and some of which are economic activities, public funding it receives will fall under the State aid rules only insofar as it covers the costs linked to the economic activities. ([50])

3. STATE ORIGIN

38. The granting of an advantage directly or indirectly through State resources and the imputability of such a measure to the State are two separate and cumulative conditions for State aid to exist. ([51]) However, they are often considered together when assessing a measure under Article 107(1) of the Treaty, as they both relate to the public origin of the measure in question.

3.1. Imputability

39. In cases where a public authority grants an advantage to a beneficiary, the measure is by definition imputable to the State, even if the authority in question enjoys legal autonomy from other public authorities. The same applies if a public authority designates a private or public body to administer a measure conferring an advantage. Indeed, Union law cannot permit the rules on State aid to be circumvented through the creation of autonomous institutions charged with allocating aid. ([52])

40. Imputability is less evident, however, if the advantage is granted through public undertakings. ([53]) In such cases, it is necessary to determine whether the public authorities can be regarded as having been involved, in one way or another, in adopting the measure. ([54])

([50]) As explained in paragraph 207, the Commission 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. Similarly, the Commission considers that public financing to customary amenities that are provided in the context of non-economic culture and heritage conservation activities (for instance, a shop, bar, or paid cloakroom in a museum) normally has no effect on trade between Member States.

([51]) See, for instance, Judgment of the Court of Justice of 16 May 2002, *France* v *Commission (Stardust)*, C-482/99, ECLI:EU:C:2002:294, paragraph 24; Judgment of the General Court of 5 April 2006, *Deutsche Bahn AG* v *Commission*, T-351/02, ECLI:EU:T:2006:104, paragraph 103.

([52]) Judgment of the General Court of 12 December 1996, *Air France* v *Commission*, T-358/94, ECLI:EU:T:1996:194, paragraph 62.

([53]) The concept of public undertakings can be defined by reference to Commission Directive 2006/111/EC, of 16 November 2006, on the transparency of financial relations between Member States and public undertakings as well as on financial transparency within certain undertakings (OJ L 318, 17.11.2006, p. 17). Article 2(b) of this Directive states that 'public undertakings' means any undertaking over which the public authorities may exercise directly or indirectly a dominant influence by virtue of their ownership of it, their financial participation therein, or the rules which govern it'.

([54]) Judgment of the Court of Justice of 16 May 2002, *France* v *Commission (Stardust)*, C-482/99, ECLI:EU:C:2002:294, paragraph 52.

41. The mere fact that a measure is taken by a public undertaking is not *per se* sufficient to consider it imputable to the State. ([55]) However, it does not need to be demonstrated that, in a particular case, the public authorities specifically incited the public undertaking to take the measure in question. ([56]) In fact, since relations between the State and public undertakings are necessarily close, there is a real risk that State aid may be granted through the intermediary of those undertakings in a non-transparent manner and in breach of the rules on State aid laid down by the Treaty. ([57]) Moreover, precisely because of the privileged relations that exist between the State and public undertakings, it will, as a general rule, be very difficult for a third party to demonstrate that measures taken by such an undertaking were in fact adopted on the instructions of the public authorities in a particular case. ([58])

42. For these reasons, the imputability to the State of a measure taken by a public undertaking may be inferred from a set of indicators arising from the circumstances of the case and the context in which the measure was taken. ([59])

3.1.1. *Indicators for imputability*

43. Possible indicators to establish whether a measure is imputable include the following: ([60])

(a) the fact that the body in question could not take the contested decision without taking account of the requirements of the public authorities;

(b) the presence of factors of an organic nature which link the public undertaking to the State;

(c) the fact that the undertaking through which aid was granted had to take account of directives issued by governmental bodies; ([61])

(d) the integration of the public undertaking into the structures of the public administration;

(e) the nature of the public undertaking's activities ([62]) and their exercise on the market in normal conditions of competition with private operators;

(f) the legal status of the undertaking (whether it is subject to public law or ordinary company law), although the mere fact that a public undertaking has been constituted in the form of a capital company under ordinary law cannot be regarded as sufficient reason to exclude imputability, ([63]) having regard to the autonomy which that legal form confers on it;

(g) the degree of supervision that the public authorities exercise over the management of the undertaking;

(h) any other indicator showing the involvement of the public authorities in adopting the measure in question or the unlikelihood of their not being involved, taking account of the scope of the measure, its content or the conditions it contains.

([55]) Judgment of the Court of Justice of 16 May 2002, *France* v *Commission (Stardust)*, C-482/99, ECLI:EU:C:2002:294. See also Judgment of the General Court of 26 June 2008, *SIC* v *Commission*, T-442/03, ECLI:EU:T:2008:228, paragraphs 93 to 100.

([56]) It is, furthermore, not necessary to demonstrate that, in a particular case, the public undertaking's conduct would have been different if it had acted autonomously, see Judgment of the General Court of 25 June 2015, *SACE and Sace BT* v *Commission*, T-305/13, ECLI:EU:T:2015:435, paragraph 48.

([57]) Judgment of the Court of Justice of 16 May 2002, *France* v *Commission (Stardust)*, C-482/99, ECLI:EU:C:2002:294, paragraph 53.

([58]) Judgment of the Court of Justice of 16 May 2002, *France* v *Commission (Stardust)*, C-482/99, ECLI:EU:C:2002:294, paragraph 54.

([59]) Judgment of the Court of Justice of 16 May 2002, *France* v *Commission (Stardust)*, C-482/99, ECLI:EU:C:2002:294, paragraph 55.

([60]) Judgment of the Court of Justice of 16 May 2002, *France* v *Commission (Stardust)*, C-482/99, ECLI:EU:C:2002:294, paragraphs 55 and 56. See also the Opinion of Advocate General Jacobs of 13 December 2001, *France* v *Commission (Stardust)*, C-482/99, ECLI:EU:C:2001/685, paragraphs 65 to 68.

([61]) Judgment of the Court of Justice of 23 October 2014, *Commerz Nederland*, C-242/13, ECLI:EU:C:2014:2224, paragraph 35.

([62]) For instance, when measures are taken by public development banks pursuing public policy objectives (Judgment of the General Court of 27 February 2013, *Nitrogenmuvek Vegyipari, Zrt. v Commission*, T-387/11, ECLI:EU:T:2013:98, paragraph 63) or when measures are taken by privatisation agencies or public pension funds (Judgment of the General Court of 28 January 2016, *Slovenia* v *Commission* ('ELAN'), T-507/12, ECLI:EU:T:2016:35, paragraph 86).

([63]) Judgment of the Court of Justice of 16 May 2002, *France* v *Commission (Stardust)*, C-482/99, ECLI:EU:C:2002:294, paragraph 57.

3.1.2. *Imputability and obligations under Union law*

44. A measure is not imputable to a Member State if the Member State is under an obligation to implement it under Union law without any discretion. In that case, the measure stems from an act of the Union legislature and is not imputable to the State. ([64])

45. However, this is not the case in situations where Union law simply allows for certain national measures and the Member State enjoys discretion (i) as to whether to adopt the measures in question or (ii) in establishing the characteristics of the concrete measure which are relevant from a State aid perspective. ([65])

46. Measures that are adopted jointly by several Member States are imputable to all the Member States concerned pursuant to Article 107(1) of the Treaty. ([66])

3.2. **State resources**

3.2.1. *General principles*

47. Only advantages granted directly or indirectly through State resources can constitute State aid within the meaning of Article 107(1) of the Treaty. ([67])

48. State resources include all resources of the public sector, ([68]) including resources of intra-State entities (decentralised, federated, regional or other) ([69]) and, under certain circumstances, resources of private bodies (see paragraphs 57 and 58). It is irrelevant whether or not an institution within the public sector is autonomous. ([70]) Funds provided by the central bank of a Member State to specific credit institutions generally imply the transfer of State resources. ([71])

49. Resources of public undertakings also constitute State resources within the meaning of Article 107(1) of the Treaty because the State is capable of directing the use of these resources. ([72]) For the purposes of State aid law, transfers within a public group may also constitute State aid if, for example, resources are transferred from the parent company to its subsidiary (even if they constitute a single undertaking from an economic point of

([64]) See Judgment of the Court of Justice of 23 April 2009, *Puffer*, C-460/07, ECLI:EU:C:2009:254, paragraph 70, on the right to tax deductions under the VAT system set up by the Union, and Judgment of the General Court of 5 April 2006, *Deutsche Bahn AG* v *Commission*, T-351/02, ECLI:EU:T:2006:104, paragraph 102, on tax exemptions required by Union law.

([65]) See Judgment of the Court of Justice of 10 December 2013, *Commission* v *Ireland and Others*, C-272/12 P, ECLI:EU:C:2013:812, paragraphs 45 to 53, on an authorisation granted to a Member State by a Council decision to introduce certain tax exemptions. The judgment also clarifies that the fact that a Council decision in the area of harmonisation of legislation was adopted on a proposal by the Commission is irrelevant because the notion of State aid is an objective notion.

([66]) Commission Decision 2010/606/EU of 26 February 2010 on State aid C 9/2009 (ex NN 45/08, NN 49/08 and NN 50/08) implemented by the Kingdom of Belgium, the French Republic and the Grand Duchy of Luxembourg for Dexia SA (OJ L 274, 19.10.2010, p. 54).

([67]) Judgment of the Court of Justice of 24 January 1978, *Van Tiggele*, 82/77, ECLI:EU:C:1978:10, paragraphs 25 and 26; Judgment of the General Court of 12 December 1996, *Air France* v *Commission*, T-358/94, ECLI:EU:T:1996:194, paragraph 63.

([68]) Judgment of the General Court of 12 December 1996, *Air France* v *Commission*, T-358/94, ECLI:EU:T:1996:194, paragraph 56.

([69]) Judgment of the Court of Justice of 14 October 1987, *Germany* v *Commission*, 248/84, ECLI:EU:C:1987:437, paragraph 17; Judgment of the General Court of 6 March 2002, *Territorio Histórico de Álava and Others* v *Commission*, Joined Cases T-92/00 and 103/00, ECLI:EU:T:2002:61, paragraph 57.

([70]) Judgment of the General Court of 12 December 1996, *Air France* v *Commission*, T-358/94, ECLI:EU:T:1996:194, paragraphs 58 to 62.

([71]) See Communication from the Commission on the application, from 1 August 2013, of State aid rules to support measures in favour of banks in the context of the financial crisis ('Banking Communication') (OJ C 216, 30.7.2013, p. 1), in particular point 62. However, the Commission clarified that where a central bank reacts to a banking crisis with general measures open to all comparable market players in the market (for example lending to the whole market on equal terms) rather than with selective measures in favour of individual banks, such general measures often fall outside the scope of State aid control.

([72]) Judgment of the Court of Justice of 16 May 2002, *France* v *Commission (Stardust)*, C-482/99, ECLI:EU:C:2002:294, paragraph 38. See also Judgment of the Court of Justice of 29 April 2004, *Greece* v *Commission*, C-278/00, ECLI:EU:C:2004:239, paragraphs 53 and 54, and Judgment of the Court of Justice of 8 May 2003, *Italy and SIM 2 Multimedia SpA* v *Commission*, Joined Cases C-328/99 and C-399/00, ECLI:EU:C:2003:252, paragraphs 33 and 34.

view). ([73]) The question of whether the transfer of such resources is imputable to the State is addressed in section 3.1. The fact that a public undertaking is a beneficiary of an aid measure does not mean it may not grant aid to another beneficiary by way of a different aid measure. ([74])

50. The fact that a measure granting an advantage is not financed directly by the State, but by a public or private body established or appointed by the State to administer the aid, does not necessarily mean that the measure is not financed through State resources. ([75]) A measure adopted by a public authority and favouring certain undertakings or products does not lose the character of a gratuitous advantage by virtue of the fact that it is wholly or partially financed by contributions imposed by the public authority and levied on the undertakings concerned. ([76])

51. The transfer of State resources may take many forms, such as direct grants, loans, guarantees, direct investment in the capital of companies and benefits in kind. A firm and concrete commitment to make State resources available at a later point in time is also considered a transfer of State resources. A positive transfer of funds does not have to occur; foregoing State revenue is sufficient. Waiving revenue which would otherwise have been paid to the State constitutes a transfer of State resources. ([77]) For example, a 'shortfall' in tax and social security revenue due to exemptions or reductions in taxes or social security contributions granted by the Member State, or exemptions from the obligation to pay fines or other pecuniary penalties, fulfils the State resources requirement of Article 107(1) of the Treaty. ([78]) The creation of a concrete risk of imposing an additional burden on the State in the future, by a guarantee or by a contractual offer, is sufficient for the purposes of Article 107(1). ([79])

52. If public authorities or public undertakings provide goods or services at a price below market rates, or invest in an undertaking in a manner that is inconsistent with the market economy operator test, as described from paragraph 73 onwards, this implies foregoing State resources (as well as the granting of an advantage).

53. Granting access to a public domain or natural resources, or granting special or exclusive rights ([80]) without adequate remuneration in line with market rates, can constitute foregoing State revenues (as well as the granting of an advantage). ([81])

54. In these cases it needs to be established whether the State, in addition to its role of manager of the public assets in question, acts as a regulator that pursues policy objectives by making the selection process of the undertakings concerned subject to qualitative criteria (established *ex ante* in a transparent and non-discriminatory manner). ([82]) When the State acts as a regulator, it can decide legitimately not to maximise the revenues

([73]) Judgment of the Court of Justice of 11 July 1996, *SFEI and Others*, C-39/94, ECLI:EU:C:1996:285, paragraph 62.
([74]) Judgment of the General Court of 24 March 2011, *Freistaat Sachsen and Land Sachsen-Anhalt and Others* v *Commission*, Joined Cases T-443/08 and T-455/08, ECLI:EU:T:2011:117, paragraph 143.
([75]) Judgment of the Court of Justice of 22 March 1977, *Steinike & Weinlig*, 78/76, ECLI:EU:C:1977:52, paragraph 21.
([76]) Judgment of the Court of Justice of 22 March 1977, *Steinike & Weinlig*, 78/76, ECLI:EU:C:1977:52, paragraph 22.
([77]) Judgment of the Court of Justice of 16 May 2000, *France* v *Ladbroke Racing Ltd and Commission*, C-83/98 P, ECLI:EU:C:2000:248, paragraphs 48 to 51.
([78]) Judgment of the Court of Justice of 15 March 1994, *Banco Exterior de España*, C-387/92, ECLI:EU:C:1994:100, paragraph 14 on tax exemptions. Furthermore, derogations from the normal insolvency rules, which allow undertakings to continue trading in circumstances under which they would not be allowed if the ordinary insolvency rules were applied, may involve an additional burden for the State if public bodies are among the principal creditors of those undertaking or where such action amounts to a de facto waiver of public debts. See Judgment of the Court of Justice of 17 June 1999, *Piaggio*, C-295/97, ECLI:EU:C:1999:313, paragraphs 40 to 43 and Judgment of the Court of Justice of 1 December 1998, *Ecotrade*, C-200/97, ECLI:EU:C:1998:579, paragraph 45.
([79]) Judgment of the Court of Justice of 1 December 1998, *Ecotrade*, C-200/97, ECLI:EU:C:1998:579, paragraph 41 and Judgment of the Court of Justice of 19 March 2013, *Bouygues and Bouygues Télécom* v *Commission and Others*, Joined Cases C-399/10 P and C-401/10 P, ECLI:EU:C:2013:175, paragraphs 137, 138 and 139.
([80]) As defined in Article 2 (f) and (g) of Commission Directive 2006/111/EC of 16 November 2006 on the transparency of financial relations between Member States and public undertakings as well as on financial transparency within certain undertakings (OJ L 318, 17.11.2006, p. 17).
([81]) See also Communication from the Commission on the application of the European Union State aid rules to compensation granted for the provision of services of general economic interest (OJ C 8, 11.1.2012, p. 4), paragraph 33.
([82]) See Judgment of the General Court of 4 July 2007, *Bouygues SA* v *Commission*, T-475/04, ECLI:EU:T:2007:196, where the General Court noted that, in granting access to a scarce public resource such as the radio spectrum, national authorities simultaneously performed the roles of telecommunications regulator and manager of such public resources, paragraph 104.

which could otherwise have been achieved without falling under the scope of State aid rules, provided that all the operators concerned are treated in line with the principle of non-discrimination, and that there is an inherent link between achieving the regulatory purpose and the foregoing of revenue. ([83])

55. In any event, a transfer of State resources is present if, in a given case, the public authorities do not charge the normal amount under their general system for access to the public domain or natural resources, or for granting certain special or exclusive rights.

56. A negative indirect effect on State revenues stemming from regulatory measures does not constitute a transfer of State resources where it is an inherent feature of the measure. ([84]) For example, a derogation from employment law provisions altering the framework for contractual relations between undertakings and employees does not constitute a transfer of State resources, despite the fact that it may reduce social security contributions or taxes payable to the State. ([85]) Similarly, national regulation which sets a minimum price for certain goods does not entail the transfer of State resources. ([86])

3.2.2. *Controlling influence over the resources*

57. The origin of the resources is not relevant provided that, before being directly or indirectly transferred to the beneficiaries, they come under public control and are therefore available to the national authorities, ([87]) even if the resources do not become the property of the public authority. ([88])

58. Thus, subsidies financed through parafiscal charges or compulsory contributions imposed by the State and managed and apportioned in accordance with the provisions of public rules imply a transfer of State resources, even if not administered by the public authorities. ([89]) Moreover, the mere fact that the subsidies are financed in

([83]) See to that effect Commission Decision of 20 July 2004 on State aid NN 42/2004 — France — Modification of payments due from Orange and SFR for UMTS licences (OJ C 275, 8.11.2005, p. 3), recitals 28, 29 and 30, upheld by the Union courts (Judgment of the General Court of 4 July 2007, *Bouygues SA* v *Commission*, T-475/04, ECLI:EU:T:2007:196, paragraphs 108 to 111 and 123, and Judgment of the Court of Justice of 2 April 2009, *Bouygues and Bouygues Télécom* v *Commission*, C-431/07 P, ECLI:EU:C:2009:223, paragraphs 94 to 98 and 125). In this case, as regards the granting of UMTS radio spectrum licences, the State simultaneously performed the roles of telecommunications regulator and manager of these public resources and pursued the regulatory objectives set out in Directive 97/13/EC of the European Parliament and of the Council of 10 April 1997 on a common framework for general authorisations and individual licences in the field of telecommunication services (OJ L 117, 7.5.1997, p. 15). In such a situation, the Union Courts confirmed that the award of licences without maximising the revenues which could have been achieved did not involve the granting of State aid, given that the measures in question were justified by the regulatory objectives set out in Directive 97/13/EC and complied with the principle of non-discrimination. In contrast, in the Judgment of the Court of Justice of 8 September 2011, *Commission* v *Netherlands*, C-279/08 P, ECLI:EU:C:2011:551, paragraphs 88 et seq. the Court did not identify regulatory reasons that would have justified the award without consideration of freely tradable emission rights. See also Judgment of the Court of Justice of 14 January 2015, *Eventech* v *The Parking Adjudicator*, C-518/13, ECLI:EU:C:2015:9, paragraphs 46 et seq.

([84]) Judgment of the Court of Justice of 13 March 2001, *PreussenElektra*, C-379/98, ECLI:EU:C:2001:160, paragraph 62.

([85]) Judgment of the Court of Justice of 17 March 1993, *Sloman Neptun Schiffahrts*, Joined Cases C-72/91 and C-73/91, ECLI:EU:C:1993:97, paragraphs 20 and 21. See also Judgment of the Court of Justice of 7 May 1998, *Viscido et al.*, Joined Cases C-52/97, C-53/97 and C-54/97, ECLI:EU:C:1998:209, paragraphs 13 and 14 and Judgment of the Court of Justice of 30 November 1993, *Kirsammer-Hack*, C-189/91, ECLI:EU:C:1993:907, paragraphs 17 and 18, on the fact that the non-application of certain provisions of employment law does not constitute a transfer of State resources.

([86]) Judgment of the Court of Justice of 24 January 1978, *Van Tiggele*, 82/77, ECLI:EU:C:1978:10, paragraphs 25 and 26.

([87]) See, for instance Judgment of the Court of Justice of 17 July 2008, *Essent Netwerk Noord*, C-206/06, ECLI:EU:C:2008:413, paragraph 70; Judgment of the Court of Justice of 16 May 2000, *France* v *Ladbroke Racing Ltd and Commission*, C-83/98 P, ECLI:EU:C:2000:248, paragraph 50.

([88]) See Judgment of the General Court of 12 December 1996, *Air France* v *Commission*, T-358/94, ECLI:EU:T:1996:194, paragraphs 65, 66 and 67, concerning an aid granted by the Caisse des Dépôts et Consignations which was financed with the voluntary deposits of private citizens which could be withdrawn at any time. That did not affect the conclusion that those funds were State resources because the Caisse was able to use them from the balance produced by deposits and withdrawals as if they were permanently at its disposal. See also Judgment of the Court of Justice of 16 May 2000, *France* v *Ladbroke Racing Ltd and Commission*, C-83/98 P, ECLI:EU:C:2000:248, paragraph 50.

([89]) Judgment of the Court of Justice of 2 July 1974, *Italy* v *Commission*, 173/73, ECLI:EU:C:1974:71, paragraph 16; Judgment of the Court of Justice of 11 March 1992, *Compagnie Commerciale de l'Ouest*, Joined Cases C-78/90 to C-83/90, ECLI:EU:C:1992:118, paragraph 35; Judgment of the Court of Justice of 17 July 2008, *Essent Netwerk Noord*, C-206/06, ECLI:EU:C:2008:413, paragraphs 58 to 74.

part by voluntary private contributions is not sufficient to rule out the presence of State resources, since the relevant factor is not the origin of the resources but the degree of intervention of the public authority within the definition of the measure and its method of financing. ([90]) The transfer of State resources can only be ruled out in very specific circumstances, notably if resources from the members of a trade association are earmarked for funding a specific purpose in the interest of the members, are decided on by a private organisation and have a purely commercial purpose, and if the Member State is simply acting as a vehicle in order to make the contribution introduced by the trade organisation compulsory. ([91])

59. A transfer of State resources is also present if the resources are at the joint disposal of several Member States who decide jointly on the use of those resources. ([92]) This would be the case, for example, for funds from the European Stability Mechanism (ESM).

60. Resources coming from the Union (for example from structural funds), from the European Investment Bank or the European Investment Fund, or from international financial institutions, such as the International Monetary Fund or the European Bank for Reconstruction and Development, are considered as State resources if national authorities have discretion as to the use of these resources (in particular the selection of beneficiaries). ([93]) By contrast, if such resources are awarded directly by the Union, by the European Investment Bank or by the European Investment Fund, with no discretion on the part of the national authorities, they do not constitute State resources (for example funding awarded in direct management under the Horizon 2020 framework programme, the EU programme for the Competitiveness of Enterprises and Small and Medium-sized Enterprises (COSME) or the Trans-European Transport Network (TEN-T) funds).

3.2.3. *State involvement in redistribution between private entities*

61. Regulation that leads to financial redistribution from one private entity to another without any further involvement of the State does not, in principle, entail a transfer of State resources if the money flows directly from one private entity to another, without passing through a public or private body designated by the State to administer the transfer. ([94])

62. For example, an obligation imposed by a Member State on private electricity suppliers to purchase electricity produced from renewable energy sources at fixed minimum prices does not entail the direct or indirect transfer of State resources to undertakings which produce that type of electricity. ([95]) In this case, the undertakings concerned (that is to say the private electricity suppliers) are not appointed by the State to manage an aid scheme, but are only bound by an obligation to purchase a specific type of electricity with their own financial resources.

63. However, a transfer of State resources is present where the charges paid by private persons transit through a public or private entity designated to channel them to the beneficiaries.

([90]) Judgment of the General Court of 27 September 2012, *France et al.* v *Commission*, Joined Cases T-139/09, T-243/09 and T-328/09, ECLI:EU:T:2012:496, paragraphs 63 and 64.

([91]) See Judgment of the Court of Justice of 15 July 2004, *Pearle*, C-345/02, ECLI:EU:C:2004:448, paragraph 41 and Judgment of the Court of Justice of 30 May 2013, *Doux élevages SNC et al*, C-677/11, ECLI:EU:C:2013:348.

([92]) Commission Decision 2010/606/EU of 26 February 2010 on State aid C 9/2009 (ex NN 45/08, NN 49/08 and NN 50/08) implemented by the Kingdom of Belgium, the French Republic and the Grand Duchy of Luxembourg for Dexia SA (OJ L 274, 19.10.2010, p. 54).

([93]) See, for instance, concerning structural funds, Commission Decision of 22 November 2006 on State aid N 157/06, United Kingdom South Yorkshire Digital Region Broadband Project, recitals 21 and 29 on a measure partly financed by the European Regional Development Fund (ERDF) (OJ C 80, 13.4.2007, p. 2). As regards financing for the production of and trade in agricultural products, the scope of application of the State aid rules is limited by Article 42 of the Treaty.

([94]) Judgment of the Court of Justice of 24 January 1978, *Van Tiggele*, 82/77, ECLI:EU:C:1978:10, paragraphs 25 and 26.

([95]) Judgment of the Court of Justice of 13 March 2001, *PreussenElektra*, C-379/98, ECLI:EU:C:2001:160, paragraphs 59 to 62. The Court held that the imposition of a purchase obligation on private undertakings does not constitute a direct or indirect transfer of State resources, and that this qualification does not change because of the lower revenues of the undertakings subject to that obligation which is likely to cause a diminution of tax revenues, because this constitutes an inherent feature of the measure. See also Judgment of the Court of Justice of 5 March 2009, *UTECA*, C-222/07, ECLI:EU:C:2009:124, paragraphs 43 to 47, on compulsory contributions imposed on broadcasters in favour of film production not involving a transfer of State resources.

64. For example, this is the case even where a private entity is appointed by law to collect such charges on behalf of the State and to channel them to the beneficiaries, but is not allowed to use the proceeds from the charges for purposes other than those provided for by the law. In this case, the sums in question remain under public control and are therefore available to the national authorities, which is sufficient reason for them to be considered State resources. ([96]) Since this principle applies both to public bodies and private entities appointed to collect the charges and process the payments, changing the status of the intermediary from a public to a private entity has no relevance for the State resources criterion if the State continues to strictly monitor that entity. ([97])

65. Moreover, a mechanism for offsetting in full the additional costs imposed on undertakings because of an obligation to purchase a product from certain providers at a price higher than the market price that is financed by all final consumers of the said product also constitutes an intervention through State resources, even when this mechanism is partly based on a direct transfer of resources between private entities. ([98])

4. ADVANTAGE

4.1. The notion of advantage in general

66. An advantage, within the meaning of Article 107(1) of the Treaty, is any economic benefit which an undertaking could not have obtained under normal market conditions, that is to say in the absence of State intervention. ([99]) Section 4.2 of this Communication provides detailed guidance on the question whether a benefit can be considered to be obtained under normal market conditions.

67. Only the effect of the measure on the undertaking is relevant, and not the cause or the objective of the State intervention. ([100]) Whenever the financial situation of an undertaking is improved as a result of State intervention ([101]) on terms differing from normal market conditions, an advantage is present. To assess this, the financial situation of the undertaking following the measure should be compared with its financial situation if the measure had not been taken. ([102]) Since only the effect of the measure on the undertaking matters, it is irrelevant whether the advantage is compulsory for the undertaking in that it could not avoid or refuse it. ([103])

68. The precise form of the measure is also irrelevant in establishing whether it confers an economic advantage on the undertaking. ([104]) Not only the granting of positive economic advantages is relevant for the notion of State aid, but relief from economic burdens ([105]) can also constitute an advantage. The latter is a broad category

([96]) Judgment of the Court of Justice of 17 July 2008, *Essent Netwerk Noord*, C-206/06, ECLI:EU:C:2008:413, paragraphs 69 to 75.
([97]) Commission Decision 2011/528/EU on State aid C-24/09 (ex NN 446/08) — Austria — Green Electricity Act (OJ L 235, 10.9.2011, p. 42), recital 76.
([98]) Judgment of the Court of Justice of 19 December 2013, *Vent de Colère and Others*, C-262/12, ECLI:EU:C:2013:851, paragraphs 25 and 26.
([99]) Judgment of the Court of Justice of 11 July 1996, *SFEI and Others*, C-39/94, ECLI:EU:C:1996:285, paragraph 60; Judgment of the Court of Justice of 29 April 1999, *Spain* v *Commission*, C-342/96, ECLI:EU:C:1999:210, paragraph 41.
([100]) Judgment of the Court of Justice of 2 July 1974, *Italy* v *Commission*, 173/73, ECLI:EU:C:1974:71, paragraph 13.
([101]) The term 'State interventions' does not only refer to positive actions by the State but also covers the fact that the authorities do not take measures in certain circumstances, for example to enforce debts. See for example Judgment of the Court of Justice of 12 October 2000, *Magefesa*, C-480/98, ECLI:EU:C:2000:559, paragraphs 19 and 20.
([102]) Judgment of the Court of Justice of 2 July 1974, *Italy* v *Commission*, 173/73, ECLI:EU:C:1974:71, paragraph 13.
([103]) Commission Decision 2004/339/EC of 15 October 2003 on the measures implemented by Italy for RAI SpA (OJ L 119, 23.4.2004, p. 1), recital 69; Opinion of Advocate General Fennelly of 26 November 1998, *France* v *Commission*, C-251/97, ECLI:EU:C:1998:572, paragraph 26.
([104]) Judgment of the Court of Justice of 24 July 2003, *Altmark Trans*, C-280/00, ECLI:EU:C:2003:415, paragraph 84.
([105]) Such as, for example, tax advantages or reductions of social security contributions.

which comprises any mitigation of charges normally included in the budget of an undertaking. ([106]) This covers all situations in which economic operators are relieved of the inherent costs of their economic activities. ([107]) For instance, if a Member State pays part of the costs of the employees of a specific undertaking, it relieves that undertaking from costs that are inherent of its economic activities. An advantage also exists where public authorities pay a salary supplement to the workers of a specific undertaking, even if the undertaking was under no legal obligation to pay such a supplement. ([108]) It also covers situations where some operators do not have to bear costs that other comparable operators normally do under a given legal order, regardless of the non-economic nature of the activity to which the costs relate. ([109])

69. Costs arising from regulatory obligations imposed by the State ([110]) can in principle be considered to relate to the inherent costs of the economic activity, so that any compensation for these costs confers an advantage on the undertaking. ([111]) This means that the existence of an advantage is in principle not excluded by the fact that the benefit does not go beyond compensation for a cost stemming from the imposition of a regulatory obligation. The same applies to relief for costs that the undertaking would not have incurred had there been no incentive stemming from the State measure because without this incentive it would have structured its activities differently. ([112]) The existence of an advantage is also not excluded if a measure compensates charges of a different nature that are unconnected with that measure. ([113])

70. As regards compensation for costs incurred to provide a service of general economic interest, the Court made clear in the *Altmark* judgment that the granting of an advantage can be excluded if four cumulative conditions are met. ([114]) First, the recipient undertaking must actually have public service obligations to discharge, and the obligations must be clearly defined. Second, the parameters on the basis of which the compensation is calculated must be established in advance in an objective and transparent manner. Third, the compensation cannot exceed what is necessary to cover all or part of the costs incurred in the discharge of public service obligations, taking into account the relevant receipts and a reasonable profit. Fourth, where the undertaking that is to discharge public service obligations is not chosen following a public procurement procedure to select a tenderer capable of providing these services at the least cost to the community, the level of compensation needed must be determined on the basis of an analysis of the costs which a typical undertaking, well-run and adequately provided with means to meet the public service requirements, would have incurred in discharging those obligations, taking into account the relevant receipts and a reasonable profit for discharging the obligations. The Commission has further elaborated its understanding of these conditions in its Communication

([106]) Judgment of the Court of Justice of 15 March 1994, *Banco Exterior de España*, C-387/92, ECLI:EU:C:1994:100, paragraph 13; Judgment of the Court of Justice of 19 September 2000, *Germany* v *Commission*, C-156/98, ECLI:EU:C:2000:467, paragraph 25; Judgment of the Court of Justice of 19 May 1999, *Italy* v Commission, C-6/97, ECLI:EU:C:1999:251, paragraph 15; Judgment of the Court of Justice of 3 March 2005, *Heiser*, C-172/03, ECLI:EU:C:2005:130, paragraph 36.

([107]) Judgment of the Court of Justice of 20 November 2003, *GEMO SA*, C-126/01, ECLI:EU:C:2003:622, paragraphs 28 to 31 on the free collection and disposal of waste.

([108]) Judgment of the Court of Justice of 26 September 1996, *France* v *Commission*, C-241/94, ECLI:EU:C:1996:353, paragraph 40; Judgment of the Court of Justice of 12 December 2002, *Belgium* v *Commission*, C-5/01, ECLI:EU:C:2002:754, paragraphs 38 and 39; Judgment of the General Court of 11 September 2012, *Corsica Ferries France SAS* v *Commission*, T-565/08, ECLI:EU:T:2012:415, paragraphs 137 and 138, upheld on appeal, see Judgment of the Court of Justice of 4 September 2014, *SNCM and France* v *Commission*, Joined Cases C-533/12 P and C-536/12 P, ECLI:EU:C:2014:2142.

([109]) See the Guidelines on State aid to airports and airlines (OJ C 99, 4.4.2014, p. 3), recital 37.

([110]) As regards the agricultural sector, examples for an imposition of a regulatory obligation would be veterinary or food-safety checks and tests that are imposed on the agricultural producers. In contrast, checks and tests carried out and financed by public bodies and not prescribed by law to be carried out or financed by the agricultural producers are not considered regulatory obligations imposed on the undertakings. See Commission Decisions of 18 September 2015 on State aid SA.35484, milk quality tests pursuant to the Milk and Fat Law and of 4 April 2016 on State aid SA.35484, general healthcare control activities pursuant to the Milk and Fat Law.

([111]) Judgment of the General Court of 25 March 2015, *Belgium* v *Commission*, T-538/11, ECLI:EU:T:2015:188, paragraphs 74 to 78.

([112]) For instance, if a company receives a subsidy to carry out an investment in an assisted region, it cannot be argued that this does not mitigate costs normally included in the budget of the undertaking given that, in the absence of the subsidy, the company would not have carried out the investment.

([113]) Judgment of the Court of Justice of 8 December 2011, *France Télécom SA* v *Commission*, C-81/10 P, ECLI:EU:C:2011:811, paragraphs 43 to 50. This logically applies to the relief of costs incurred by an undertaking to replace the status of officials with the status of employees comparable to that of its competitors, which confers an advantage on the undertaking concerned (on which there was some previous uncertainty following the judgment of the General Court of 16 March 2004, *Danske Busvognmænd* v *Commission*, T-157/01, ECLI:EU:T:2004:76, paragraph 57). On compensation for stranded costs, see also Judgment of the General Court of 11 February 2009, *Iride SpA and Iride Energia SpA* v *Commission*, T-25/07, ECLI:EU:T:2009:33, paragraphs 46 to 56.

([114]) Judgment of the Court of Justice of 24 July 2003, *Altmark Trans*, C-280/00, ECLI:EU:C:2003:415, paragraph 87 to 95.

on the application of the European Union State aid rules to compensation granted for the provision of services of general economic interest. ([115])

71. The existence of an advantage is excluded in the case of a reimbursement of illegally levied taxes, ([116]) an obligation for the national authorities to compensate for damage they have caused to certain undertakings ([117]) or the payment of compensation for an expropriation. ([118])

72. The existence of an advantage is not ruled out by the mere fact that competing undertakings in other Member States are in a more favourable position, ([119]) because the notion of advantage is based on an analysis of the financial situation of an undertaking in its own legal and factual context with and without the particular measure.

4.2. **The market economy operator (MEO) test**

4.2.1. *Introduction*

73. The Union legal order is neutral with regard to the system of property ownership ([120]) and does not in any way prejudice the right of Member States to act as economic operators. However, when public authorities directly or indirectly carry out economic transactions in any form, ([121]) they are subject to Union State aid rules.

74. Economic transactions carried out by public bodies (including public undertakings) do not confer an advantage on its counterpart, and therefore do not constitute aid, if they are carried out in line with normal market conditions. ([122]) This principle has been developed with regard to different economic transactions. The Union courts have developed the '*market economy investor principle*' to identify the presence of State aid in cases of public investment (in particular, capital injections): to determine whether a public body's investment constitutes State aid, it is necessary to assess whether, in similar circumstances, a private investor of a comparable size operating in normal conditions of a market economy could have been prompted to make the investment in question. ([123]) Similarly, the Union courts have developed the '*private creditor test*' to examine whether debt renegotiations by public creditors involve State aid, comparing the behaviour of a public creditor to that of hypothetical private creditors that find themselves in a similar situation. ([124]) Finally, the Union courts have developed the '*private vendor test*' to assess whether a sale carried out by a public body involves State aid, considering whether a private vendor, under normal market conditions, could have obtained the same or a better price. ([125])

([115]) OJ C 8, 11.1.2012, p. 4.

([116]) Judgment of the Court of Justice of 27 March 1980, *Amministrazione delle finanze dello Stato*, 61/79, ECLI:EU:C:1980:100, paragraphs 29 to 32.

([117]) Judgment of the Court of Justice of 27 September 1988, *Asteris AE and Others* v *Greece*, Joined Cases 106 to 120/87, ECLI:EU:C:1988:457, paragraphs 23 and 24.

([118]) Judgment of the General Court of 1 July 2010, *Nuova Terni Industrie Chimiche SpA* v *Commission*, T-64/08, ECLI:EU:T:2010:270, paragraphs 59 to 63 and 140 to 141, clarifying that while the payment of compensation for an expropriation does not grant an advantage, an extension *ex post* of such compensation can constitute State aid.

([119]) Judgment of the Court of Justice of 2 July 1974, *Italy* v *Commission*, 173/73, ECLI:EU:C:1974:71, paragraph 17. See also Judgment of the General Court of 29 September 2000, *Confederación Espanola de Transporte de Mercancías* v *Commission*, T-55/99, ECLI:EU:T:2000:223, paragraph 85.

([120]) Article 345 of the Treaty provides that '*The Treaties shall in no way prejudice the rules in Member States governing the system of property ownership*'.

([121]) See, for instance, Judgment of the Court of Justice of 10 July 1986, *Belgium* v *Commission*, 40/85, ECLI:EU:C:1986:305, paragraph 12.

([122]) Judgment of the Court of Justice of 11 July 1996, *SFEI and Others*, C-39/94, ECLI:EU:C:1996:285, paragraphs 60 and 61.

([123]) See, for instance, Judgment of the Court of Justice of 21 March 1990, *Belgium* v *Commission ('Tubemeuse')*, C-142/87, ECLI:EU:C:1990:125, paragraph 29; Judgment of the Court of Justice of 21 March 1991, *Italy* v *Commission ('ALFA Romeo')*, C-305/89, ECLI:EU:C:1991:142, paragraphs 18 and 19; Judgment of the General Court of 30 April 1998, *Cityflyer Express* v *Commission*, T-16/96, ECLI:EU:T:1998:78, paragraph 51; Judgment of the General Court of 21 January 1999, *Neue Maxhütte Stahlwerke and Lech-Stahlwerke* v *Commission*, Joined Cases T-129/95, T-2/96 and T-97/96, ECLI:EU:T:1999:7, paragraph 104; Judgment of the General Court of 6 March 2003, *Westdeutsche Landesbank Girozentrale and Land Nordrhein-Westfalen* v *Commission*, Joined Cases T-228/99 and T-233/99, ECLI:EU:T:2003:57.

([124]) Judgment of the Court of Justice of 22 November 2007, *Spain v Commission*, C-525/04 P, ECLI:EU:C:2007:698; Judgment of the Court of Justice of 24 January 2013, *Frucona* v *Commission*, C-73/11 P, ECLI:EU:C:2013:32; Judgment of the Court of Justice of 29 June 1999, *DMTransport*, C-256/97, ECLI:EU:C:1999:332.

([125]) Judgment of the General Court of 28 February 2012, *Land Burgenland and Austria* v *Commission*, Joined Cases T-268/08 and T-281/08, ECLI:EU:T:2012:90.

75. Those tests are variations of the same basic concept that the behaviour of public bodies should be compared to that of similar private economic operators under normal market conditions to determine whether the economic transactions carried out by such bodies grant an advantage to their counterparts. In this Communication, the Commission will therefore refer, in general terms, to the '*market economy operator*' (MEO) test as the relevant method to assess whether a range of economic transactions carried out by public bodies take place under normal market conditions and, therefore, whether they involve the granting of an advantage (which would not have occurred in normal market conditions) to their counterparts. The general principles and the relevant criteria for applying the MEO test are set out in sections 4.2.2. and 4.2.3.

4.2.2. *General principles*

76. The purpose of the MEO test is to assess whether the State has granted an advantage to an undertaking by not acting like a market economy operator with regard to a certain transaction. In that respect, it is not relevant whether the intervention constitutes a rational means for the public bodies to pursue public policy (for example employment) considerations. Similarly, the profitability or unprofitability of the beneficiary is not in itself a decisive indicator for establishing whether or not the economic transaction in question is in line with market conditions. The decisive element is whether the public bodies acted as a market economy operator would have done in a similar situation. If this is not the case, the beneficiary undertaking has received an economic advantage which it would not have obtained under normal market conditions, ([126]) placing it in a more favourable position compared to that of its competitors. ([127])

77. For the purpose of the MEO test, only the benefits and obligations linked to the role of the State as an economic operator — to the exclusion of those linked to its role as a public authority — are to be taken into account. ([128]) Indeed, the MEO test is normally not applicable if the State acts as a public authority rather than as an economic operator. For example, if a State intervention is driven by public policy reasons (for instance, for reasons of social or regional development), the State's behaviour, while being rational from a public policy perspective, may at the same time include considerations which a market economy operator would normally not consider. Accordingly, the MEO test should be applied leaving aside all considerations which exclusively relate to a Member State's role as a public authority (for example social, regional or sectoral policy considerations). ([129])

78. Whether a State intervention is in line with market conditions must be examined on an *ex-ante* basis, having regard to the information available at the time the intervention was decided upon. ([130]) In fact, any prudent market economy operator would normally carry out its own *ex-ante* assessment of the strategy and financial prospects of a project, ([131]) for instance, by means of a business plan. It is not enough to rely on *ex-post*

([126]) Judgment of the General Court of 6 March 2003, *Westdeutsche Landesbank Girozentrale and Land Nordrhein-Westfalen* v *Commission*, Joined Cases T-228/99 and T-233/99, ECLI:EU:T:2003:57, paragraph 208.

([127]) See, to that effect, Judgment of the Court of Justice of 5 June 2012, *Commission* v *EDF*, C-124/10 P, ECLI:EU:C:2012:318, paragraph 90; Judgment of the Court of Justice of 15 March 1994, *Banco Exterior de España*, C-387/92, ECLI:EU:C:1994:100, paragraph 14; Judgment of the Court of Justice of 19 May 1999, *Italy* v Commission, C-6/97, ECLI:EU:C:1999:251, paragraph 16.

([128]) Judgment of the Court of Justice of 5 June 2012, *Commission* v *EDF*, C-124/10 P, ECLI:EU:C:2012:318, paragraphs 79 to 81; Judgment of the Court of Justice of 10 July 1986, *Belgium* v *Commission*, 234/84, ECLI:EU:C:1986:302, paragraph 14; Judgment of the Court of Justice of 10 July 1986, *Belgium* v *Commission*, 40/85, ECLI:EU:C:1986:305, paragraph 13; Judgment of the Court of Justice of 14 September 1994, *Spain* v *Commission*, Joined Cases C-278/92 to C-280/92, ECLI:EU:C:1994:325, paragraph 22; Judgment of the Court of Justice of 28 January 2003, *Germany* v *Commission*, C-334/99, ECLI:EU:C:2003:55, paragraph 134.

([129]) Judgment of the Court of Justice of 5 June 2012, *Commission* v *EDF*, C-124/10 P, ECLI:EU:C:2012:318, paragraphs 79, 80 and 81; Judgment of the Court of Justice of 10 July 1986, *Belgium* v *Commission*, 234/84, ECLI:EU:C:1986:302, paragraph 14; Judgment of the Court of Justice of 10 July 1986, *Belgium* v *Commission*, 40/85, ECLI:EU:C:1986:305, paragraph 13; Judgment of the Court of Justice of 14 September 1994, *Spain* v *Commission*, Joined Cases C-278/92 to C-280/92, ECLI:EU:C:1994:325, paragraph 22; Judgment of the Court of Justice of 28 January 2003, *Germany* v *Commission*, C-334/99, ECLI:EU:C:2003:55, paragraph 134; Judgment of the General Court of 6 March 2003, *Westdeutsche Landesbank Girozentrale and Land Nordrhein-Westfalen* v *Commission*, Joined Cases T-228/99 and T-233/99, ECLI:EU:T:2003:57; Judgment of the General Court of 24 September 2008, *Kahla Thüringen Porzellan* v *Commission*, T-20/03, ECLI:EU:T:2008:395; Judgment of the General Court of 17 October 2002, *Linde* v *Commission*, T-98/00, ECLI:EU:T:2002:248.

([130]) Judgment of the Court of Justice of 5 June 2012, *Commission* v *EDF*, C-124/10 P, ECLI:EU:C:2012:318, paragraphs 83, 84 and 85 and 105; Judgment of the Court of Justice of 16 May 2002, *France* v *Commission (Stardust)*, C-482/99, ECLI:EU:C:2002:294, paragraphs 71 and 72; Judgment of the General Court of 30 April 1998, *Cityflyer Express* v *Commission*, T-16/96, ECLI:EU:T:1998:78, paragraph 76.

([131]) Judgment of the Court of Justice of 5 June 2012, *Commission* v *EDF*, C-124/10 P, ECLI:EU:C:2012:318, paragraphs 82 to 85 and 105.

economic evaluations entailing a retrospective finding that the investment made by the Member State concerned was actually profitable. ([132])

79. If a Member State argues that it acted as a market economy operator it must, where there is doubt, provide evidence showing that the decision to carry out the transaction was taken on the basis of economic evaluations comparable to those which, in similar circumstances, a rational market economy operator (with characteristics similar to those of the public body concerned) would have had carried out to determine the profitability or economic advantages of the transaction. ([133])

80. Whether a transaction is in line with market conditions must be established through a global assessment of the effects of the transaction on the undertaking concerned without considering whether the specific means used to carry out that transaction would be available to market economy operators. For instance, the applicability of the MEO test cannot be ruled out simply because the means employed by the State are fiscal in nature. ([134])

81. In certain cases, several consecutive measures of State intervention may, for the purposes of Article 107(1) of the Treaty, be regarded as a single intervention. This could be the case, in particular, where consecutive interventions are so closely linked to each other, especially having regard to their chronology, their purpose and the circumstances of the undertaking at the time of those interventions, that they are inseparable. ([135]) For instance, a series of State interventions which take place in relation to the same undertaking in a relatively short period of time, are linked to each other, or were all planned or foreseeable at the time of the first intervention, may be assessed as one intervention. On the other hand, when the later intervention was a result of unforeseen events at the time of the earlier intervention ([136]) the two measures should normally be assessed separately.

82. To assess whether certain transactions are in line with market conditions all the relevant circumstances of the particular case should be considered. For instance, there can be exceptional circumstances in which the purchase of goods or services by a public authority, even if carried out at market prices, may not be considered in line with market conditions. ([137])

4.2.3. *Establishing compliance with market conditions*

83. When applying the MEO test, it is useful to distinguish between situations in which the transaction's compliance with market conditions can be directly established through transaction-specific market data and situations in which, due to the absence of such data, the transaction's compliance with market conditions has to be assessed on the basis of other available methods.

([132]) Judgment of the Court of Justice of 5 June 2012, *Commission* v *EDF*, C-124/10 P, ECLI:EU:C:2012:318, paragraph 85.

([133]) Judgment of the Court of Justice of 5 June 2012, *Commission* v *EDF*, C-124/10 P, ECLI:EU:C:2012:318, paragraphs 82 to 85. See also Judgment of the Court of Justice of 24 October 2013, *Land Burgenland* v *Commission*, Joined Cases C-214/12 P, C-215/12 P and C-223/12 P, ECLI:EU:C:2013:682, paragraph 61. The level of sophistication of such an *ex ante* assessment may vary depending on the complexity of the transaction concerned and the value of the assets, goods or services involved. Normally, such *ex ante* evaluations should be carried out with the support of experts with appropriate skills and experience. Such evaluations should always be based on objective criteria and should not be affected by policy considerations. Evaluations conducted by independent experts may provide an additional corroboration for the credibility of the assessment.

([134]) Judgment of the Court of Justice of 5 June 2012, *Commission* v *EDF*, C-124/10 P, ECLI:EU:C:2012:318, paragraph 88.

([135]) Judgment of the Court of Justice of 19 March 2013, *Bouygues and Bouygues Télécom* v *Commission and Others*, Joined Cases C-399/10 P and C-401/10 P, ECLI:EU:C:2013:175, paragraph 104; Judgment of the General Court of 13 September 2010, *Greece and Others* v *Commission*, Joined Cases T-415/05, T-416/05 and T-423/05, ECLI:EU:T:2010:386, paragraph 177; Judgment of the General Court of 15 September 1998, *BP Chemicals* v *Commission*, T-11/95, ECLI:EU:T:1998:199, paragraphs 170 and 171.

([136]) Commission Decision of 19 December 2012 in Case SA.35378 Financing of Berlin Brandenburg Airport, Germany (OJ C 36, 8.2.2013, p. 10), recitals 14 to 33.

([137]) In Judgment of the General Court of 28 January 1999, *BAI* v *Commission*, T-14/96, ECLI:EU:T:1999:12, paragraphs 74 to 79, the General Court held that, in the light of specific circumstances of the case, it could be concluded that the purchase of travel vouchers by national authorities from P&O Ferries did not meet an actual need, and thus the national authorities did not act in a manner similar to that of a private operator acting under normal market economy conditions. Accordingly, that purchase conferred an advantage on P&O Ferries which it would not have obtained under normal market conditions and all the sums paid in the fulfilment of the purchase agreement constituted State aid.

4.2.3.1. Cases where compliance with market conditions can be directly established

84. A transaction's compliance with market conditions can be directly established through transaction-specific market information in the following situations

(i) where the transaction is carried out '*pari passu*' by public entities and private operators; or

(ii) where it concerns the sale and purchase of assets, goods and services (or other comparable transactions) carried out through a competitive, transparent non-discriminatory and unconditional tender procedure.

85. In such cases, if the specific market information concerning the transaction shows that it does not comply with market conditions, it would not normally be appropriate to use other assessment methodologies to reach a different conclusion. ([138])

(i) *Pari passu* transactions

86. When a transaction is carried out under the same terms and conditions (and therefore with the same level of risk and rewards) by public bodies and private operators who are in a comparable situation (a '*pari passu*' transaction), ([139]) as may occur in public private partnerships, it can normally be inferred that such a transaction is in line with market conditions. ([140]) In contrast, if a public body and private operators who are in a comparable situation take part in the same transaction at the same time but under different terms or conditions, this normally indicates that the intervention of the public body is not in line with market conditions. ([141])

87. In particular, to consider a transaction '*pari passu*', the following criteria should be assessed:

(a) whether the intervention of the public bodies and private operators is decided and carried out at the same time or whether there has been a time lapse and a change of economic circumstances between those interventions;

(b) whether the terms and conditions of the transaction are the same for the public bodies and all private operators involved, also taking into account the possibility of increasing or decreasing the level of risk over time;

(c) whether the intervention of the private operators has real economic significance and is not merely symbolic or marginal; ([142]) and

([138]) See to that effect, Judgment of the Court of Justice of 24 October 2013, *Land Burgenland* v *Commission*, Joined Cases C-214/12 P, C-215/12 P and C-223/12 P, ECLI:EU:C:2013:682, paragraphs 94 and 95. In that case, the Court held in particular that, where a public authority proceeds to sell an undertaking through a proper tender, it can be presumed that the market price corresponds to the highest (binding and credible) offer, without the necessity to resort to other valuation methods, such as independent studies.

([139]) The terms and conditions cannot be considered to be the same if public bodies and private operators intervene on the same terms but at different moments, following a change in the economic situation that is relevant to the transaction.

([140]) See, in that regard, Judgment of the General Court of 12 December 2000, *Alitalia* v *Commission*, T-296/97, ECLI:EU:T:2000:289, paragraph 81.

([141]) However, if the transactions are different and are not carried out at the same time, the mere fact that the terms and conditions are different does not provide any decisive indication (positive or negative) as to whether the transaction carried out by the public body is in line with market conditions.

([142]) For instance, in the Citynet Amsterdam case, the Commission considered that two private operators taking up one-third of the total equity investments in a company (considering also the overall shareholding structure and that their shares are sufficient to form a blocking minority regarding any strategic decision of the company) could be considered economically significant (see Commission Decision 2008/729/EC of 11 December 2007 on State aid C-53/2006 Citynet Amsterdam, the Netherlands (OJ L 247, 16.9.2008, p. 27), recitals 96 to 100). By contrast, in case N 429/2010 Agricultural Bank of Greece (ATE) (OJ C 317, 29.10.2011, p. 5), the private participation reached only 10 % of the investment, as opposed to 90 % by the State, so that the Commission concluded that '*pari passu*' conditions were not met since the capital injected by the State was neither accompanied by a comparable participation of a private shareholder nor proportionate to the number of shares held by the State. See also Judgment of the General Court of 12 December 2000, *Alitalia* v *Commission*, T-296/97, ECLI:EU:T:2000:289, paragraph 81.

(d) whether the starting position of the public bodies and the private operators involved is comparable with regard to the transaction, taking into account, for instance, their prior economic exposure vis-à-vis the undertakings concerned (see section 4.2.3.3), the possible synergies which can be achieved, ([143]) the extent to which the different investors bear similar transaction costs, ([144]) or any other circumstance specific to the public body or private operator which could distort the comparison.

88. The '*pari passu*' condition may not be applicable in some cases where the public involvement (in view of its unique nature or magnitude) is such that it could in practice not be replicated by a market economy operator.

(ii) The sale and purchase of assets, goods and services (or other comparable transactions) through competitive, transparent, non-discriminatory and unconditional tenders

89. If the sale and purchase of assets, goods and services (or other comparable transactions ([145])) are carried out following a competitive ([146]), transparent, non-discriminatory and unconditional tender procedure in line with the principles of the TFEU on public procurement ([147]) (see paragraphs 90 to 94), it can be presumed that those transactions are in line with market conditions, provided that the appropriate criteria for selecting the buyer or seller as set out in paragraphs 95 and 96 have been used. In contrast, if a Member States decides to provide support, for public policy reasons, to a certain activity and tenders out, for example, the amount of funding provided, such as in the case of support to the production of renewable energy or to the mere availability of electricity generation capacity, this would not fall in the scope of this sub-section (ii). In such a situation a tender can only minimize the amount granted but cannot exclude an advantage.

90. A tender procedure has to be competitive to allow all interested and qualified bidders to participate in the process.

91. The procedure has to be transparent to allow all interested tenderers to be equally and duly informed at each stage of the tender procedure. Accessibility of information, sufficient time for interested tenderers, and the clarity of the selection and award criteria are all crucial elements for a transparent selection procedure. A tender has to be sufficiently well-publicised, so that all potential bidders can take note of it. The degree of publicity needed to ensure sufficient publication in a given case depends on the characteristics of the assets, goods and services. Assets, goods and services which may attract bidders operating on a Europe-wide or international scale in view of their high value or other features should be publicised in such a manner as to attract potential bidders operating on a Europe-wide or international scale.

92. Non-discriminatory treatment of all bidders at all stages of the procedure and objective selection and award criteria specified in advance of the process are indispensable conditions for ensuring that the resulting transaction is in line with market conditions. To guarantee equal treatment, the criteria for the award of the contract should enable tenders to be compared and assessed objectively.

([143]) They must also have the same industrial rationale; see Commission Decision 2005/137/EC on State aid C-25/2002 Walloon region's financial stake in Carsid SA (OJ L 47, 18.2.2005, p. 28), recitals 67 to 70.

([144]) Transaction costs may relate to the costs that the respective investors incur for the purpose of screening and selecting the investment project, arranging the terms of the contract or monitoring the performance over the lifetime of the contract. For instance, where publicly owned banks consistently bear the costs of screening investment projects for loan financing, the mere fact that private investors co-invest at the same interest rate is not sufficient to exclude aid.

([145]) For instance, the lease of certain goods or the grant of concessions for the commercial exploitation of natural resources.

([146]) The Union Courts often refer, in the context of State aid, to an 'open' tender procedure (see for example Judgment of the General Court of 5 August 2003, *P & O European Ferries (Vizcaya)* v *Commission*, Joined Cases T-116/01 and T-118/01, ECLI:EU:T:2003:217, paragraphs 117 and 118; Judgment of the Court of Justice of 24 October 2013, *Land Burgenland* v *Commission*, Joined Cases C-214/12 P, C-215/12 P and C-223/12 P, ECLI:EU:C:2013:682, paragraph 94). The use of the word 'open', however, does not refer to a specific procedure under Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC and Directive 2014/25/EU of the European Parliament and of the Council of 26 February 2014 on procurement by entities operating in the water, energy, transport and postal services sectors and repealing Directive 2004/17/EC. Therefore, the word 'competitive' appears more appropriate. It is not intended to deviate from the substantive conditions set out in the case law.

([147]) Judgment of the Court of Justice of 7 December 2000, *Telaustria*, C-324/98, ECLI:EU:C:2000:669, paragraph 62; Judgment of the Court of Justice of 3 December 2001, *Bent Mousten Vestergaard*, C-59/00, ECLI:EU:C:2001:654, paragraph 20. See also Commission Interpretative Communication on the Community law applicable to contract awards not or not fully subject to the provisions of the Public Procurement Directives (OJ C 179, 1.8.2006, p. 2).

93. Using and complying with the procedures provided for in the Public Procurement Directives ([148]) can be considered sufficient to meet the requirements above provided that all the conditions for the use of the respective procedure are fulfilled. This does not apply in specific circumstances that make it impossible to establish a market price, such as the use of the negotiated procedure without publication of a contract notice. If only one bid is submitted, the procedure would not normally be sufficient to ensure a market price, unless either (i) there are particularly strong safeguards in the design of the procedure ensuring genuine and effective competition and it is not apparent that only one operator is realistically able to submit a credible bid or (ii) the public authorities verify through additional means that the outcome corresponds to the market price.

94. A tender for the sale of assets, goods or services is unconditional when a potential buyer is generally free to acquire the assets, goods or services to be sold and to use them for its own purposes irrespective of whether or not it runs certain businesses. If there is a condition that the buyer is to assume special obligations for the benefit of the public authorities or in the general public interest, which a private seller would not have demanded — other than those arising from general domestic law or a decision of the planning authorities —, the tender cannot be considered unconditional.

95. When public bodies sell assets, goods and services, the only relevant criterion for selecting the buyer should be the highest price, ([149]) also taking into account the requested contractual arrangements (for example the vendor's sales guarantee or other post-sale commitments). Only credible ([150]) and binding offers should be considered. ([151])

96. When public bodies buy assets, goods and services, any specific conditions attached to the tender should be non-discriminatory and closely and objectively related to the subject matter and to the specific economic objective of the contract. They should allow for the most economically advantageous offer to match the value of the market. The criteria therefore should be defined in such a way as to allow for an effectively competitive tendering procedure which leaves the successful bidder with a normal return, not more. In practice, this implies the use of tenders which put significant weight on the 'price' component of the bid or which are otherwise likely to achieve a competitive outcome (e.g. certain reverse tenders with sufficiently clear-cut award criteria).

4.2.3.2. Establishing whether a transaction is in line with market conditions on the basis of benchmarking or other assessment methods

97. If a transaction has been realised through a tender or on '*pari passu*' terms, this provides direct and specific evidence of compliance with market conditions. However, if a transaction has not been realised through a tender, or if the intervention of the public bodies is not '*pari passu*' with that of private operators, this does not automatically mean that the transaction does not comply with market conditions. ([152]) In such cases compliance with market conditions can still be assessed through (i) benchmarking or (ii) other assessment methods. ([153])

([148]) Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC; Directive 2014/25/EU of the European Parliament and of the Council of 26 February 2014 on procurement by entities operating in the water, energy, transport and postal services sectors and repealing Directive 2004/17/EC.

([149]) Judgment of the General Court of 28 February 2012, *Land Burgenland and Austria v Commission*, Joined Cases T-268/08 and T-281/08, ECLI:EU:T:2012:90, paragraph 87.

([150]) An unsolicited bid can also be credible, depending on the circumstances of the case, and in particular if the bid is binding (see Judgment of the General Court of 13 December 2011, *Konsum Nord v Commission*, T-244/08, ECLI:EU:T:2011:732, paragraphs 73, 74 and 75).

([151]) For instance, mere announcements without legally binding requirements would not be given consideration in the tender procedure; see Judgment of the General Court of 28 February 2012, *Land Burgenland and Austria v Commission*, Joined Cases T-268/08 and T-281/08, ECLI:EU:T:2012:90, paragraph 87 and Judgment of the General Court of 13 December 2011, *Konsum Nord v Commission*, T-244/08, ECLI:EU:T:2011:732, paragraphs 67 and 75.

([152]) See Judgment of the General Court of 12 June 2014, *Sarc* v *Commission*, T-488/11, ECLI:EU:T:2014:497, paragraph 98.

([153]) When the market price is set through '*pari passu*' or tender transactions, these results cannot be disputed by other assessment methodologies, such as by independent studies (see Judgment of the Court of Justice of 24 October 2013, *Land Burgenland* v *Commission*, Joined Cases C-214/12 P, C-215/12 P and C-223/12 P, ECLI:EU:C:2013:682, paragraphs 94 and 95).

(i) Benchmarking

98. To establish whether a transaction is in compliance with market conditions, that transaction can be assessed in the light of the terms under which comparable transactions carried out by comparable private operators have taken place in comparable situations (benchmarking).

99. To identify an appropriate benchmark, it is necessary to pay particular attention to the kind of operator concerned (for example a group holding, a speculative fund, or a long-term investor seeking to secure profits in the longer run), the type of transaction at stake (for example equity participation or debt transaction) and the market or markets concerned (for example financial markets, fast-growing technology markets, utility or infrastructure markets). The timing of the transactions is also particularly relevant when significant economic developments have taken place. Where appropriate, the available market benchmarks may need to be adjusted according to the specific features of the State transaction (for instance, the situation of the beneficiary undertaking and of the relevant market). ([154]) Benchmarking may not be an appropriate method to establish market prices if the available benchmarks have not been defined with regard to market considerations or the existing prices are significantly distorted by public interventions.

100. Benchmarking often does not establish one precise reference value but rather establishes a range of possible values by assessing a set of comparable transactions. Where the aim of the assessment is to consider whether the State intervention is in line with market conditions, it is normally appropriate to consider measures of central tendency such as the average or the median of the set of comparable transactions.

(ii) Other assessment methods

101. Whether a transaction is in line with market conditions can also be established on the basis of a generally-accepted, standard assessment methodology. ([155]) Such a methodology must be based on the available objective, verifiable and reliable data, ([156]) which should be sufficiently detailed and should reflect the economic situation at the time at which the transaction was decided, taking into account the level of risk and future expectations. ([157]) Depending on the value of the transaction, the robustness of the evaluation should normally be corroborated by performing a sensitivity analysis, assessing different business scenarios, preparing contingency plans and comparing the results with alternative evaluation methodologies. A new (*ex-ante*) valuation may need to be carried out if the transaction is delayed and it is necessary to take into account recent changes in market conditions.

102. A widely accepted standard methodology to determine the (annual) return on investments is to calculate the internal rate of return (IRR). ([158]) One can also evaluate the investment decision in terms of its net present value (NPV), ([159]) which produces results equivalent to the IRR in most cases. ([160]) To assess whether the investment is

([154]) See Judgment of the General Court of 6 March 2003, *Westdeutsche Landesbank Girozentrale and Land Nordrhein-Westfalen* v *Commission*, Joined Cases T-228/99 and T-233/99, ECLI:EU:T:2003:57, paragraph 251.

([155]) See Judgment of the General Court of 29 March 2007, *Scott* v *Commission*, T-366/00, ECLI:EU:T:2007:99, paragraph 134, and Judgment of the Court of Justice of 16 December 2010, *Seydaland Vereinigte Agrarbetriebe*, C-239/09, ECLI:EU:C:2010:778, paragraph 39.

([156]) See Judgment of the General Court of 16 September 2004, *Valmont Nederland BV* v *Commission*, T-274/01, ECLI:EU:T:2004:266, paragraph 71.

([157]) See Judgment of the General Court of 29 March 2007, *Scott* v *Commission*, T-366/00, ECLI:EU:T:2007:99, paragraph 158.

([158]) The IRR is not based on accounting earnings in a given year, but takes into account the stream of future cash flows that the investor expects to receive over the entire lifetime of the investment. It is defined as the discount rate for which the NPV of a stream of cash flows equals zero.

([159]) The NPV is the difference between the positive and negative cash flows over the lifetime of the investment, discounted at the appropriate return (the cost of capital).

([160]) There is a perfect correlation between NPV and IRR in cases where the IRR is equal to the opportunity cost to the investor. Where the NPV of an investment is positive, this implies that the project has an IRR that exceeds the required rate of return (opportunity cost to the investor). In this case, the investment is worth carrying out. If the project has an NPV that is equal to zero, the IRR of the project equals the required rate of return. In this case, it is immaterial whether the investor makes the investment or invests elsewhere. Where the NPV is negative, the IRR is below the cost of capital. The investment is not profitable enough as better opportunities exist elsewhere. Where the IRR and the NPV lead to different investment decisions (such a difference in result could arise, in particular, in mutually exclusive projects), in principle the NPV method should be preferred in line with market practice, unless there is significant uncertainty as to the appropriate discount rate.

carried out on market terms, the return on the investment must be compared to the normal expected market return. A normal expected return (or cost of capital of the investment) can be defined as the average expected return that the market requires from the investment on the basis of generally accepted criteria, in particular the risk of the investment, taking into account the financial position of the company and the specific features of the sector, region or country. If this normal return cannot be reasonably expected, then the investment would most likely not be pursued on market terms. In general, the riskier the project, the higher the rate of return that fund providers will demand, that is to say the higher the cost of capital.

103. The appropriate assessment methodology may depend on the market situation, ([161]) data availability or the type of transaction. For instance, whereas an investor seeks to generate a profit by investing in undertakings (in which case IRR or NPV are likely to be the most appropriate method), a creditor seeks to obtain payment of sums owed to it (the principal sum and any interest) by a debtor within the contractually and legally determined period ([162]) (in which case the evaluation of collateral, for example the asset value, could be more relevant). In the case of sales of land, an independent expert evaluation prior to the sale negotiations to establish the market value on the basis of generally accepted market indicators and valuation standards is in principle satisfactory. ([163])

104. Methods to establish the IRR or NPV of an investment do not typically result in one precise value that could be accepted, but rather in a range of possible values (depending on the economic, legal and other specific circumstances of the transaction inherent in the assessment method). Where the aim of the assessment is to consider whether the State intervention is in line with market conditions, it is normally appropriate to consider measures of central tendency, such as the average or the median of the set of comparable transactions.

105. Prudent market economy operators typically assess their interventions by using several different methodologies to corroborate the estimates (for instance, NPV calculations are validated by benchmarking methods). The different methodologies converging at the same value will provide a further indication for establishing a genuine market price. Thus, the presence of complementary valuation methodologies corroborating each other's findings will be considered a positive indication when assessing whether a transaction is in line with market conditions.

4.2.3.3. Counterfactual analysis in the case of prior economic exposure to the undertaking concerned

106. The fact that the public body concerned has prior economic exposure to an undertaking should be taken into consideration when examining whether a transaction is in line with market conditions, provided that a comparable private operator could have such prior exposure (for example in its capacity of shareholder of an undertaking). ([164])

107. Prior exposure must be considered in the framework of counterfactual scenarios for the purpose of the MEO test. For instance, in the case of an equity or debt intervention in a public undertaking in difficulty, the

([161]) For instance, in the case of liquidation of a company, a valuation based on liquidation value or on asset value could be the most appropriate assessment methods.

([162]) See, for instance, Judgment of the Court of Justice of 29 April 1999, *Spain* v *Commission*, C-342/96, ECLI:EU:C:1999:210, paragraph 46, and Judgment of the Court of Justice of 29 June 1999, *DMTransport*, C-256/97, ECLI:EU:C:1999:332, paragraph 24.

([163]) If the comparative method (benchmarking) is not appropriate and other generally accepted methods appear to fail to accurately establish the land value, an alternative method could be employed, such as the Vergleichspreissystem valuation method proposed by Germany (endorsed for agricultural and forestry land in Commission Decision on State aid SA.33167 Proposed alternative method to evaluate agriculture and forestry land in Germany when sold by public authorities (OJ C 43, 15.2.2013, p. 7)). On the limitations of other methods see Judgment of the Court of Justice of 16 December 2010, *Seydaland Vereinigte Agrarbetriebe*, C-239/09, ECLI:EU:C:2010:778, paragraph 52.

([164]) See Judgment of the Court of Justice of 3 April 2014, *ING Groep NV*, C-224/12 P, ECLI:EU:C:2014:213, paragraphs 29 to 37. However the prior exposure should not be taken into account if it results from a measure which, on a global assessment of all aspects of that measure, could not have been undertaken by a private investor seeking a profit (Judgment of the Court of Justice of 24 October 2013, *Land Burgenland* v *Commission*, Joined Cases C-214/12 P, C-215/12 P and C-223/12 P, ECLI:EU:C:2013:682, paragraphs 52 to 61.

expected return on such an investment should be compared with the expected return in the counterfactual scenario of the liquidation of the company. In the event that liquidation provides higher gains or lower losses, a prudent market economy operator would choose that option. ([165]) For this purpose, the liquidation costs to be considered should not include costs linked to the responsibilities of the public authorities, but only costs that a rational market economy operator would incur, ([166]) also taking into account the evolution of the social, economic and environmental context in which it operates. ([167])

4.2.3.4. Specific considerations to establish whether the terms for loans and guarantees are in line with market terms

108. In the same way as any other transaction, loans and guarantees granted by public bodies (including public undertakings) may entail State aid if they are not in line with market terms.

109. For guarantees, a triangular situation involving a public entity as a guarantor, a borrower and a lender normally has to be analysed. ([168]) In most cases, aid can only be present at the level of the borrower, as the public guarantee may grant it an advantage, by enabling it to borrow at a rate that would not have been obtainable on the market without the guarantee ([169]) (or to borrow in a situation where, exceptionally, no loan could have been obtained on the market at any rate). However, under certain specific circumstances, the granting of a public guarantee might also entail aid to the lender, in particular where the guarantee is given *ex post* on an existing obligation between lender and borrower, where a complete passing on of the advantage to the borrower is not ensured ([170]) or where a guaranteed loan is used to pay back a non-guaranteed one. ([171])

110. Any guarantee granted on terms that are more favourable than market conditions, taking into account the economic situation of the borrower, confers an advantage on the latter (who pays a fee that does not appropriately reflect the risk that the guarantor assumes). ([172]) In general, unlimited guarantees are not in line with normal market conditions. This also applies to implicit guarantees stemming from State liability for the debts of insolvent undertakings sheltered from ordinary bankruptcy rules. ([173])

111. In the absence of specific market information on a given debt transaction, the debt instrument's compliance with market conditions may be established on the basis of a comparison with comparable market transactions (that is to say through benchmarking). In the case of loans and guarantees, information on the financing costs of the undertaking may, for example, be obtained from other (recent) loans taken by the undertaking in question, from yields on bonds issued by the undertaking or from credit default swap spreads on that undertaking. Comparable market transactions may also be similar loan or guarantee transactions undertaken by a sample of comparator companies, bonds issued by a sample of comparator companies or credit default swap spreads on a sample of comparator companies. In the case of guarantees, if no corresponding price benchmark can be found on the financial markets, the total financing cost of the guaranteed loan, including the interest

([165]) See, to that effect, Judgment of the General Court of 12 December 2000, *Alitalia* v *Commission*, T-296/97, ECLI:EU:T:2000:289, or Judgment of the Court of Justice of 24 January 2013, *Frucona* v *Commission*, C-73/11 P, ECLI:EU:C:2013:32, paragraphs 79 and 80.
([166]) Judgment of the Court of Justice of 28 January 2003, *Germany* v *Commission*, C-334/99, ECLI:EU:C:2003:55, paragraph 140.
([167]) Judgment of the General Court of 11 September 2012, *Corsica Ferries France SAS* v *Commission*, T-565/08, ECLI:EU:T:2012:415, paragraphs 79 to 84, upheld on appeal, see Judgment of the Court of Justice of 4 September 2014, *SNCM and France* v *Commission*, Joined Cases C-533/12 P and C-536/12 P, ECLI:EU:C:2014:2142, paragraphs 40 and 41. The Courts confirmed in this case that, in principle, it might be economically rational in the long term for private investors, in particular larger groups of companies, to pay complementary indemnities (for instance, to protect the brand image of a group). However, the necessity of paying such complementary indemnities should be demonstrated thoroughly in the concrete case in which the protection of the image is needed and it should also be demonstrated that such payments are an established practice amongst private companies in similar circumstances (mere examples are not sufficient).
([168]) For information on the assessment to be carried out concerning the possible grant of State aid in the form of a guarantee, see also the Commission Notice on the application of Articles 87 and 88 of the EC Treaty to State aid in the form of guarantees (OJ C 155, 20.6.2008, p. 10). That Notice is not replaced by this Notice.
([169]) See Judgment of the Court of Justice of 8 December 2011, *Residex Capital* v *Gemeente Rotterdam*, C-275/10, ECLI:EU:C:2011:814, paragraph 39.
([170]) See Judgment of the Court of Justice of 19 March 2015, *OTP Bank Nyrt* v *Magyar Állam and Others*, C-672/13, ECLI:EU:C:2015:185.
([171]) See Judgment of the Court of Justice of 8 December 2011, *Residex Capital* v *Gemeente Rotterdam*, C-275/10, ECLI:EU:C:2011:814, paragraph 42.
([172]) See Judgment of the Court of Justice of 3 April 2014, *France* v *Commission*, C-559/12 P, ECLI:EU:C:2014:217, paragraph 96.
([173]) See Judgment of the Court of Justice of 3 April 2014, *France* v *Commission*, C-559/12 P, ECLI:EU:C:2014:217, paragraph 98.

rate of the loan and the guarantee premium, should be compared to the market price of a similar non-guaranteed loan. Benchmarking methods may be complemented with assessment methods based on the return on capital. ([174])

112. To facilitate assessment of whether a measure complies with the MEO test, the Commission has developed proxies to determine the aid character of loans and guarantees.

113. For loans, the methodology to calculate a reference rate, to act as a proxy for the market price in situations where comparable market transactions are not easy to identify (something that is more likely to apply to transactions involving limited amounts and/or transactions involving small and medium sized undertakings (SMEs)) is set out in the Reference Rate Communication. ([175]) It should be recalled that this reference rate is only a proxy. ([176]) If comparable transactions have typically taken place at a lower price than that indicated as a proxy by the reference rate, the Member State can consider this lower price to be the market price. If, on the other hand, the same company has carried out recent similar transactions at a higher price than the reference rate, and its financial situation and the market environment have remained substantially unchanged, the reference rate may not constitute a valid proxy of market rates for that specific case.

114. The Commission has developed detailed guidance on proxies (and irrebuttable presumptions ('safe harbours') for SMEs) relating to guarantees in the Notice on Guarantees. ([177]) According to that Notice, in order to rule out the presence of aid, it is normally sufficient that the borrower is not in financial difficulty, that the guarantee is linked to a specific transaction, that the lender bears part of the risk and that the borrower pays a market-oriented price for the guarantee.

4.3. **Indirect advantage**

115. An advantage can be conferred on undertakings other than those to which State resources are directly transferred (indirect advantage). ([178]) A measure can also constitute both a direct advantage to the recipient undertaking and an indirect advantage to other undertakings, for instance, undertakings operating at subsequent levels of activity. ([179]) The direct recipient of the advantage can be either an undertaking or an entity (natural or legal person) not engaged in any economic activity. ([180])

116. Such indirect advantages should be distinguished from mere secondary economic effects that are inherent in almost all State aid measures (for example through an increase of output). For this purpose, the foreseeable effects of the measure should be examined from an *ex ante* point of view. An indirect advantage is present if the measure is designed in such a way as to channel its secondary effects towards identifiable undertakings or groups of undertakings. This is the case, for example, if the direct aid is, *de facto* or *de jure*, made conditional on the purchase of goods or services produced by certain undertakings only (for example only undertakings established in certain areas). ([181])

([174]) For instance, through RAROC (Risk Adjusted Return on Capital), which is what lenders and investors require for providing finance of similar benchmark risk and maturity to an undertaking active in the same sector.

([175]) See the Communication from the Commission on the revision of the method for setting the reference and discount rates (OJ C 14, 19.1.2008, p. 6). For subordinated loans, which are not covered in the Reference Rate Communication, the methodology set out in Commission Decision of 11 December 2008 on State aid N 55/2008, GA/EFRE Nachrangdarlehen, (OJ C 9, 14.1.2009, p. 1), can be used.

([176]) However, where Commission regulations or Commission decisions on aid schemes refer to the reference rate for the identification of the aid amount, the Commission will consider it as a fixed no-aid benchmark (safe-harbour).

([177]) Commission Notice on the application of Articles 87 and 88 of the EC Treaty to State aid in the form of guarantees (OJ C 155, 20.6.2008, p. 10).

([178]) Judgment of the Court of Justice of 19 September 2000, *Germany* v *Commission*, C-156/98, ECLI:EU:C:2000:467, paragraphs 26 and 27; Judgment of the Court of Justice of 28 July 2011, *Mediaset SpA* v *Commission*, C-403/10 P, ECLI:EU:C:2011:533, paragraphs 73 to 77; Judgment of the Court of Justice of 13 June 2002, *Netherlands* v *Commission*, C-382/99, ECLI:EU:C:2002:363, paragraphs 60 to 66; Judgment of the General Court of 4 March 2009, *Italy* v *Commission*, T-424/05, ECLI:EU:T:2009:49, paragraphs 136 to 147. See also Article 107(2)(a) of the Treaty.

([179]) In case an intermediary undertaking is a mere vehicle for transferring the advantage to the beneficiary and it does not retain any advantage, it should not normally be considered as a recipient of State aid.

([180]) Judgment of the Court of Justice of 19 September 2000, *Germany* v *Commission*, C-156/98, ECLI:EU:C:2000:467, paragraphs 26 and 27; Judgment of the Court of Justice of 28 July 2011, *Mediaset SpA* v *Commission*, C-403/10 P, ECLI:EU:C:2011:533, paragraph 81.

([181]) By contrast, a mere secondary economic effect in the form of increased output (which does not amount to indirect aid) can be found where the aid is simply channelled through an undertaking (for example a financial intermediary) which passes it on in full to the aid beneficiary.

5. SELECTIVITY

5.1. General principles

117. To fall within the scope of Article 107(1) of the Treaty, a State measure must favour 'certain undertakings or the production of certain goods'. Hence, not all measures which favour economic operators fall under the notion of aid, but only those which grant an advantage in a selective way to certain undertakings or categories of undertakings or to certain economic sectors.

118. Measures of purely general application which do not favour certain undertakings only or the production of certain goods only do not fall within the scope of Article 107(1) of the Treaty. However, the case-law has made it clear that even interventions which, at first appearance, apply to undertakings in general may be selective to a certain extent and, accordingly, be regarded as measures designed to favour certain undertakings or the production of certain goods. ([182]) Neither a large number of eligible undertakings (which can even include all undertakings of a given sector), nor the diversity and size of the sectors to which they belong, provide grounds for concluding that a State measure constitutes a general measure of economic policy, if not all economic sectors can benefit from it. ([183]) The fact that the aid is not aimed at one or more specific recipients defined in advance, but that it is subject to a series of objective criteria according to which it may be granted, within the framework of a predetermined overall budget allocation, to an indefinite number of beneficiaries who are not initially individually identified, is insufficient to call into question the selective nature of the measure. ([184])

119. To clarify the notion of selectivity under State aid law, it is useful to distinguish between material and regional selectivity. Moreover, it is useful to provide further guidance on certain issues specific to tax (or similar) measures.

5.2. Material selectivity

120. The material selectivity of a measure implies that the measure applies only to certain (groups of) undertakings or certain sectors of the economy in a given Member State. Material selectivity can be established *de jure* or *de facto*.

5.2.1. *De jure and de facto selectivity*

121. De jure selectivity results directly from the legal criteria for granting a measure that is formally reserved for certain undertakings only (for instance: those having a certain size, active in certain sectors or having a certain legal form ([185]); companies incorporated or newly listed on a regulated market during a particular period ([186]); companies belonging to a group having certain characteristics or entrusted with certain functions within

([182]) Judgment of the Court of Justice of 29 June 1999, *DMTransport*, C-256/97, ECLI:EU:C:1999:332, paragraph 27; Judgment of the General Court of 6 March 2002, *Territorio Histórico de Álava — Diputación Foral de Álava et aL.* v *Commission*, Joined Cases T-127/99, T-129/99 and T-148/99, ECLI:EU:T:2002:59, paragraph 149.

([183]) See, for instance, Judgment of the Court of Justice of 17 June 1999, *Belgium* v *Commission*, C-75/97, ECLI:EU:C:1999:311, paragraph 32; Judgment of the Court of Justice of 8 November 2001, *Adria-Wien Pipeline*, C-143/99, ECLI:EU:C:2001:598, paragraph 48.

([184]) Judgment of the General Court of 29 September 2000, *Confederación Espanola de Transporte de Mercancías* v *Commission*, T-55/99, ECLI:EU:T:2000:223, paragraph 40. See also Judgment of the General Court of 13 September 2012, *Italy* v *Commission*, T-379/09, ECLI:EU:T:2012:422, paragraph 47. The measure in question in that case was a partial exemption from excise duty on the diesel used for the heating of greenhouses. The General Court indicated that the fact that the exemption could benefit all undertakings choosing greenhouse production was not sufficient to establish the general character of the measure.

([185]) Judgment of the Court of Justice of 8 September 2011, *Paint Graphos and others*, Joined Cases C-78/08 to C-80/08, ECLI:EU:C:2011:550, paragraph 52.

([186]) Judgment of the General Court of 4 September 2009, *Italy* v *Commission*, T-211/05, ECLI:EU:T:2009:304, paragraph 120, and Judgment of the Court of Justice of 24 November 2011, *Italy* v *Commission*, C-458/09 P, ECLI:EU:C:2011:769, paragraphs 59 and 60.

a group ([187]); ailing companies ([188]); or export undertakings or undertakings performing export-related activities ([189])). *De facto* selectivity can be established in cases where, although the formal criteria for the application of the measure are formulated in general and objective terms, the structure of the measure is such that its effects significantly favour a particular group of undertakings (as in the examples in the preceding sentence). ([190])

122. *De facto* selectivity may be the result of conditions or barriers imposed by Member States preventing certain undertakings from benefiting from the measure. For example, applying a tax measure (for example a tax credit) only to investments exceeding a certain threshold (other than a minor threshold for reasons of administrative expediency) may mean that the measure is de facto reserved for undertakings with significant financial resources. ([191]) A measure granting certain advantages for a brief period only may also be de facto selective. ([192])

5.2.2. *Selectivity stemming from discretionary administrative practices*

123. General measures which *prima facie* apply to all undertakings but are limited by the discretionary power of the public administration are selective. ([193]) This is the case where meeting the given criteria does not automatically result in an entitlement to the measure.

124. Public administrations have discretionary power in applying a measure, in particular, where the criteria for granting the aid are formulated in a very general or vague manner that necessarily involves a margin of discretion in the assessment. One example would be that the tax administration can vary the conditions for granting a tax concession according to the characteristics of the investment project submitted to it for assessment. Similarly, if the tax administration has broad discretion to determine the beneficiaries or the conditions under which a tax advantage is granted on the basis of criteria unrelated to the tax system, such as maintaining employment, the exercise of that discretion must then be regarded as favouring 'certain undertakings or the production of certain goods'. ([194])

125. The fact that a tax relief requires prior administrative authorisation does not automatically mean that it constitutes a selective measure. This is not the case where a prior administrative authorisation is based on objective, non-discriminatory criteria which are known in advance, thus circumscribing the exercise of the public administrations' discretion. Such a prior administrative authorisation scheme must also be based on a procedural system which is easily accessible and capable of ensuring that a request for authorisation will be dealt with objectively and impartially within a reasonable time and refusals to grant authorisation must also be capable of being challenged in judicial or quasi-judicial proceedings. ([195])

([187]) Judgment of the Court of Justice of 22 June 2006, *Belgium and Forum 187* v *Commission*, Joined Cases C-182/03 and C-217/03, ECLI:EU:C:2006:416, paragraph 122.

([188]) Judgment of the General Court of 4 February 2016, *Heitkamp Bauholding* v *Commission*, T-287/11, ECLI:EU:T:2016:60, paragraph 129 et seq.

([189]) Judgment of the Court of Justice of 10 December 1969, *Commission* v *France*, Joined Cases 6 and 11/69, ECLI:EU:C:1969:68, paragraph 3; Judgment of the Court of Justice of 7 June 1988, *Greece* v *Commission*, 57/86, ECLI:EU:C:1988:284, paragraph 8; Judgment of the Court of Justice of 15 July 2004, *Spain* v *Commission*, C-501/00, ECLI:EU:C:2004:438, paragraph 92.

([190]) This was the case in the Judgment of the Court of Justice of 15 November 2011, *Commission and Spain* v *Government of Gibraltar and United Kingdom*, Joined Cases C-106/09 P and C-107/09 P, ECLI:EU:C:2011:732, concerning the Gibraltar tax reform, which de facto favoured offshore companies. See paragraphs 101 et seq. of that judgment. The reform introduced a system consisting of three taxes applicable to all Gibraltar companies, namely a payroll tax, a business property occupation tax (BPOT) and a registration fee. Liability for payroll tax and BPOT would have been capped at 15 % of profits. The Court found that such a combination of taxes excluded from the outset any taxation of offshore companies as they had no taxable basis due to the lack of employees and lack of business property in Gibraltar.

([191]) See, for instance, Judgment of the General Court of 6 March 2002, *Ramondin SA and Ramondín Cápsulas SA* v *Commission*, Joined Cases T-92/00 and T-103/00, ECLI:EU:T:2002:61, paragraph 39.

([192]) Judgment of the General Court of 12 September 2007, *Italy and Brandt Italia* v *Commission*, Joined Cases T-239/04 and T-323/04, ECLI:EU:T:2007:260, paragraph 66; Judgment of the General Court of 4 September 2009, *Italy* v *Commission*, T-211/05, ECLI:EU:T:2009:304, paragraph 120; Judgment of the Court of Justice of 24 November 2011, *Italy* v *Commission*, C-458/09 P, ECLI:EU:C:2011:769, paragraphs 59 and 60.

([193]) See Judgment of the Court of Justice of 29 June 1999, *DMTransport*, C-256/97, ECLI:EU:C:1999:332, paragraph 27.

([194]) See Judgment of the Court of Justice of 18 July 2013, *P Oy*, C-6/12, ECLI:EU:C:2013:525, paragraph 27.

([195]) See Judgment of the Court of Justice of 12 July 2001, *Smits and Peerbooms*, C-157/99, ECLI:EU:C:2001:404, paragraph 90; Judgment of the Court of Justice of 3 June 2010, *Sporting Exchange Ltd, trading 'Betfair'* v *Minister van Justitie*, C-203/08, ECLI:EU:C:2010:307, paragraph 50.

5.2.3. *The assessment of material selectivity for measures mitigating the normal charges of undertakings*

126. When Member States adopt ad hoc positive measures benefiting one or more identified undertakings (for instance, granting money or assets to certain undertakings), it is normally easy to conclude that such measures have a selective character, as they reserve favourable treatment for one or a few undertakings. ([196])

127. The situation is usually less clear when Member States adopt broader measures applicable to all undertakings fulfilling certain criteria, which mitigate the charges that those undertakings would normally have to bear (for instance, tax or social security exemptions for undertakings fulfilling certain criteria).

128. In such cases, the selectivity of the measures should normally be assessed by means of a three-step analysis. First, the system of reference must be identified. Second, it should be determined whether a given measure constitutes a derogation from that system insofar as it differentiates between economic operators who, in light of the objectives intrinsic to the system, are in a comparable factual and legal situation. Assessing whether a derogation exists is the key element of this part of the test and allows a conclusion to be drawn as to whether the measure is *prima facie* selective. If the measure in question does not constitute a derogation from the reference system, it is not selective. However, if it does (and therefore is *prima facie* selective), it needs to be established, in the third step of the test, whether the derogation is justified by the nature or the general scheme of the (reference) system. ([197]) If a *prima facie* selective measure is justified by the nature or the general scheme of the system, it will not be considered selective and will thus fall outside the scope of Article 107(1) of the Treaty. ([198])

129. However, the three-step analysis cannot be applied in certain cases, taking into account the practical effects of the measures concerned. It must be emphasised that Article 107(1) of the Treaty does not distinguish between measures of State intervention in terms of their causes or aims, but defines them in relation to their effects, independently of the techniques used. ([199]) This means that in certain exceptional cases it is not sufficient to examine whether a given measure derogates from the rules of the reference system as defined by the Member State concerned. It is also necessary to evaluate whether the boundaries of the system of reference have been designed in a consistent manner or, conversely, in a clearly arbitrary or biased way, so as to favour certain undertakings which are in a comparable situation with regard to the underlying logic of the system in question.

130. Thus, in Joined Cases C-106/09 P and C-107/09 P ([200]) concerning the Gibraltar tax reform, the Court of Justice found that the reference system as defined by the Member State concerned, although founded on criteria that were of a general nature, discriminated in practice between companies which were in a comparable situation with regard to the objective of the tax reform, resulting in a selective advantage being conferred on offshore companies. ([201]) In this respect, the Court found that the fact that offshore companies were not taxed was not a random consequence of the regime, but the inevitable consequence of the fact that the bases of assessment were specifically designed so that offshore companies had no tax base. ([202])

131. Similar verification may also be necessary in certain cases concerning special-purpose levies, where there are elements indicating that the boundaries of the levy have been designed in a clearly arbitrary or biased way, so

([196]) See Judgment of the Court of Justice of 4 June 2015, *Commission* v *MOL*, C-15/14 P, ECLI:EU:C:2015:362, paragraphs 60 et seq.; Opinion of Advocate General Mengozzi of 27 June 2013, *Deutsche Lufthansa*, C-284/12, ECLI:EU:C:2013:442, paragraph 52.

([197]) See, for instance, Judgment of the Court of Justice of 8 September 2011, *Commission* v *Netherlands*, C-279/08 P, ECLI:EU:C:2011:551, paragraph 62; Judgment of the Court of Justice of 8 November 2001, *Adria-Wien Pipeline*, C-143/99, ECLI:EU:C:2001:598.

([198]) See, for instance, Judgment of the Court of Justice of 8 September 2011, *Paint Graphos and others*, Joined Cases C-78/08 to C-80/08, ECLI:EU:C:2011:550, paragraph 49 et seq.; Judgment of the Court of Justice of 29 April 2004, *GIL Insurance*, C-308/01, ECLI:EU:C:2004:252.

([199]) See Judgment of the Court of Justice of 22 December 2008, *British Aggregates v Commission*, C-487/06 P, ECLI:EU:C:2008:757, paragraphs 85 and 89 and the case-law cited; Judgment of the Court of Justice of 8 September 2011, *Commission* v *Netherlands*, C-279/08 P, ECLI:EU:C:2011:551, paragraphs 51; Judgment of the Court of Justice of 15 November 2011, *Commission and Spain* v *Government of Gibraltar and United Kingdom*, Joined Cases C-106/09 P and C-107/09 P, ECLI:EU:C:2011:732, paragraph 87.

([200]) Judgment of the Court of Justice of 15 November 2011, *Commission and Spain* v *Government of Gibraltar and United Kingdom*, Joined Cases C-106/09 P and C-107/09 P, ECLI:EU:C:2011:732.

([201]) Judgment of the Court of Justice of 15 November 2011, *Commission and Spain* v *Government of Gibraltar and United Kingdom*, Joined Cases C-106/09 P and C-107/09 P, ECLI:EU:C:2011:732, paragraphs 101 et seq.

([202]) Judgment of the Court of Justice of 15 November 2011, *Commission and Spain* v *Government of Gibraltar and United Kingdom*, Joined Cases C-106/09 P and C-107/09 P, ECLI:EU:C:2011:732, paragraph 106.

as to favour certain products or certain activities which are in a comparable situation with regard to the underlying logic of the levies in question. For instance, in *Ferring*, ([203]) the Court of Justice considered that a levy imposed on the direct sale of medicinal products by pharmaceutical laboratories but not on the sale by wholesalers was selective. In the light of the particular factual circumstances — such as the clear objective of the measure and its effects — the Court did not simply examine whether the measure in question would lead to a derogation from the reference system constituted by the levy. It also compared the situations of the pharmaceutical laboratories (subject to the levy) and of the wholesalers (excluded), concluding that the non-imposition of the tax on the direct sales by the wholesalers equated to granting them a *prima facie* selective tax exemption. ([204])

5.2.3.1. Identification of the reference system

132. The reference system constitutes the benchmark against which the selectivity of a measure is assessed.

133. The reference system is composed of a consistent set of rules that generally apply — on the basis of objective criteria — to all undertakings falling within its scope as defined by its objective. Typically, those rules define not only the scope of the system, but also the conditions under which the system applies, the rights and obligations of undertakings subject to it and the technicalities of the functioning of the system.

134. In the case of taxes, the reference system is based on such elements as the tax base, the taxable persons, the taxable event and the tax rates. For example, a reference system could be identified with regard to the corporate income tax system, ([205]) the VAT system, ([206]) or the general system of taxation of insurance. ([207]) The same applies to special-purpose (stand-alone) levies, such as levies on certain products or activities having a negative impact on the environment or health, which do not really form part of a wider taxation system. As a result, and subject to special cases illustrated in paragraphs 129 to 131 above, the reference system is, in principle, the levy itself. ([208])

5.2.3.2. Derogation from the system of reference

135. Once the reference system has been established, the next step of the analysis consists in examining whether a given measure differentiates between undertakings in derogation from that system. To do this, it is necessary to determine whether the measure is liable to favour certain undertakings or the production of certain goods as compared with other undertakings which are in a similar factual and legal situation, in the light of the intrinsic objective of the system of reference. ([209]) External policy objectives — such as regional, environmental or industrial policy objectives — cannot be relied upon by the Member State to justify the differentiated treatment of undertakings. ([210])

([203]) Judgment of the Court of Justice of 22 November 2001, *Ferring*, C-53/00, ECLI:EU:C:2001:627, paragraph 20.
([204]) Judgment of the Court of Justice of 22 November 2001, *Ferring*, C-53/00, ECLI:EU:C:2001:627, paragraphs 19 and 20.
([205]) See Judgment of the Court of Justice of 8 September 2011, *Paint Graphos and others*, Joined Cases C-78/08 to C-80/08, ECLI:EU:C:2011:550, paragraph 50. The Court sometimes applies in this context the term of 'the ordinary tax system' (see Judgment of the Court of Justice of 22 June 2006, *Belgium and Forum 187* v *Commission*, Joined Cases C-182/03 and C-217/03, ECLI:EU:C:2006:416, paragraph 95) or 'the general tax scheme' (see Judgment of the Court of Justice of 15 December 2005, *Italy* v *Commission*, C-66/02, ECLI:EU:C:2005:768, paragraph 100).
([206]) See the Court's reasoning concerning selectivity in Judgment of the Court of Justice of 3 March 2005, *Heiser*, C-172/03, ECLI:EU:C:2005:130, paragraphs 40 et seq.
([207]) See Judgment of the Court of Justice of 29 April 2004, *GIL Insurance*, C-308/01, ECLI:EU:C:2004:252, paragraphs 75 and 78.
([208]) See Judgment of the General Court of 7 March 2012, *British Aggregates Association* v *Commission*, T-210/02 RENV, ECLI:EU:T:2012:110, paragraphs 49 and 50. Even if a levy is introduced in the national legal system to transpose a Union directive, that levy remains the system of reference.
([209]) In its *Paint Graphos* judgment, the Court has indicated however that, in light of the peculiarities of cooperative societies which have to conform to particular operating principles, those undertakings cannot be regarded as being in a comparable factual and legal situation to that of commercial companies, provided that they act in the economic interest of their members and their relations with their members are not purely commercial but personal and individual, the members being actively involved in the running of the business and entitled to equitable distribution of the results of economic performance (See Judgment of the Court of Justice of 8 September 2011, *Paint Graphos and others*, Joined Cases C-78/08 to C-80/08, ECLI:EU:C:2011:550, paragraph 61).
([210]) Judgment of the Court of Justice of 18 July 2013, *P Oy*, C-6/12, ECLI:EU:C:2013:525, paragraph 27 et seq.

136. The structure of certain special-purpose levies (and in particular their tax bases), such as environmental and health taxes imposed to discourage certain activities or products that have an adverse effect on the environment or human health, will normally integrate the policy objectives pursued. In such cases, a differentiated treatment for activities or products whose situation is different from the situation of those activities or products which are subject to the tax as regards the intrinsic objective pursued, does not constitute a derogation. ([211])

137. If a measure favours certain undertakings or the production of certain goods which are in a comparable legal and factual situation, the measure is *prima facie* selective.

5.2.3.3. Justification by the nature or general scheme of the system of reference

138. A measure which derogates from the reference system (*prima facie* selectivity) is non-selective if it is justified by the nature or general scheme of that system. This is the case where a measure derives directly from the intrinsic basic or guiding principles of the reference system or where it is the result of inherent mechanisms necessary for the functioning and effectiveness of the system. ([212]) In contrast, it is not possible to rely on external policy objectives which are not inherent to the system. ([213])

139. The basis for a possible justification could, for instance, be the need to fight fraud or tax evasion, the need to take into account specific accounting requirements, administrative manageability, the principle of tax neutrality ([214]), the progressive nature of income tax and its redistributive purpose, the need to avoid double taxation, ([215]) or the objective of optimising the recovery of fiscal debts.

140. Member States should, however, introduce and apply appropriate control and monitoring procedures to ensure that derogations are consistent with the logic and general scheme of the tax system. ([216]) For derogations to be justified by the nature or general scheme of the system, it is also necessary to ensure that those measures are proportionate and do not go beyond what is necessary to achieve the legitimate objective being pursued, in that the objective could not be attained by less far-reaching measures. ([217])

141. A Member State which introduces a differentiation between undertakings needs to be able to show that this differentiation is actually justified by the nature and general scheme of the system in question. ([218])

([211]) A levy introduced in the national legal system transposing an EU directive which provides within its scope for differentiated treatment for certain activities/products can indicate that such activities/products are in a different situation as regards the intrinsic objective pursued.

([212]) See for example Judgment of the Court of Justice of 8 September 2011, *Paint Graphos and others*, Joined Cases C-78/08 to C-80/08, ECLI:EU:C:2011:550, paragraph 69.

([213]) See Judgment of the Court of Justice of 8 September 2011, *Paint Graphos and others*, Joined Cases C-78/08 to C-80/08, ECLI:EU:C:2011:550, paragraphs 69 and 70; Judgment of the Court of Justice of 6 September 2006, *Portugal* v *Commission*, C-88/03, ECLI:EU:C:2006:511, paragraph 81; Judgment of the Court of Justice of 8 September 2011, *Commission* v *Netherlands*, C-279/08 P, ECLI:EU:C:2011:551; Judgment of the Court of Justice of 22 December 2008, *British Aggregates v Commission*, C-487/06 P, ECLI:EU:C:2008:757; Judgment of the Court of Justice of 18 July 2013, *P Oy*, C-6/12, ECLI:EU:C:2013:525, paragraphs 27 et seq.

([214]) For undertakings for collective investment; see section 5.4.2.

([215]) In Judgment of the Court of Justice of 8 September 2011, *Paint Graphos and others*, Joined Cases C-78/08 to C-80/08, ECLI:EU:C:2011:550, the Court referred to the possibility of relying on the nature or general scheme of the national tax system as a justification for the fact that cooperative societies which distribute all their profits to their members are not taxed themselves as cooperatives, provided that tax is levied on the individual members (paragraph 71).

([216]) Judgment of the Court of Justice of 8 September 2011, *Paint Graphos and others*, Joined Cases C-78/08 to C-80/08, ECLI:EU:C:2011:550, paragraph 74.

([217]) Judgment of the Court of Justice of 8 September 2011, *Paint Graphos and others*, Joined Cases C-78/08 to C-80/08, ECLI:EU:C:2011:550, paragraph 75.

([218]) See Judgment of the Court of Justice of 15 November 2011, *Commission and Spain* v *Government of Gibraltar and United Kingdom*, Joined Cases C-106/09 P and C-107/09 P, ECLI:EU:C:2011:732, paragraph 146; Judgment of the Court of Justice of 29 April 2004, *Netherlands* v *Commission*, C-159/01, ECLI:EU:C:2004:246, paragraph 43; Judgment of the Court of Justice of 6 September 2006, *Portugal* v *Commission*, C-88/03, ECLI:EU:C:2006:511.

5.3. **Regional selectivity**

142. In principle, only measures that apply within the entire territory of the Member State escape the regional selectivity criterion laid down in Article 107(1) of the Treaty. However, as outlined below, the reference system does not necessarily have to be defined as the entire Member State. ([219]) It follows that not all measures that apply only to certain parts of the territory of a Member State are automatically selective.

143. As established by the case-law, ([220]) measures with a regional or local scope of application may not be selective if certain requirements are fulfilled. This case-law has so far only dealt with tax measures. However, as regional selectivity is a general concept, the principles set out by the Union Courts as regards tax measures apply to other types of measures as well.

144. In order to assess regional selectivity, three scenarios must be distinguished: ([221])

(1) In the first scenario, which results in the regional selectivity of a measure, the central government of a Member State unilaterally decides to apply a lower level of taxation within a defined geographical area.

(2) The second scenario corresponds to symmetrical devolution of tax powers ([222]) — a model of distribution of tax competences in which all infra-State authorities at a particular level (regions, districts or others) of a Member State have the same autonomous power in law to decide the applicable tax rate within their territory of competence, independently of the central government. In this case, the measures decided by the infra-State authorities are not selective as it is impossible to determine a normal tax rate capable of constituting the reference framework.

(3) In the third scenario — the asymmetrical devolution of tax powers ([223]) — only certain regional or local authorities can adopt tax measures applicable within their territory. In this case, the assessment of the selective nature of the measure at stake depends on whether the authority concerned is sufficiently autonomous from the central government of the Member State. ([224]) This is the case when three cumulative criteria of autonomy are fulfilled: institutional, procedural and economic and financial autonomy. ([225]) If all of these criteria of autonomy are present when a regional or local authority decides to adopt a tax measure applicable only within its territory, then the region in question, not the Member State, constitutes the geographical reference framework.

5.3.1. *Institutional autonomy*

145. The existence of institutional autonomy can be established where the tax measure decision has been taken by a regional or local authority with its own constitutional, political and administrative status that is separate from that of the central government. In the *Azores* case, the Court observed that the Portuguese Constitution recognised the Azores as an autonomous region with its own political and administrative status and self-governing institutions, which also have their own fiscal competence, and the power to adapt national fiscal provisions to particular regional features. ([226])

([219]) Judgment of the Court of Justice of 6 September 2006, *Portugal* v *Commission*, C-88/03, ECLI:EU:C:2006:511, paragraph 57; Judgment of the Court of Justice of 11 September 2008, *Unión General de Trabajadores de La Rioja*, Joined Cases C-428/06 to C-434/06, ECLI:EU:C:2008:488, paragraph 47.

([220]) Judgment of the Court of Justice of 6 September 2006, *Portugal* v *Commission*, C-88/03, ECLI:EU:C:2006:511, paragraphs 57 et seq.; Judgment of the Court of Justice of 11 September 2008, *Unión General de Trabajadores de La Rioja*, Joined Cases C-428/06 to C-434/06, ECLI:EU:C:2008:488, paragraphs 47 et seq.

([221]) Judgment of the Court of Justice of 6 September 2006, *Portugal* v *Commission*, C-88/03, ECLI:EU:C:2006:511, paragraphs 63 to 66.

([222]) See Opinion of Advocate General Geelhoed of 20 October 2005, *Portugal* v *Commission*, C-88/03, ECLI:EU:C:2005:618, paragraph 60.

([223]) Opinion of Advocate General Geelhoed of 20 October 2005, *Portugal* v *Commission*, C-88/03, ECLI:EU:C:2005:618, paragraph 60.

([224]) Judgment of the Court of Justice of 6 September 2006, *Portugal* v *Commission*, C-88/03, ECLI:EU:C:2006:511, paragraph 58: '*It is possible that an infra-state body enjoys legal and factual status which makes it sufficiently autonomous in relation to the central government of a Member State, with the result that, by the measures it adopts, it is that body and not the central government which plays a fundamental role in the definition of the political and economic environment in which undertakings operate*.'

([225]) Judgment of the Court of Justice of 6 September 2006, *Portugal* v *Commission*, C-88/03, ECLI:EU:C:2006:511, paragraph 67.

([226]) Judgment of the Court of Justice of 6 September 2006, *Portugal* v *Commission*, C-88/03, ECLI:EU:C:2006:511, paragraph 70.

146. The assessment of whether this criterion has been fulfilled in each individual case should include, in particular, examination of the constitution and other relevant laws of a given Member State so as to verify whether a given region indeed has its own separate political and administrative status and whether it has its own self-governing institutions which have the power to exercise their own fiscal competence.

5.3.2. *Procedural autonomy*

147. The existence of procedural autonomy can be established where a tax measure decision has been adopted without the central government being able to directly intervene in determining its content.

148. The essential criterion for determining whether procedural autonomy exists is not the extent of the competence that the infra-State body is recognised as having, but the capability of that body, in view of its competence, to adopt a decision on a tax measure independently, that is to say without the central government being able to intervene directly as regards its content.

149. The fact that a consultation or conciliation procedure exists between the central and regional (or local) authorities to avoid conflicts does not automatically mean that an infra-State body does not have procedural autonomy, provided that that body, and not the central government, has the final word on the adoption of the measure at stake. ([227])

150. The mere fact that the acts which an infra-State body adopts are subject to judicial review does not in itself mean that that body lacks procedural autonomy, since the existence of such review is an inherent feature of the rule of law. ([228])

151. A regional (or local) tax measure does not have to be completely separate from a more general tax system for it not to constitute State aid. In particular, it is not necessary that the tax system in question (bases of assessment, tax rates, tax recovery rules and exemptions) is fully devolved to the infra-State body. ([229]) For example, corporate tax devolution limited to the power to vary rates within a limited range, without devolving the power to change the bases of assessment (tax allowances and exemptions, etc.), could be considered as fulfilling the procedural autonomy condition if the pre-defined rate bracket allows the region concerned to exercise meaningful autonomous powers of taxation, without the central government being able to directly intervene as regards content.

5.3.3. *Economic and financial autonomy*

152. The existence of economic and financial autonomy can be established where an infra-State body assumes responsibility for the political and financial consequences of a tax reduction measure. This cannot be the case if the infra-State body is not responsible for managing a budget, that is to say when it does not have control of both revenue and expenditure.

153. Therefore, in establishing the existence of economic and financial autonomy, the financial consequences of the tax measure in the region must not be offset by aid or subsidies from other regions or the central government. Hence, the existence of a direct causal link between the tax measure adopted by the infra-State body and the financial support from other regions or the central government of the Member State concerned rules out the existence of such autonomy. ([230])

([227]) Judgment of the Court of Justice of 11 September 2008, *Unión General de Trabajadores de La Rioja*, Joined Cases C-428/06 to C-434/06, ECLI:EU:C:2008:488, paragraphs 96 to 100.
([228]) Judgment of the Court of Justice of 11 September 2008, *Unión General de Trabajadores de La Rioja*, Joined Cases C-428/06 to C-434/06, ECLI:EU:C:2008:488, paragraphs 80 to 83.
([229]) Judgment of the Court of Justice of 6 September 2006, *Portugal* v *Commission*, C-88/03, ECLI:EU:C:2006:511.
([230]) Judgment of the Court of Justice of 11 September 2008, *Unión General de Trabajadores de La Rioja*, Joined Cases C-428/06 to C-434/06, ECLI:EU:C:2008:488, paragraphs 129 et seq.

154. The existence of economic and financial autonomy is not undermined by the fact that a shortfall in tax revenues as a result of the implementation of devolved tax powers (for example a lower tax rate) is offset by a parallel increase in the same revenues due to the arrival of new businesses attracted by the lower rates.

155. The autonomy criteria do not require the rules governing tax collection to be devolved to the regional or local authorities, nor do they require the tax revenues to actually be collected by those authorities. The central government may continue to be responsible for collecting devolved taxes if the collection costs are borne by the infra-State authority.

5.4. **Specific issues concerning tax measures**

156. Member States are free to decide on the economic policy which they consider most appropriate and, in particular, to spread the tax burden as they see fit across the various factors of production. Nonetheless, Member States must exercise this competence in accordance with Union law. ([231])

5.4.1. *Cooperative societies*

157. In principle, genuine cooperative societies conform to operating principles which distinguish them from other economic operators. ([232]) In particular, they are subject to specific membership requirements and their activities are conducted for the mutual benefit of their members, ([233]) not in the interest of outside investors. In addition, reserves and assets are non-distributable and must be dedicated to the common interest of the members. Finally, cooperatives generally have limited access to equity markets and generate low profit margins.

158. In the light of these particular features, cooperatives can be regarded as not being in a comparable factual and legal situation to that of commercial companies, so that preferential tax treatment for cooperatives may fall outside the scope of the State aid rules provided that: ([234])

— they act in the economic interest of their members;

— their relations with members are not purely commercial, but personal and individual;

— the members are actively involved in the running of the business;

— they are entitled to equitable distribution of the results of economic performance.

159. If, however, the cooperative society under examination is found to be comparable to commercial companies, it should be included in the same reference framework as commercial companies and undergo the three-step analysis as set out in paragraphs 128 to 141. The third step of that analysis requires an analysis of whether the tax regime in question is justified by the logic of the tax system. ([235])

160. For this purpose, it should be noted that the measure needs to be in line with the basic or guiding principles of the Member State's tax system (by reference to the mechanisms inherent to that system). A derogation for

([231]) In particular, Member States must not introduce or maintain legislation which entails incompatible State aid or discrimination that is contrary to the fundamental freedoms. See, for instance, Judgment of the Court of Justice of 17 September 2009, *Glaxo Wellcome*, C-182/08, ECLI:EU:C:2009:559, paragraph 34 and the case-law cited.

([232]) See preamble to Council Regulation (EC) No 1435/2003 of 22 July 2003 on the Statute for a European Cooperative Society.

([233]) Control of cooperatives is vested equally in its members, as reflected in the 'one person, one vote' rule.

([234]) See Judgment of the Court of Justice of 8 September 2011, *Paint Graphos and others*, Joined Cases C-78/08 to C-80/08, ECLI:EU:C:2011:550, paragraphs 55 and 61.

([235]) See Judgment of the Court of Justice of 8 September 2011, *Paint Graphos and others*, Joined Cases C-78/08 to C-80/08, ECLI:EU:C:2011:550, paragraphs 69 to 75.

cooperative societies in the sense that they are not taxed themselves as cooperatives can, for example, be justified by the fact that they distribute all their profits to their members and that tax is then levied on those individual members. In any event, the reduced taxation must be proportionate and not go beyond what is necessary. Moreover, appropriate control and monitoring procedures must be applied by the Member State concerned. ([236])

5.4.2. *Undertakings for collective investment* ([237])

161. It is generally accepted that investment vehicles, such as undertakings for collective investment, ([238]) should be subject to an appropriate level of taxation since they basically operate as intermediary bodies between (third party) investors and the target companies that are the subject of investment. The absence of special tax rules governing investment funds or companies could result in an investment fund being treated as a separate taxpayer — with an additional layer of tax being imposed on any income or gains by the intermediary vehicle. In this context, Member States generally seek to reduce adverse taxation effects on investments through investment funds or companies compared to direct investments by individual investors and, as far as possible, to ensure that the overall final tax burden on the basket of various types of investments is about the same, irrespective of the vehicle used for the investment.

162. Tax measures aimed at ensuring tax neutrality for investments in collective investment funds or companies should not be viewed as selective where those measures do not have the effect of favouring certain undertakings for collective investment or certain types of investments, ([239]) but rather of reducing or eliminating double economic taxation in accordance with the overall principles inherent to the tax system in question. For the purpose of this section, tax neutrality means that taxpayers are treated the same whether they invest in assets, such as government securities and the shares of joint-stock companies, directly or indirectly through investment funds. Accordingly, a tax regime for undertakings for collective investment respecting the purpose of fiscal transparency at the level of the intermediary vehicle may be justified by the logic of the tax system in question, provided that the prevention of double economic taxation constitutes a principle inherent to the tax system in question. By contrast, preferential tax treatment limited to well-defined investment vehicles which fulfil specific conditions ([240]) to the detriment of other investment vehicles that are in a comparable legal and factual situation should be viewed as selective, ([241]) for instance, where tax rules would provide for a favourable treatment of national venture, social impact or long-term investment funds and omit EU-harmonised EuVECA, ([242]) EuSEF ([243]) or ELTIF ([244]) funds.

163. However, tax neutrality does not mean that such investment vehicles should be entirely exempt from any tax or that the fund managers should be exempt from tax on the fees charged by them for managing the underlying

([236]) See Judgment of the Court of Justice of 8 September 2011, *Paint Graphos and others*, Joined Cases C-78/08 to C-80/08, ECLI:EU:C:2011:550, paragraphs 74 and 75.

([237]) This section is not limited to undertakings for collective investment subject to Directive 2009/65/EC of the European Parliament and of the Council on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (UCITS). It also covers other types of collective investment undertakings not covered by that Directive, such as — among others — Alternative Investment Funds as defined by Directive 2011/61/EU of the European Parliament and of the Council (OJ L 174, 1.7.2011, p. 1).

([238]) Such undertakings may be constituted under the law of contract (as common funds managed by management companies) or trust law (as unit trusts) or under statute (as investment companies). See Article 1(3) of the UCITS Directive.

([239]) See Judgment of the General Court of 4 March 2009, *Associazione italiana del risparmio gestito and Fineco Asset Management* v *Commission*, T-445/05, ECLI:EU:T:2009:50, paragraph 78 et seq. where the General Court upheld Commission Decision 2006/638/EC of 6 September 2005 (OJ L 268, 27.9.2006, p. 1), declaring as incompatible with the common market an aid scheme that provides certain undertakings with tax incentives for collective investment in transferable securities specialising in shares of small or medium-sized capitalisation companies which may be traded on the regulated European market.

([240]) For example, preferential tax treatment at the investment vehicle level being conditional upon the investment of three-quarters of the fund's assets in SMEs.

([241]) See Judgment of the General Court of 4 March 2009, *Associazione italiana del risparmio gestito and Fineco Asset Management* v *Commission*, T-445/05, ECLI:EU:T:2009:50, paragraph 150.

([242]) Regulation (EU) No 345/2013 of the European Parliament and of the Council of 17 April 2013 on European venture capital funds (OJ L 115, 25.4.2013, p. 1).

([243]) Regulation (EU) No 346/2013 of the European Parliament and of the Council of 17 April 2013 on European social entrepreneurship funds (OJ L 115, 25.4.2013, p. 18).

([244]) Regulation (EU) 2015/760 of the European Parliament and of the Council of 29 April 2015 on European long-term investment funds (OJ L 123, 19.5.2015, p. 98).

assets being invested into by the funds. ([245]) Nor does it justify a more beneficial tax treatment of a collective investment than of an individual investment for the tax regimes in question. ([246]) In such cases, the tax regime would be disproportionate and would go beyond what is necessary to achieve the objective of preventing double taxation and would therefore constitute a selective measure.

5.4.3. *Tax amnesties*

164. Tax amnesties commonly involve immunity from criminal penalties, fines and (some or all) interest payments. While certain amnesties require payment in full of tax amounts due, ([247]) others entail a partial waiver of the amount of tax due. ([248])

165. In general, a tax amnesty measure that applies to undertakings can be considered a general measure if the conditions below are met. ([249])

166. First, the measure is effectively open to any undertaking of any sector or size that has outstanding tax liabilities due at the date set by the measure, without favouring any pre-defined group of undertakings. Second, it does not entail any *de facto* selectivity in favour of certain undertakings or sectors. Third, the tax administration's action is limited to administering the implementation of the tax amnesty without any discretionary power to intervene in the granting or intensity of the measure. Finally, the measure does not entail a waiver from verification.

167. The limited temporal application of tax amnesties, which apply only for a short period ([250]) to tax liabilities which were due before a pre-defined date and which are still due at the time of the introduction of the tax amnesty, is inherent to the concept of a tax amnesty that aims to improve both the collection of taxes and taxpayers' compliance.

168. Tax amnesty measures may also be considered as general measures if they follow the national legislature's objective of ensuring compliance with a general principle of law, such as the principle that a judgment must be given within a reasonable period of time. ([251])

5.4.4. *Tax rulings and settlements*

5.4.4.1. Administrative tax rulings

169. The function of a tax ruling is to establish in advance the application of the ordinary tax system to a particular case in view of its specific facts and circumstances. For reasons of legal certainty, many national tax authorities provide prior administrative rulings on how specific transactions will be treated fiscally. ([252]) This may be done

([245]) The logic of neutrality behind the special taxation of investment undertakings applies to the fund capital, but not to the management companies' own revenues and capital. See State aid Decision of the EFTA Surveillance Authority of 18 March 2009 with regard to the taxation of investment undertakings in Lichtenstein.

([246]) See Commission Decision of 12 May 2010, N 131/2009, Finland, Residential Real Estate Investment Trust (REIT) scheme (OJ C 178, 3.7.2010, p. 1), recital 33.

([247]) Tax amnesties may also provide the possibility to report undeclared assets or incomes.

([248]) See Judgment of the Court of Justice of 29 March 2012, *Ministero dell'Economia e delle Finanze*, C-417/10, ECLI:EU:C:2012:184, paragraph 12.

([249]) See Commission Decision of 11 July 2012 on the tax amnesty measure notified by Latvia, SA.33183 (OJ C 1, 4.1.2013, p. 6).

([250]) The period of application should be sufficient to allow all taxpayers to whom the measure applies to seek to benefit from it.

([251]) See Judgment of the Court of Justice of 29 March 2012, *Ministero dell'Economia e delle Finanze*, C-417/10, ECLI:EU:C:2012:184, paragraphs 40, 41 and 42.

([252]) Some Member States have adopted circulars regulating the scope and extent of their ruling practices. Some of them also publish their rulings.

to establish in advance how the provisions of a bilateral tax treaty or national fiscal provisions will be applied to a particular case or how 'arm's-length profits' will be set for related party transactions where uncertainty justifies an advance ruling to ascertain whether certain intra-group transactions are priced at arm's length. ([253]) Member States can provide their taxpayers with legal certainty and predictability on the application of general tax rules, which is best ensured if its administrative ruling practice is transparent and the rulings are published.

170. The grant of a tax ruling must, however, respect the State aid rules. Where a tax ruling endorses a result that does not reflect in a reliable manner what would result from a normal application of the ordinary tax system, that ruling may confer a selective advantage upon the addressee, in so far as that selective treatment results in a lowering of that addressee's tax liability in the Member State as compared to companies in a similar factual and legal situation.

171. The Court of Justice has held that a reduction in the taxable base of an undertaking that results from a tax measure that enables a taxpayer to employ transfer prices in intra-group transactions that do not resemble prices which would be charged in conditions of free competition between independent undertakings negotiating under comparable circumstances at arm's length confers a selective advantage on that taxpayer, by virtue of the fact that its tax liability under the ordinary tax system is reduced as compared to independent companies which rely on their actually recorded profit to determine their taxable base. ([254]) Accordingly, a tax ruling which endorses a transfer pricing methodology for determining a corporate group entity's taxable profit that does not result in a reliable approximation of a market-based outcome in line with the arm's length principle confers a selective advantage upon its recipient. The search for a 'reliable approximation of a market-based outcome' means that any deviation from the best estimate of a market-based outcome must be limited and proportionate to the uncertainty inherent in the transfer pricing method chosen or the statistical tools employed for that approximation exercise.

172. This arm's length principle necessarily forms part of the Commission's assessment of tax measures granted to group companies under Article 107(1) of the Treaty, independently of whether a Member State has incorporated this principle into its national legal system and in what form. It is used to establish whether the taxable profit of a group company for corporate income tax purposes has been determined on the basis of a methodology that produces a reliable approximation of a market-based outcome. A tax ruling endorsing such a methodology ensures that that company is not treated favourably under the ordinary rules of corporate taxation of profits in the Member State concerned as compared to standalone companies who are taxed on their accounting profit, which reflects prices determined on the market negotiated at arm's length. The arm's length principle the Commission applies in assessing transfer pricing rulings under the State aid rules is therefore an application of Article 107(1) of the Treaty, which prohibits unequal treatment in taxation of undertakings in a similar factual and legal situation. This principle binds the Member States and the national tax rules are not excluded from its scope. ([255])

([253]) See Commission Decision of 21 October 2015 in Case SA.38374, Starbucks, not yet published, Commission Decision of 21 October 2015 in Case SA.38375, Fiat, not yet published, Commission Decision of 11 January 2016 in Case SA.37667, excess profit exemption state aid scheme, not yet published, all cases are under appeal.

([254]) See Judgment of the Court of Justice of 22 June 2006, *Belgium and Forum 187* v *Commission*, Joined Cases C-182/03 and C-217/03, ECLI:EU:C:2006:416. In that judgment on the Belgian tax regime for coordination centres, the Court of Justice assessed a challenge to a Commission decision (Commission Decision 2003/757/EC of 17 February 2003 on the aid scheme implemented by Belgium for coordination centres established in Belgium (OJ L 282, 30.10.2003, p. 25)) which concluded, inter alia, that the method for determining taxable income under that regime conferred a selective advantage on those centres. Under that regime, taxable profit was established at a flat-rate amount which represented a percentage of the full amount of operating costs and expenses, from which staff costs and financial charges were excluded. According to the Court, '*in order to decide whether a method of assessment of taxable income such as that laid down under the regime for coordination centres confers an advantage on them, it is necessary, […], to compare that regime with the ordinary tax system, based on the difference between profit and outgoings of an undertaking carrying on its activities in conditions of free competition.*' The Court then held that '*the effect of the exclusion of [staff costs and the financial costs] from the expenditure which serves to determine the taxable income of the centres is that the transfer prices do not resemble those which would be charged in conditions of free competition*', which the Court found to '*[confer] an advantage on the coordination centres*' (paragraphs 96 and 97).

([255]) See Judgment of the Court of Justice of 22 June 2006, *Belgium and Forum 187* v *Commission*[Joined Cases C-182/03 and C-217/03, ECLI:EU:C:2006:416, paragraph 81. See also Judgment of the General Court of 25 March 2015, *Belgium v Commission*, T-538/11, ECLI:EU:T:2015:188, paragraphs 65 and 66 and the case-law cited.

173. When examining whether a transfer pricing ruling complies with the arm's length principle inherent in Article 107(1) of the Treaty, the Commission may have regard to the guidance provided by the Organisation for Economic Cooperation and Development ('OECD'), in particular the 'OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations'. Those guidelines do not deal with matters of State aid *per se*, but they capture the international consensus on transfer pricing and provide useful guidance to tax administrations and multinational enterprises on how to ensure that a transfer pricing methodology produces an outcome in line with market conditions. Consequently, if a transfer pricing arrangement complies with the guidance provided by the OECD Transfer Pricing Guidelines, including the guidance on the choice of the most appropriate method and leading to a reliable approximation of a market based outcome, a tax ruling endorsing that arrangement is unlikely to give rise to State aid.

174. In sum, tax rulings confer a selective advantage on their addressees in particular where:

(a) the ruling misapplies national tax law and this results in a lower amount of tax; ([256])

(b) the ruling is not available to undertakings in a similar legal and factual situation; ([257]) or

(c) the administration applies a more 'favourable' tax treatment compared with other taxpayers in a similar factual and legal situation. This could, for instance, be the case where the tax authority accepts a transfer pricing arrangement which is not at arm's length because the methodology endorsed by that ruling produces an outcome that departs from a reliable approximation of a market-based outcome. ([258]) The same applies if the ruling allows its addressee to use alternative, more indirect methods for calculating taxable profits, for example the use of fixed margins for a cost-plus or resale-minus method for determining an appropriate transfer pricing, while more direct ones are available. ([259])

5.4.4.2. Tax settlements

175. Tax settlements generally occur in the context of disputes between a taxpayer and the tax authorities concerning the amount of tax owed. They constitute a common practice in a number of Member States. The conclusion of such tax settlements allows tax authorities to avoid long-standing legal disputes before national jurisdictions and to ensure quick recovery of the tax due. While the competence of Member States in this field is not in dispute, State aid may be involved in the conclusion of a tax settlement, in particular where it appears that the amount of tax due has been reduced without clear justification (such as optimising the recovery of debt) or in a disproportionate manner to the benefit of the taxpayer. ([260])

([256]) See Commission Decision 2003/601/EC of 17 February 2003 on the Foreign Income aid scheme implemented by Ireland (OJ L 204, 13.8.2003, p. 51), recitals 33 to 35.

([257]) For example, this would be the case if some undertakings involved in transactions with controlled entities are not allowed to request such rulings, contrary to a pre-defined category of undertakings. See in this respect Commission Decision 2004/77/EC of 24 June 2003 on the tax ruling system for US foreign sales corporations (OJ L 23, 28.1.2004, p. 14), recitals 56 to 62.

([258]) See Commission Decision of 21 October 2015 in Case SA.38374, Starbucks, not yet published, Commission Decision of 21 October 2015 in Case SA.38375, Fiat, not yet published, Commission Decision of 11 January 2016 in Case SA.37667, excess profit exemption state aid scheme, not yet published, all cases are under appeal.

([259]) See Commission Decision 2003/438/EC of 16 October 2002 on State aid C 50/2001, Luxembourg Finance Companies (OJ L 153, 20.6.2003, p. 40), recitals 43 and 44; Commission Decision 2003/501/EC of 16 October 2002 on State aid C 49/2001, Luxembourg Coordination centres (OJ L 170, 9.7.2003, p. 20), recitals 46, 47 and 50; Commission Decision 2003/757/EC of 17 February 2003, Belgian Coordination centres (OJ L 282, 30.10.2003, p. 25), recitals 89 to 95 and the related Judgment of the Court of Justice of 22 June 2006, *Belgium and Forum 187* v *Commission*, Joined Cases C-182/03 and C-217/03, ECLI:EU:C:2006:416, paragraphs 96 and 97; Commission Decision 2004/76/EC of 13 May 2003, French Headquarters and Logistic Centres (OJ L 23, 28.1.2004, p. 1), recitals 50 and 53; Commission Decision of 21 October 2015 in Case SA.38374, *Starbucks*, not yet published, under appeal, recitals 282 to 285; Commission Decision of 21 October 2015 in Case SA.38375, *Fiat*, not yet published, under appeal, recital 245.

([260]) See Commission Decision 2011/276/EU of 26 May 2010 on State aid C-76/03, Umicore SA (OJ L 122, 11.5.2011, p. 76).

176. In this context, a transaction between the tax administration and a taxpayer may in particular entail a selective advantage where: ([261])

(a) in making disproportionate concessions to a taxpayer, the administration applies a more 'favourable' discretionary tax treatment compared to other taxpayers in a similar factual and legal situation;

(b) the settlement is contrary to the applicable tax provisions and has resulted in a lower amount of tax, outside a reasonable range. This might be the case, for example, where established facts should have led to a different assessment of the tax on the basis of the applicable provisions (but the amount of tax due has been unlawfully reduced).

5.4.5. *Depreciation/amortisation rules*

177. In general, tax measures of a purely technical nature such as depreciation/amortisation rules do not constitute State aid. The method of calculating asset depreciation varies from one Member State to another, but such methods may be inherent to the tax systems to which they belong.

178. The difficulty in assessing possible selectivity with regard to the depreciation rate of certain assets lies in the requirement to establish a benchmark (from which a specific rate or depreciation method would possibly derogate). While in accounting terms, the purpose of this exercise is generally to reflect the economic depreciation of the assets with the aim of presenting a fair view of the financial situation of the company, the fiscal process follows different purposes such as allowing companies to spread deductible expenses over time.

179. Depreciation incentives (such as a shorter term of depreciation, a more favourable depreciation method, ([262]) early depreciation, etc.) for certain types of assets or undertakings, which are not based on the guiding principles of the depreciation rules in question, may give rise to the existence of State aid. In contrast, accelerated and early depreciation rules for leased assets may be seen as general measures if the lease contracts in question are really accessible to companies of all sectors and sizes. ([263])

180. If the tax authority has discretionary power to set different depreciation periods or different valuation methods, firm by firm or sector by sector, there is obviously a presumption of selectivity. Likewise, prior authorisation from a tax administration as a condition for applying a depreciation scheme involves selectivity if the authorisation is not limited to the prior verification of the legal requirements. ([264])

5.4.6. *Fixed basis tax regime for specific activities*

181. Specific provisions that do not contain discretionary elements, allowing, for example, income tax to be determined on a fixed basis, may be justified by the nature and general scheme of the system where, for instance, they take account of specific accounting requirements or of the importance of land in assets which are specific to certain sectors.

([261]) See Commission Decision 2011/276/EU of 26 May 2010 on State aid C-76/03, Umicore SA (OJ L 122, 11.5.2011, p. 76), recital 155.
([262]) Declining-balance method or the sum-of-the-years' digits method as opposed to the most common straight-line method.
([263]) See Commission Decision of 20 November 2012 on SA.34736 on the early depreciation of certain assets acquired through a financial leasing (OJ C 384, 13.12.2012, p. 1).
([264]) See Commission Decision of 20 December 2006 on the aid scheme implemented by France under Article 39 CA of the General Tax Code (OJ L 112, 30.4.2007, p. 41), recital 122.

182. Such provisions are therefore not selective, if the following conditions are fulfilled:

(a) the fixed basis regime is justified by the concern to avoid disproportionate administrative burden on certain types of undertakings because of their small size or sector of activity (for example in the agriculture or fisheries sectors);

(b) on average, the fixed basis regime does not have the effect of implying a lower tax burden for those undertakings as compared to other undertakings excluded from its scope and does not entail advantages for a sub-category of beneficiaries of the regime.

5.4.7. *Anti-abuse rules*

183. The provision of anti-abuse rules may be justified as measures to prevent tax avoidance by taxpayers. ([265]) However, such rules might be selective if they provide for a derogation (non-application of the anti-abuse rules) to specific undertakings or transactions, which would not be consistent with the logic underlying the anti-abuse rules in question. ([266])

5.4.8. *Excise duties*

184. Although excise duties are largely harmonised at Union level (which may affect the imputability criterion ([267])), this does not automatically imply that any duty relief in these areas would fall outside the scope of the State aid rules. In fact, a reduced excise duty can grant a selective advantage to the undertakings which use the product in question as an input or sell it on the market. ([268])

6. EFFECT ON TRADE AND COMPETITION

6.1. General principles

185. Public support to undertakings only constitutes State aid under Article 107(1) of the Treaty if it 'distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods' and only insofar as it 'affects trade between Member States'.

186. These are two distinct and necessary elements of the notion of aid. In practice, however, these criteria are often treated jointly in the assessment of State aid as they are, as a rule, considered inextricably linked. ([269])

([265]) Judgment of the Court of Justice of 29 April 2004, *GIL Insurance*, C-308/01, ECLI:EU:C:2004:252, paragraphs 65 et seq.
([266]) See Commission Decision 2007/256/EC of 20 December 2006 on the aid scheme implemented by France under Article 39 CA of the General Tax Code (OJ L 112, 30.4.2007, p. 41), recital 81 et seq.
([267]) See section 3.1.
([268]) See, for instance, Commission Decision 1999/779/EC of 3 February 1999 on an Austrian aid granted in the form of an exemption from beverage tax of wine and other fermented beverages sold directly on the place of production to the consumer (OJ L 305, 30.11.1999, p. 27).
([269]) Judgment of the General Court of 15 June 2000, *Alzetta*, Joined Cases T-298/97, T-312/97 etc., ECLI:EU:T:2000:151, paragraph 81.

6.2. **Distortion of competition**

187. A measure granted by the State is considered to distort or threaten to distort competition when it is liable to improve the competitive position of the recipient compared to other undertakings with which it competes. ([270]) For all practical purposes, a distortion of competition within the meaning of Article 107(1) of the Treaty is generally found to exist when the State grants a financial advantage to an undertaking in a liberalised sector where there is, or could be, competition. ([271])

188. The fact that the authorities assign a public service to an in-house provider (even if they were free to entrust that service to third parties) does not as such exclude a possible distortion of competition. However, a possible distortion of competition is excluded if the following cumulative conditions are met:

(a) a service is subject to a legal monopoly (established in compliance with EU law); ([272])

(b) the legal monopoly not only excludes competition on the market, but also for the market, in that it excludes any possible competition to become the exclusive provider of the service in question; ([273])

(c) the service is not in competition with other services; and

(d) if the service provider is active in another (geographical or product) market that is open to competition, cross-subsidisation has to be excluded. This requires that separate accounts are used, costs and revenues are allocated in an appropriate way and public funding provided for the service subject to the legal monopoly cannot benefit other activities.

189. Public support is liable to distort competition even if it does not help the recipient undertaking to expand and gain market share. It is enough that the aid allows it to maintain a stronger competitive position than it would have had if the aid had not been provided. In this context, for aid to be considered to distort competition, it is normally sufficient that the aid gives the beneficiary an advantage by relieving it of expenses it would otherwise have had to bear in the course of its day-to-day business operations. ([274]) The definition of State aid does not require that the distortion of competition or effect on trade is significant or material. The fact that the amount of aid is low or the recipient undertaking is small will not in itself rule out a distortion of competition or the threat thereof, ([275]) provided however that the likelihood of such a distortion is not merely hypothetical. ([276])

6.3. **Effect on trade**

190. Public support to undertakings only constitutes State aid under Article 107(1) of the Treaty insofar as it 'affects trade between Member States'. In that respect, it is not necessary to establish that the aid has an actual effect on

([270]) Judgment of the Court of Justice of 17 September 1980, *Philip Morris*, 730/79, ECLI:EU:C:1980:209, paragraph 11; Judgment of the General Court of 15 June 2000, *Alzetta*, Joined Cases T-298/97, T-312/97 etc., ECLI:EU:T:2000:151, paragraph 80.

([271]) Judgment of the General Court of 15 June 2000, *Alzetta*, Joined Cases T-298/97, T-312/97 etc., ECLI:EU:T:2000:151, paragraphs 141 to 147; Judgment of the Court of Justice of 24 July 2003, *Altmark Trans*, C-280/00, ECLI:EU:C:2003:415.

([272]) A legal monopoly exists where a given service is reserved by law or regulatory measures to an exclusive provider, with a clear prohibition for any other operator to provide such service (not even to satisfy a possible residual demand from certain customer groups). However, the mere fact that the provision of a public service is entrusted to a specific undertaking does not mean that such undertaking enjoys a legal monopoly.

([273]) Judgment of the General Court of 16 July 2014, *Germany* v *Commission*, T-295/12, ECLI:EU:T:2014:675, paragraph 158; Commission Decision of 7 July 2002 on State aid No N 356/2002 — United Kingdom — Network Rail (OJ C 232, 28.9.2002, p. 2), recitals 75, 76 and 77. For example, if a concession is awarded through a competitive procedure there is competition for the market.

([274]) Judgment of the Court of Justice of 3 March 2005, *Heiser*, C-172/03, ECLI:EU:C:2005:130, paragraph 55.

([275]) Judgment of the General Court of 29 September 2000, *Confederación Espanola de Transporte de Mercancías* v *Commission*, T-55/99, ECLI:EU:T:2000:223, paragraph 89; Judgment of the Court of Justice of 24 July 2003, *Altmark Trans*, C-280/00, ECLI:EU:C:2003:415, paragraph 81.

([276]) Judgment of the Court of Justice of 24 July 2003, *Altmark Trans*, C-280/00, ECLI:EU:C:2003:415, paragraph 79.

trade between Member States but only whether the aid is liable to affect such trade. ([277]) In particular, the Union Courts have ruled that 'where State financial aid strengthens the position of an undertaking as compared with other undertakings competing in intra-[Union] trade, the latter must be regarded as affected by the aid.' ([278])

191. Public support can be considered capable of having an effect on trade between Member States even if the recipient is not directly involved in cross-border trade. For instance, the subsidy may make it more difficult for operators in other Member States to enter the market by maintaining or increasing local supply. ([279])

192. The relatively small amount of aid or the relatively small size of the undertaking which receives it does not as such exclude the possibility that trade between Member States might be affected. ([280]) A public subsidy granted to an undertaking which provides only local or regional services and does not provide any services outside its State of origin may nonetheless have an effect on trade between Member States where undertakings from other Member States could provide such services (also through the right of establishment) and that possibility is not merely hypothetical. For example, where a Member State grants a public subsidy to an undertaking for supplying transport services, the supply of those services may, by virtue of the subsidy, be maintained or increased with the result that undertakings established in other Member States have less of a chance of providing their transport services in the market in that Member State. ([281]) Such an effect may, however, be less likely where the scope of the economic activity is very small, as may for instance be evidenced by a very low turnover.

193. In principle, an effect on trade can also occur even if the recipient exports all or most of its production outside the Union, but in such situations the effect is less immediate and cannot be assumed from the mere fact that the market is open to competition. ([282])

194. In establishing an effect on trade, it is not necessary to define the market or to investigate in detail the impact of the measure on the competitive position of the beneficiary and its competitors. ([283])

195. However, an effect on trade between Member States cannot be merely hypothetical or presumed. It must be established why the measure distorts or threatens to distort competition and is liable to have an effect on trade between Member States, based on the foreseeable effects of the measure. ([284])

196. The Commission has in a number of decisions considered, in view of the specific circumstances of the cases, that the measure had a purely local impact and consequently had no effect on trade between Member States. In those cases the Commission ascertained in particular that the beneficiary supplied goods or services to a limited area within a Member State and was unlikely to attract customers from other Member States, and that it could not be foreseen that the measure would have more than a marginal effect on the conditions of cross-border investments or establishment.

([277]) Judgment of the Court of Justice of 14 January 2015, *Eventech* v *The Parking Adjudicator*, C-518/13, ECLI:EU:C:2015:9, paragraph 65; Judgment of the Court of Justice of 8 May 2013, *Libert and others*, Joined Cases C-197/11 and C-203/11, ECLI:EU:C:2013:288, paragraph 76.

([278]) Judgment of the Court of Justice of 14 January 2015, *Eventech* v *The Parking Adjudicator*, C-518/13, ECLI:EU:C:2015:9, paragraph 66; Judgment of the Court of Justice of 8 May 2013, *Libert and others*, Joined Cases C-197/11 and C-203/11, ECLI:EU:C:2013:288, paragraph 77; Judgment of the General Court of 4 April 2001, *Friulia Venezia Giulia*, T-288/97, ECLI:EU:T:2001:115, paragraph 41.

([279]) Judgment of the Court of Justice of 14 January 2015, *Eventech* v *The Parking Adjudicator*, C-518/13, ECLI:EU:C:2015:9, paragraph 67; Judgment of the Court of Justice of 8 May 2013, *Libert and others*, Joined Cases C-197/11 and C-203/11, ECLI:EU:C:2013:288, paragraph 78; Judgment of the Court of Justice of 24 July 2003, *Altmark Trans*, C-280/00, ECLI:EU:C:2003:415, paragraph 78.

([280]) Judgment of the Court of Justice of 14 January 2015, *Eventech* v *The Parking Adjudicator*, C-518/13, ECLI:EU:C:2015:9, paragraph 68.

([281]) Judgment of the Court of Justice of 24 July 2003, *Altmark Trans*, C-280/00, ECLI:EU:C:2003:415, paragraphs 77 and 78.

([282]) Judgment of the Court of Justice of 21 March 1990, *Belgium* v *Commission ('Tubemeuse')*, C-142/87, ECLI:EU:C:1990:125, paragraph 35; Judgment of the Court of Justice of 30 April 2009, *Commission* v *Italian Republic and Wam SpA*, C-494/06 P, ECLI:EU:C:2009:272, paragraph 62.

([283]) Judgment of the Court of Justice of 17 September 1980, *Philip Morris*, 730/79, ECLI:EU:C:1980:209; Judgment of the General Court of 4 September 2009, *Italy* v *Commission*, T-211/05, ECLI:EU:T:2009:304, paragraphs 157 to 160; Judgment of the General Court of 15 June 2000, *Alzetta*, Joined Cases T-298/97, T-312/97 etc., ECLI:EU:T:2000:151, paragraph 95.

([284]) Judgment of the General Court of 6 July 1995, *AITEC and others* v *Commission*, Joined Cases T-447/93, T-448/93 and T-449/93, ECLI:EU:T:1995:130, paragraph 141.

197. While it is not possible to define general categories of measures that typically meet these criteria, past decisions provide examples of situations where the Commission found, in the light of the specific circumstances of the case, that public support was not liable to affect trade between Member States. Some examples of such cases are:

(a) sports and leisure facilities serving predominantly a local audience and unlikely to attract customers or investment from other Member States; ([285])

(b) cultural events and entities performing economic activities ([286]) which however are unlikely to attract users or visitors away from similar offers in other Member States; ([287]) the Commission considers that only funding granted to large and renowned cultural institutions and events in a Member State which are widely promoted outside their home region has the potential to affect trade between Member States;

(c) hospitals and other health care facilities providing the usual range of medical services aimed at a local population and unlikely to attract customers or investment from other Member States; ([288])

(d) news media and/or cultural products which, for linguistic and geographical reasons, have a locally restricted audience; ([289])

(e) a conference centre, where its location and the potential effect of the aid on prices is genuinely unlikely to divert users from other centres in other Member States; ([290])

(f) an information and networking platform to directly address problems of unemployment and social conflicts in a predefined and very small local area; ([291])

(g) small airports ([292]) or ports ([293]) that predominately serve local users, thereby limiting competition for the services offered to a local level, and for which the impact on cross-border investment is genuinely no more than marginal;

([285]) See, for instance, Commission Decisions on State aid cases in N 258/2000 Leisure Pool Dorsten (OJ C 172, 16.6.2001, p. 16); C 10/2003 — Netherlands — Non-profit harbours for recreational crafts (OJ L 34, 6.2.2004, p. 63); SA.37963 — United Kingdom — Alleged State aid to Glenmore Lodge (OJ C 277, 21.8.2015, p. 3); SA.38208 — United Kingdom — Alleged State aid to UK member-owned golf clubs (OJ C 277, 21.8.2015, p. 4).

([286]) See section 2.6 for the conditions under which cultural or heritage conservation activities are economic in nature in the meaning of Article 107(1) of the Treaty. For cultural or heritage conservation activities which are not economic in nature an assessment whether possible public funding may have an effect on trade is not necessary.

([287]) See, for instance, the Commission decisions in State aid cases N 630/2003 Local Museums Sardinia (OJ C 275, 8.11.2005, p. 3); SA.34466 Cyprus — Center for Visual Arts and Research (OJ C 1, 4.1.2013, p. 10); SA.36581 Greece — Construction of Archaeogical Museum, Messara, Crete (OJ C 353, 3.12.2013, p. 4); SA.35909 (2012/N) — Czech Republic — Infrastructure for tourism (NUTS II region Southeast) (OJ C 306, 22.10.2013, p. 4); SA.34891 (2012/N) — Poland — State support to Związek Gmin Fortecznych Twierdzy Przemyśl (OJ C 293, 9.10.2013, p. 1).

([288]) See, for instance, Commission Decisions in State aid cases N 543/2001 Ireland — Capital allowances for hospitals (OJ C 154, 28.6.2002, p. 4); SA.34576 Portugal — Jean Piaget North-east Continuing Care Unit (OJ C 73, 13.3.2013, p. 1); SA.37432 — Czech Republic — Funding to public hospitals in the Hradec Králové Region (OJ C 203, 19.6.2015, p. 2); SA.37904 — Germany — Alleged State aid to medical center in Durmersheim (OJ C 188, 5.6.2015, p. 2); SA.38035 — Germany — Alleged aid to a specialised rehabilitation clinic for orthopaedic medicine and trauma surgery (OJ C 188, 5.6.2015, p. 3).

([289]) See, for instance, Commission Decisions in State aid cases N 257/2007 Subsidies for theatre productions in the Basque country (OJ C 173, 26.7.2007, p. 1); N 458/2004 Editorial Andaluza Holding (OJ C 131, 28.5.2005, p. 1); SA.33243 Jornal da Madeira (OJ C 16, 19.1.2013, p. 1).

([290]) See, for instance, the Commission Decision in State aid case N 486/2002 Sweden — Congress hall in Visby (OJ C 75, 27.3.2003, p. 2).

([291]) See Commission Decision on State aid in SA.33149 — Germany — Alleged unlawful State aid for the Städtische Projekt 'Wirtschaftsbür Gaarden' — Kiel (OJ C 188, 5.6.2015, p. 1).

([292]) See, for instance, Commission Decision in State aid in case SA.38441 — United Kingdom — Isles of Scilly Air links (OJ C 5, 9.1.2015, p. 4).

([293]) See, for instance, Commission Decisions in State aid cases SA.39403 — Netherlands — Investment in the port of Lauwersoog (OJ C 259, 7.8.2015, p. 4); SA.42219 — Germany — Refurbishment of the Schuhmacher-quay in the port of Maasholm (OJ C 426, 18.12.2015, p. 5).

(h) the financing of certain cable ways (and in particular ski lifts) in areas with few facilities and limited tourism capability. The Commission has clarified that the following factors are typically taken into account to draw a distinction between installations supporting an activity capable of attracting non-local users, which are generally considered to have an effect on trade, and sport-related installations in areas with few facilities and limited tourism capability, where public support may not have an effect on trade between Member States: ([294]) a) the location of the installation (for example within cities or linking villages); b) operating time; c) predominantly local users (proportion of daily as opposed to weekly passes); d) the total number and capacity of installations relative to the number of resident users; e) other tourism-related facilities in the area. Similar factors could, with the necessary adjustments, also be relevant for other types of facilities.

198. Even if the circumstances in which the aid is granted are in most cases sufficient to show that the aid is capable of affecting trade between Member States and of distorting or threatening to distort competition, those circumstances should be appropriately set out. In the case of aid schemes, it is normally sufficient to examine the characteristics of the particular scheme. ([295])

7. INFRASTRUCTURE: SOME SPECIFIC CLARIFICATIONS

7.1. Introduction

199. The guidance regarding the notion of State aid as set out in this Notice applies to the public funding of infrastructure having an economic use, as it applies to any other public funding that favours an economic activity. ([296]) However, given the strategic importance of public funding of infrastructure, not least for the promotion of growth, and the questions which it often raises, it is appropriate to provide specific guidance on when public funding of infrastructure favours an undertaking, grants an advantage and has an effect on competition and on trade between Member States.

200. Infrastructure projects often involve several categories of actors and any State aid involved may potentially benefit the construction (including extensions or improvements), the operation or the use of the infrastructure. ([297]) For the purposes of this section, it is, therefore, useful to distinguish between the developer and/or first owner ('developer/owner' ([298])) of an infrastructure, the operators (that is to say undertakings who make direct use of the infrastructure to provide services to end-users, including undertakings which acquire the infrastructure from the developer/owner to exploit it economically or which obtain a concession or lease for the use and operation of the infrastructure), and the end-users of an infrastructure, although these functions may in some cases overlap.

7.2. Aid to the developer/owner

7.2.1. *Economic activity versus non-economic activity*

201. The public funding of much infrastructure was traditionally considered to fall outside the State aid rules since their construction and operation were considered to constitute general measures of public policy and not an economic activity. ([299]) More recently, several factors, such as liberalisation, privatisation, market integration and technological progress have, however, increased the scope for commercial exploitation of infrastructures.

([294]) Commission communication to the Member States and other interested parties concerning State aid N 376/01 — Aid scheme for cableways (OJ C 172, 18.7.2002, p. 2).
([295]) See, for instance, Judgment of the Court of Justice of 14 October 1987, *Germany* v *Commission*, 248/84, ECLI:EU:C:1987:437, paragraph 18.
([296]) 'Public funding to infrastructure' is meant to include all forms of provision of State resources for the construction, acquisition or operation of infrastructure.
([297]) This section does not concern potential aid to contractors involved in the construction of infrastructure.
([298]) 'Owner' includes any entity exercising the effective ownership rights over the infrastructure and enjoying the economic benefits thereof. For example, in case the owner delegates its ownership rights to a separate entity (for example to a port authority) who manages the infrastructure on behalf of the owner, this can be seen as replacing the owner for the purposes of State aid control.
([299]) Twenty-Fifth Report on Competition Policy, 1995, pt. 175.

202. In the *Aéroports de Paris* judgment ([300]) the General Court acknowledged this evolution, clarifying that the operation of an airport had to be seen as an economic activity. More recently, the *Leipzig/Halle* judgment ([301]) confirmed that the construction of a commercial airport runway is an economic activity in itself. While these cases relate specifically to airports, the principles developed by the Union Courts appear to be of broader interpretation and thus applicable to the construction of other infrastructures that are indissociably linked to an economic activity. ([302])

203. On the other hand, the funding of infrastructure that is not meant to be commercially exploited is in principle excluded from the application of the State aid rules. This concerns, for instance, infrastructure that is used for activities that the State normally performs in the exercise of its public powers (for instance, military facilities, air traffic control in airports, lighthouses and other equipment for the needs of general navigation including on inland waterways, flood protection and low water management in the public interest, police and customs) or that is not used for offering goods or services on a market (for instance roads made available for free public use). Such activities are not of an economic nature and consequently fall outside the scope of the State aid rules, as does, accordingly, the public funding of the related infrastructure. ([303])

204. 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. ([304])

205. If an infrastructure is used for both economic and non-economic activities, public funding for its construction will fall under the State aid rules only insofar as it covers the costs linked to the economic activities.

206. If an entity is engaged in economic and non-economic activities, Member States have to ensure that the public funding provided for the non-economic activities cannot be used to cross-subsidize the economic activities. This can notably be ensured by limiting the public funding to the net cost (including the cost of capital) of the non-economic activities, to be identified on the basis of a clear separation of accounts.

207. If, in cases of mixed use, 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. ([305]) Examples of such ancillary economic activities may include a research organisation occasionally renting out its equipment and laboratories to industrial partners. ([306]) The Commission also considers that public financing provided to customary amenities (such as

([300]) Judgment of the General Court of 12 December 2000, *Aéroports de Paris* v *Commission*, T-128/98, ECLI:EU:T:2000:290, paragraph 125, confirmed on appeal in Judgment of the Court of Justice of 24 October 2002, *Aéroports de Paris* v *Commission*, C-82/01 P, ECLI:EU:C:2002:617. See also Judgment of the General Court of 17 December 2008, *Ryanair* v *Commission*, T-196/04, ECLI:EU:T:2008:585, paragraph 88.

([301]) Judgment of the General Court of 24 March 2011, *Freistaat Sachsen and Land Sachsen-Anhalt and Others* v *Commission*, Joined Cases T-443/08 and T-455/08, ECLI:EU:T:2011:117, in particular paragraphs 93 and 94, upheld on appeal in Judgment of the Court of Justice of 19 December 2012, *Mitteldeutsche Flughafen AG and Flughafen Leipzig-Halle GmbH* v *Commission*, C-288/11 P, ECLI:EU:C:2012:821, in particular paragraphs 40 to 43, 47.

([302]) Judgment of the Court of Justice of 19 December 2012, *Mitteldeutsche Flughafen AG and Flughafen Leipzig-Halle GmbH* v *Commission*, C-288/11 P, ECLI:EU:C:2012:821, paragraphs 43 and 44. Judgment of the Court of Justice of 14 January 2015, *Eventech* v *The Parking Adjudicator*, C-518/13, ECLI:EU:C:2015:9, paragraph 40.

([303]) Judgment of the Court of Justice of 16 June 1987, *Commission* v *Italy*, C-118/85, ECLI:EU:C:1987:283, paragraphs 7 and 8. Judgment of the Court of Justice of 4 May 1988, *Bodson/Pompes funèbres des régions libérées*, C-30/87, ECLI:EU:C:1988:225, paragraph 18; Judgment of the General Court of 24 March 2011, *Freistaat Sachsen and Land Sachsen-Anhalt and Others* v *Commission*, Joined Cases T-443/08 and T-455/08, ECLI:EU:T:2011:117, paragraph 98.

([304]) See Commission Decision on State aid SA.23324 — Tampere-Pirkkala Airport (OJ L 309, 13.11.2013, p. 27), and on State aid SA.35388 — Poland — Setting up the Gdynia-Kosakowo Airport.

([305]) In this respect, the economic use of the infrastructure may be considered ancillary when the capacity allocated each year to such activity does not exceed 20 per cent of the infrastructure's overall annual capacity.

([306]) If the activities do not remain ancillary, also secondary economic activities can be subject to the State aid rules (see Judgment of the General Court of 12 September 2013, *Germany* v *Commission*, T-347/09, ECLI:EU:T:2013:418 on the selling of wood and tourism activities of nature conservation organizations).

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.

208. As the Court of Justice acknowledged in its *Leipzig/Halle* judgment, the construction of an infrastructure, or part of it, can fall within the State's exercise of public powers. ([307]) In such a case the public funding of the infrastructure (or the relevant part of the infrastructure) is not subject to State aid rules.

209. Due to the uncertainty that existed prior to the *Aéroports de Paris* judgment, public authorities could legitimately consider that the public funding of infrastructure granted prior to that judgment did not constitute State aid and that, accordingly, such measures did not need to be notified to the Commission. It follows that the Commission cannot put such funding measures definitively adopted before the *Aéroports de Paris* judgment into question on the basis of State aid rules. ([308]) This does not imply any presumption as regards the presence or absence of State aid or legitimate expectations as regards funding measures not definitively adopted before the *Aéroports de Paris* judgment, which will have to be verified on a case by case basis. ([309])

7.2.2. *Distortion of competition and effect on trade*

210. The rationale underlying the cases in which the Commission considered that certain measures were not capable of affecting trade between Member States as set out in paragraphs 196 and 197 can also be relevant for certain public funding of infrastructure, particularly local or municipal infrastructure, even if it is commercially exploited. One pertinent characteristic of such cases would be a predominately local catchment area as well as evidence that cross-border investment is unlikely to be affected more than marginally. For example, the construction of local leisure installations, health care facilities, small airports or ports that predominately serve local users and for which the impact on cross-border investment is marginal are unlikely to affect trade. Evidence to demonstrate that there is no effect on trade could include data showing that there is only limited use of the infrastructure from outside the Member State and that cross-border investments in the market under consideration are minimal or unlikely to be adversely affected.

211. There are circumstances in which certain infrastructures do not face direct competition from other infrastructures of the same kind or other infrastructures of a different kind offering services with a significant degree of substitutability, or with such services directly ([310]). The absence of direct competition between infrastructures is likely the case for comprehensive network infrastructures ([311]) that are natural monopolies, that is to say for which a replication would be uneconomical. Similarly, there may be sectors where private financing for the construction of infrastructures is insignificant. ([312]) The Commission considers that an effect on trade between Member States or a distortion of competition is normally excluded as regards the construction of the infrastructure in cases where at the same time (i) an infrastructure typically faces no direct competition, (ii) private financing is insignificant in the sector and Member State concerned and (iii) the infrastructure is not designed to selectively favour a specific undertaking or sector but provides benefits for society at large.

([307]) Judgment of the Court of Justice of 19 December 2012, *Mitteldeutsche Flughafen AG and Flughafen Leipzig-Halle GmbH* v *Commission*, C-288/11 P, ECLI:EU:C:2012:821, paragraph 47.

([308]) Commission Decision of 3 October 2012 on State aid case SA.23600, Financing Arrangements for Munich Airport Terminal 2 (OJ L 319, 29.11.2013, p. 8), recitals 74 to 81. The Commission's 1994 Aviation guidelines stated that '*[t]he 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*' (OJ C 350, 10.12.1994, p. 5), paragraph 12.

([309]) These clarifications are without prejudice to the application of Cohesion Policy rules in these circumstances, on which guidance has been provided in other instances. See for example the Commission's guidance note to the COCOF: Verification of compliance with State Aids in infrastructure cases, available under http://ec.europa.eu/regional_policy/sources/docoffic/cocof/2012/cocof_12_0059_01_en.pdf.

([310]) For example services offered by commercial ferry operators can be in competition with a toll bridge or tunnel.

([311]) In a network infrastructure different elements of the network complement each other, instead of competing with one another.

([312]) The question whether there is only insignificant market financing in a given sector has to be assessed at the level of the Member State concerned rather than a regional or local level, similarly to the assessment of the existence of a market in a Member State (see, for example, Judgment of the General Court of 26 November 2015, *Spain* v *Commission*, T-461/13, ECLI:EU:T:2015:891, paragraph 44).

212. In order for the entire public funding of a given project to fall outside State aid rules, Member States have to ensure that the funding provided for the construction of the infrastructures in the situations mentioned in paragraph 211 cannot be used to cross-subsidize or indirectly subsidize other economic activities, including the operation of the infrastructure. Cross-subsidization 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. The absence of indirect aid, in particular to the operator of the infrastructure, can be ensured, for example, by tendering out the operation.

7.2.3. *Aid to the developer/owner of an infrastructure — an overview sector-by-sector*

213. This section provides an overview of how the Commission intends to assess the State aid nature of the funding of infrastructure in different sectors, having regard to the main features that public infrastructure financing typically and currently shows in the different sectors with respect to the conditions identified above. It is without prejudice to the outcome of the concrete case by case assessment of projects in the light of their specific characteristics, the way a given Member State has organised the provision of services linked to the use of the infrastructure and the development of the commercial services and of the internal market. It is not intended to replace an individual assessment of whether all the elements of the notion of State aid are fulfilled in respect of the concrete financing measure of a specific infrastructure. The Commission has also provided more detailed guidance on specific sectors in some of its Guidelines and Frameworks.

214. **Airport infrastructure** consists of different types of infrastructure. Based on the case law of the Union courts, it is well established that most airport infrastructure ([313]) is intended for the provision of airport services to airlines against payment, ([314]) which qualify as economic activities, and that therefore their funding is subject to the State aid rules. Similarly, if an infrastructure is intended for non-aeronautical commercial services to other users, its public funding is subject to the State aid rules. ([315]) Since airports often compete with one another, the financing of airport infrastructure is also likely to affect trade between Member States. In contrast, public funding of infrastructures intended for activities that fall under the responsibility of the State in the exercise of its public powers does not fall under the State aid rules. Air traffic control, aircraft rescue and firefighting, police, customs and activities necessary to safeguard civil aviation at an airport against acts of unlawful interference are in general considered to be of such a non-economic nature.

215. Similarly, as follows from the Commission's decision-making practice, ([316]) public funding of **port infrastructure** favours an economic activity and is hence in principle subject to State aid rules. As is the case with airports, ports may compete with one another and the financing of port infrastructure is therefore also likely to affect trade between Member States. However, investment for infrastructure that is necessary for activities that fall under the responsibility of the State in the exercise of its public powers are not subject to State aid control. Maritime traffic control, firefighting, police and customs are in general of such non-economic nature.

216. **Broadband infrastructure** is used to enable the provision of telecommunication connectivity to end-users. Providing connectivity to end-users against payment is an economic activity. Broadband infrastructure is in many instances built by operators without any State funding, which is evidence of significant market financing, and in many geographical zones several networks of different operators compete. ([317]) Broadband infrastructures

([313]) Such as runways and their lighting systems, terminals, aprons, taxiways or centralised ground handling infrastructure such as baggage belts.
([314]) Guidelines on State aid to airports and airlines (OJ C 99, 4.4.2014, p. 3), recital 31.
([315]) Guidelines on State aid to airports and airlines (OJ C 99, 4.4.2014, p. 3), recital 33.
([316]) Commission Decision of 27 March 2014 on State aid SA.38302 — Italy — Port of Salerno; Commission Decision of 22 February 2012 on State aid SA.30742 (N/2010) — Lithuania — Construction of infrastructure for the passenger and cargo ferries terminal in Klaipeda (OJ C 121, 26.4.2012, p. 1); Commission Decision of 2 July 2013 on State Aid SA.35418 (2012/N) — Greece — Extension of Piraeus Port (OJ C 256, 5.9.2013, p. 2).
([317]) As stated in paragraph 211 and footnote 312, the question whether there is only insignificant market financing in a given sector has to be assessed at the level of the Member State concerned rather than at regional or local level.

are part of large, interconnected and commercially exploited networks. For these reasons, public funding of broadband infrastructure for the provision of connectivity to end-users is subject to State aid rules, as set out in the Guidelines for the application of State aid rules in relation to the rapid deployment of broadband networks. ([318]) In contrast, connecting only public authorities is a non-economic activity and the public funding of so called 'closed networks' therefore does not constitute State aid. ([319])

217. **Energy infrastructure** ([320]) is used for the provision of energy services against payment, which amounts to an economic activity. Energy infrastructure is, to a large extent, built by market actors, which is evidence of significant market financing, and financed through user tariffs. Public funding of energy infrastructure therefore favours an economic activity and is likely to have an effect on trade between Member States and is hence in principle subject to State aid rules. ([321])

218. Public funding of **research infrastructures** can favour an economic activity and is hence subject to State aid rules insofar as the infrastructure is in fact intended for the performance of economic activities (such as renting out equipment or laboratories to undertakings, supplying services to undertakings or performing contract research). Public funding of research infrastructures used for non-economic activities, such as independent research for increased knowledge and better understanding, in contrast, does not fall under the State aid rules. For more detailed guidance on the distinction between economic and non-economic activities in the area of research, see the explanations provided in the Framework for State aid for research and development and innovation. ([322])

219. While the operation of **railway infrastructure** ([323]) may constitute an economic activity, ([324]) the construction of railway infrastructure which is made available to potential users on equal and non-discriminatory terms — as opposed to the operation of the infrastructure — typically fulfils the conditions set out in paragraph 211 and its financing therefore typically does not affect trade between Member States or distort competition. To ensure that the entire funding of a given project is not subject to State aid rules, Member States also have to ensure that the conditions set out in paragraph 212 are fulfilled. The same reasoning applies to investments in **railway bridges, railway tunnels** and **urban transport infrastructure** ([325]).

220. 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. However, the construction as such of road infrastructure ([326]), including toll-roads — as opposed to the operation of a toll-road and provided that it does not constitute dedicated infrastructure — typically fulfils the conditions set out in paragraph 211 and its financing therefore typically does not affect trade between Member States or

([318]) OJ C 25, 26.1.2013, p. 1. The guidelines explain that the broadband sector is characterised by specific features, in particular by the fact that a broadband network can host several operators of telecommunication services and can therefore provide an opportunity for the presence of competing operators.

([319]) EU Guidelines for the application of State aid rules in relation to the rapid deployment of broadband networks (OJ C 25, 26.1.2013, p. 1), recital 11 and footnote 14.

([320]) Energy infrastructure includes, in particular, transmission, distribution and storage infrastructures for electricity, gas and oil. For more details, see the definition in Guidelines on State aid for environmental protection and energy 2014-2020 (OJ C 200, 28.6.2014, p. 1), recital 31.

([321]) Guidelines on State aid for environmental protection and energy 2014-2020 (OJ C 200, 28.6.2014, p. 1), section 3.8; Commission Decision of 10.7.2014 on State aid no SA.36290 — United Kingdom — Northern Ireland Gas Pipeline; extension to the West and the North West.

([322]) OJ C 198, 27.6.2014, p. 1, recitals 17 et seq.

([323]) Such as rail tracks and train stations.

([324]) This observation is without any prejudice to the question of whether any advantage granted to the infrastructure operator by the State amounts to State aid. For instance, if the operation of the infrastructure is subject to a legal monopoly and if competition for the market to operate the infrastructure is excluded, an advantage granted to the infrastructure operator by the State cannot distort competition and therefore does not constitute State aid. See paragraph 188 of this Communication and Commission Decision of 17 July 2002 on State aid N 356/2002 — United Kingdom Network Rail and Commission Decision of 2 May 2013 on SA.35948 — Czech Republic — Prolongation of interoperability scheme in railway transport. As explained in paragraph 188, if the owner or operator is active in another liberalised market, it should, in order to prevent cross-subsidisation, maintain separate accounts, allocate costs and revenues in an appropriate way and ensure that any public funding does not benefit other activities.

([325]) Such as tracks for trams or underground public transport.

([326]) Including roads for the connection of commercially exploitable land, see Commission Decision of 1 October 2014 on SA.36147 — Alleged infrastructure aid for Propapier and Commission Decision of 8 January 2016 on SA.36019 — Road infrastructure measures in the vicinity of a real estate project — Uplace.

distort competition. ([327]) To ensure that the entire public funding of a given project is not subject to State aid rules Member States also have to ensure that the conditions set out in paragraph 212 are fulfilled. The same reasoning applies to investments in **bridges**, **tunnels** and **inland waterways (for example rivers and canals)**.

221. While the operation of **water supply and waste water networks** ([328]) constitutes an economic activity, the construction of a comprehensive water supply and waste water network as such typically fulfils the conditions set out in paragraph 211 and its financing therefore typically does not distort competition or affect trade between Member States. To ensure that the entire funding of a given project is not subject to State aid rules Member States also have to ensure that the conditions set out in paragraph 212 are fulfilled.

7.3. Aid to operators

222. Where all the elements of Article 107(1) of the Treaty are fulfilled as regards the developer/owner of an infrastructure, State aid to the developer/owner is present, irrespective of whether they make direct use of the infrastructure to provide goods or services themselves or make the infrastructure available to a third party operator who in turn provides services to end-users of the infrastructure (for example, where the owner of an airport grants a concession for the provision of services in the airport).

223. Operators who make use of the aided infrastructure to provide services to end-users receive an advantage if the use of the infrastructure provides them with an economic benefit that they would not have obtained under normal market conditions. This normally applies if what they pay for the right to exploit the infrastructure is less than what they would pay for a comparable infrastructure under normal market conditions. Guidance on how to establish whether the terms of operation comply with market conditions is provided in section 4.2. In line with that section, the Commission considers that an economic advantage to the operator can in particular be excluded if the concession to operate the infrastructure (or parts of it) is assigned for a positive price through a tender that meets all the relevant conditions set out in paragraphs 90 to 96. ([329])

224. However, the Commission recalls that if a Member State does not comply with its notification obligation and there are doubts as to the compatibility of the aid to the developer/owner with the internal market, the Commission may issue an injunction requiring the Member State to suspend the implementation of the measure and to provisionally recover any money paid until it has taken a decision on its compatibility. In addition, national judges are under an obligation to do so as well at the request of competitors. Furthermore, if, following its assessment of the measure, the Commission adopts a decision declaring the aid to be incompatible with the internal market and orders its recovery, an impact on the operator of the infrastructure cannot be excluded.

7.4. Aid to end-users

225. If the operator of an infrastructure has received State aid or if its resources constitute State resources, it is in a position to grant an advantage to the users of the infrastructure (if they are undertakings) unless the terms of use comply with the MEO test, that is to say the infrastructure is made available to the users on market terms.

([327]) An atypical situation in which State aid cannot be excluded would, for example, be a bridge or tunnel between two Member States, offering a largely substitutable service to the service offered by commercial ferry operators or the construction of a toll-road in direct competition with another toll-road (for example two toll-roads running in parallel to each other, thereby offering largely substitutable services).

([328]) Water supply and waste water networks include the infrastructure for the distribution of water and the transportation of waste water, such as the respective pipes.

([329]) See Commission Decision of 1 October 2014 on SA.38478 — Hungary — Development of the Győr-Gönyű National Public Port. In contrast, an advantage for the developer/owner of an infrastructure cannot be excluded by a tender and the tender only minimizes the aid granted.

226. In accordance with the general principles explained in section 4.2, an advantage to users in such cases can be excluded where the fees for use of the infrastructure have been set through a tender that meets all the relevant conditions set out in paragraphs 90 to 96.

227. As explained in section 4.2, where such specific evidence is not available, the question of whether a transaction is in line with market conditions can be assessed in the light of the terms and conditions under which the use of comparable infrastructure is granted by comparable private operators in comparable situations (benchmarking), provided such a comparison is possible.

228. If none of the above assessment criteria can be applied, the fact that a transaction is in line with market conditions can be established on the basis of a generally accepted, standard assessment methodology. 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. ([330])

8. FINAL PROVISIONS

229. This Communication replaces the following Commission Communications and Notices:

— Commission Communication to the Member States 93/C-307/03 on the application of Articles 92 and 93 of the EEC Treaty and of Article 5 of Commission Directive 80/723/EEC to public undertakings in the manufacturing sector ([331]);

— Commission Communication on State aid elements in sales of land and buildings by public authorities ([332]);

— Commission Notice on the application of the State aid rules to measures relating to direct business taxation ([333]).

230. The present Communication replaces any opposing statements relating to the notion of State aid included in any existing Commission Communications and Frameworks, save for statements pertaining to specific sectors and justified by their particular features.

([330]) See for example Commission Decision of 1 October 2014 on SA.36147, Alleged infrastructure aid for Propapier. See also the Guidelines on State aid to airports and airlines (OJ C 99, 4.4.2014, p. 3), recitals 61 to 64.
([331]) OJ C 307, 13.11.1993, p. 3.
([332]) OJ C 209, 10.7.1997, p. 3.
([333]) OJ C 384, 10.12.1998, p. 3.

Brexit countdown

Show articles

Brexit

Brussels to fight tough on state aid in post-Brexit talks

Red line on subsidies sets tone for the trade battle to come

© FT Montage/Reuters/Getty

Sam Fleming and **Jim Brunsden** in Brussels and **George Parker** in London
JANUARY 27 2020

EU member states are determined to curtail Britain's ability to hand out state money to prized industries as a key price for agreeing a trade deal, according to senior European diplomats, opening up a major battleground in the post-Brexit negotiations.

Brussels, whose negotiating team will be headed by Michel Barnier, will insist that the UK sticks especially closely to EU state aid rules when it kicks off what are set to be fraught future relationship negotiations with Britain soon after Brexit day on Friday.

Boris Johnson last November caused concern in Brussels when he announced plans to make it "faster and easier" for the UK government to intervene in failing industries after Brexit.

He also said he would "fundamentally change" public procurement rules to "back British business". Britain's former ambassador to the EU Ivan Rogers claimed the idea appeared to mimic Donald Trump's "Buy American" policy.

But the EU sees state aid as one of the most sensitive parts of the "level playing field" of common rules and standards that it says Britain must adhere to if it wants any trade deal — and it plans to impose requirements that go far beyond those demanded of other trading partners in this area.

France has urged that the UK should have to stay in "dynamic alignment" with EU law for all areas of the level playing field, including environmental protection, labour market rights and state aid. While some other governments believe that forcing Britain to mirror future changes to swaths of EU rules would be asking too much, there is broad sympathy in EU capitals that state aid is an area with a heightened risk.

Agreeing on the new regime — and mechanisms to enforce it — will be one of the most complex elements of the upcoming negotiations, meaning many member states fret that the 11-month time period ahead to strike an agreement will be extremely challenging to meet.

"State aid is going to be a critical area in the negotiations," said one senior EU diplomat. "We will need to see some form of dynamic alignment in this area. More broadly the negotiations on the level playing field design will be extremely time consuming, because in many areas you are designing something that doesn't yet exist."

It's a little irritating. We all signed up in the political declaration to make our very best efforts to do everything by the end of 2020

Government official close to the talks

British officials have insisted that Mr Johnson does not envisage a big increase in state aid after Brexit, rather that he wants to be able to intervene more promptly; they cite attempts by the government to help the UK steel industry in 2015, which they claim were hindered by a "50 day" wait for state aid approval from Brussels.

Steve Barclay, Brexit secretary, on Sunday told the BBC's Andrew Marr programme that "the UK has a far better record than, for example, France or Germany on state aid".

But if Britain is able to use public money to bolster key companies in a way that EU countries are not, it will give UK businesses a competitive advantage — something Brussels is determined to prevent.

EU27 diplomats on Friday drew conclusions from close to 50 hours of seminars they have sat through over the past two weeks covering every aspect of the negotiations to come. More than 200 people have been in the room for the meetings, where the European Commission has sought to forge a consensus ahead of what are expected to be gruelling battles with Britain.

Among the key tools being discussed by the EU are a monitoring system to ensure compliance with the level playing field and a rapid-fire system of enforcement.

A set of slides, seen by the FT, sums up the challenge facing negotiators, noting that Britain "does not intend to be a rule-taker," but at the same time the EU cannot allow any "competitive undercutting or freeriding" by British companies.

That circle will need to be squared quickly, given that Britain's post-Brexit transition arrangements expire at the end of 2020. The slides warn that failure to reach a deal would lead to a "cliff-edge in many areas".

The sensitivities around state aid are heightened by the concessions that Britain had to make on the issue when it hammered out a Brexit deal with the EU. A core part of arrangements for preventing a hard border on the island of Ireland is that Northern Ireland must stay within the EU's state-aid regime.

EU officials note that in practice this means the UK will need to notify state-aid decisions for review by Brussels — even if they only have indirect relevance for Northern Ireland. Making that system mesh with the broader state-aid conditions attached to a trade deal will be fiendishly difficult.

Mr Johnson has rejected the close alignment with EU rules favoured by his predecessor Theresa May, which he once called a "moral and intellectual humiliation" that would leave Britain copying Brussels rules. But he is anxious to secure what he has called a "super Canada" free trade agreement, focused on removing tariffs and quotas, before the end of the 11-month transition period that follows Britain's exit on Friday evening.

This will mean painful compromises when it comes to the degree of regulatory alignment Britain is willing to accept. Mr Johnson's allies admit that Brussels will try to run down the clock in the negotiation, knowing that a "no trade deal" Brexit at the end of the year will be more painful for Britain — which sends about 40 per cent of its exports to Europe — than for the EU.

They also accept that the EU will try to make "linkages" to other areas — notably access to UK fisheries — as a precondition for any free trade agreement, although Mr Johnson will try to make similar "linkages" too.

Already British officials are growing frustrated at warnings from Brussels — including from European Commission president Ursula von der Leyen on a recent visit to London — that the EU will have to "prioritise" what issues are addressed in the trade deal.

"It's a little irritating," said one government official close to the talks. "We all signed up in the political declaration to make our very best efforts to do everything by the end of 2020."

Brexit — the year ahead

January 31 2020

With Boris Johnson's Withdrawal Agreement bill receiving Royal Assent last week and the European Parliament due to ratify the divorce deal, the UK will formally exit the EU after 47 years of membership at 11pm (GMT) on Friday.

March 1

Brussels is aiming to have its negotiating mandate agreed for March 1 — legal authorisation for the EU to open talks with the UK. Both sides agree that a priority in the talks will be to hammer out a free trade agreement with zero tariffs and zero quotas.

June

An EU-UK political declaration, agreed as part of Mr Johnson's Brexit deal, says a summit should take place in June so Britain and the EU27 can assess the progress of talks. June is also the final month for Britain to request an extension of its transition period beyond 2020.

November 26 2020

EU officials say that a trade deal must be negotiated, checked, translated and presented to the European Parliament by this week if it is to be ratified by the end of the year.

December 31 2020

If a trade deal is not in place, then Britain will fall back on to basic World Trade Organization terms, meaning tariffs on goods and little practical co-operation to smooth border checks.

This is the first in an FT series to mark the UK's formal exit from the EU on Jan 31

JUDGMENT OF THE COURT (Eighth chamber)

19 December 2012 (*)

(Appeal – State aids – Concept of 'undertaking' – Economic activity –Airport infrastructure construction – Runway)

In Case C−288/11 P,

APPEAL under Article 56 of the Statute of the Court of Justice of the European Union, brought on 6 June 2011,

Mitteldeutsche Flughafen AG, established in Leipzig (Germany),

Flughafen Leipzig-Halle GmbH, established in Leipzig,

represented by M. Núñez Müller and J. Dammann, Rechtsanwälte,

appellants,

the other parties to the procedure being:

European Commission, represented by B. Martenczuk and T. Maxian Rusche, acting as agents, with an address for service in Luxembourg,

defendant at first instance,

Federal Republic of Germany,

Arbeitsgemeinschaft Deutscher Verkehrsflughäfen eV (ADV), represented by L. Giesberts and G. Kleve, Rechtsanwälte,

interveners at first instance,

THE COURT (Eighth chamber),

composed of E. Jarašiūnas (Rapporteur), President of the Chamber, A. Ó Caoimh and C. Toader, judges,

Advocate General: E. Sharpston,

Registrar: M. Aleksejev, Administrator,

having regard to the written procedure and further to the hearing on 14 November 2012,

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,

gives the following

Judgment

1 By their appeal, Mitteldeutsche Flughafen AG ('MF') and Flughafen Leipzig-Halle GmbH ('FLH') seek the partial setting aside of the judgment in Joined Cases T-443/08 and T-455/08 *Freistaat Sachsen and Others* v *Commission* [2011] ECR II-1311 ('the judgment under appeal'), by which the General Court, in Case T-455/08, first, annulled Article 1 of Commission Decision 2008/948/EC of 23 July 2008 on measures by Germany to assist DHL and Leipzig Halle Airport (OJ 2008 L 346, p. 1) ('the contested decision') in so far as it fixes at EUR 350 million the amount of State aid which the Federal Republic of Germany was planning to grant to Leipzig Halle airport for the purposes of the construction of a new southern runway and related airport infrastructure and, second, dismissed the action as to the remainder.

Background to the dispute and the contested decision

2 It is apparent from paragraphs 1 to 12 of the judgment under appeal that Leipzig-Halle airport is operated by FLH which is a subsidiary of MF, whose shareholders are the Länder of Saxony and Saxony-Anhalt and the cities of Dresden (Germany), Halle (Germany) and Leipzig. On 4 November 2004, MF decided to construct a new runway ('the new southern runway') which was to be financed by capital contributions of EUR 350 million to MF or FLH by their public shareholders.

3 The DHL group ('DHL'), operating in the express parcel delivery sector, which is wholly-owned by Deutsche Post AG, decided, after carrying out negotiations with several airports, to move its European air freight hub from Brussels (Belgium) to Leipzig Halle from 2008. On 21 September 2005, FLH, MF and DHL Hub Leipzig GmbH ('DHL Hub Leipzig') signed a framework agreement, under which FLH was required to construct the new southern runway and to honour other commitments for the duration of that framework agreement, such as the guarantee that DHL be granted continuous access to that runway and the assurance that at least 90% of the flights made by or for DHL could be carried out at any time from that runway.

4 On 21 December 2005, the Land of Saxony issued a comfort letter in favour of Leipzig airport and DHL Hub Leipzig ('the comfort letter'). That letter seeks to guarantee the financial performance of FLH during the framework agreement and commits the Land of Saxony to pay compensation to DHL Hub Leipzig in the situation where it is no longer possible to use Leipzig-Halle airport as envisaged.

5 On 5 April 2006, the Federal Republic of Germany, in accordance with Article 2(1) of Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article [88 EC] (OJ 1999 L 83, p. 1), notified the framework agreement and the comfort letter to the Commission of the European Communities.

6 By letter of 23 November 2006, the Commission informed the Federal Republic of Germany of its decision to initiate the procedure under Article 88(2) EC. That procedure concerned the framework agreement, the comfort letter and the capital contributions.

7 On 23 July 2008, the Commission adopted the contested decision. It found, in that decision, that the capital contributions constituted State aid compatible with the common market, in accordance with Article 87(3)(c) EC. On the other hand, it considered that the comfort letter and the unlimited warranties provided for in the framework agreement constituted State aid which were not compatible with the common market and requested the Federal Republic of Germany to recover the

part of the aid already put at DHL's disposal pursuant to those warranties.

8 As is apparent from paragraphs 62 and 67 of the judgment under appeal, the capital contributions were granted prior to the contested decision. That was confirmed by the Commission at the hearing.

The proceedings before the General Court and the judgment under appeal

9 By applications lodged at the Registry of the General Court on 6 October 2008, the Freistaat Sachsen and the Land Sachsen-Anhalt, in Case T-443/08, and MF and FLH, in Case T-455/08, brought actions for annulment of Article 1 of the contested decision in so far as the Commission declares in it, first, that the capital contributions constitute State aid for the purpose of Article 87(1) EC and, secondly, that that State aid amounts to EUR 350 million.

10 By orders of 30 March 2009 and 24 June 2010, the President of the Eighth Chamber of the General Court granted the applications for leave to intervene submitted by the Federal Republic of Germany and the Arbeitsgemeinschaft Deutscher Verkehrsflughäfen eV ('ADV') in the two cases and also decided to join those cases for the purposes of the oral procedure.

11 In support of their action, MF and FLH, supported by ADV, raised eight pleas alleging, essentially, as to the first, infringement of Article 87(1) EC, as to the second, that FLH could not be the recipient of State aid, as to the third, that it is impossible to treat FLH at the same time as both the donor and recipient of State aid, as to the fourth, infringement of the principles of non-retroactivity, legal certainty, protection of legitimate expectations and equal treatment, as to the fifth, infringement of primary law by the Community guidelines on financing of airports and start-up aid to airlines departing from regional airports (OJ 2005 C 312, p. 1) ('the 2005 Guidelines'), as to the sixth, put forward in the alternative, a breach of procedure, as to the seventh, an infringement of the division of competences as it follows from the EC Treaty and, as to the eighth, that the decision on the amount of the alleged aid was inherently contradictory and insufficient reasons were stated for it.

12 By the judgment under appeal, the General Court joined Cases T-443/08 and T-445/08 for the purposes of the judgment, dismissed the action in the former case as inadmissible and annulled, in the latter case, Article 1 of the contested decision in so far as it fixes at EUR 350 million the amount of the State aid which the Federal Republic of Germany intended to grant to Leipzig-Halle airport for the purposes of the construction of the new southern runway and related airport infrastructure, dismissing the action as to the remainder.

13 In dismissing the first plea, in support of which the applicants in Case T-455/08 argued, inter alia, that the concept of 'undertaking', within the meaning of Article 87(1) EC, did not apply to regional airports so far as concerns the financing of airport infrastructure, the General Court first held, for the reasons set out at paragraphs 87 to 100 of the judgment under appeal, that, in so far as it was operating the new southern runway, FLH was engaged in an economic activity, from which that consisting in the construction of that runway could not be dissociated.

14 Next, at paragraphs 102 to 107 of the judgment under appeal, the General Court rejected the argument put forward by the applicants that the construction of the new southern runway constituted a measure falling within regional, economic and transport policy which the Commission could not review under the rules of the EC Treaty on State aid, in accordance with the Commission's Communication on the application of Articles [87 EC] and [88 EC] and Article 61 of the EEA Agreement to State aids in the aviation sector (OJ 1994 C 350, p. 5) ('the 1994 Communication'). It

observed, in this connection, that the airports sector had undergone developments, in particular so far as concerns its organisation and its economic and competitive situation, and that the case-law following from Case T-128/98 *Aéroports de Paris* v *Commission* [2000] ECR II-3929, confirmed by Case C-82/01 P *Aéroports de Paris* v *Commission* [2002] ECR I-9297, ('the *Aéroports de Paris* judgments') had acknowledged, since 2000, that the managers of airports carried out an economic activity for the purposes of Article 87(1) EC.

15 Likewise, the General Court rejected, at paragraphs 108 to 116 of the judgment under appeal, the applicants' arguments concerning the alleged dissociability of the activities of construction and operation of airport infrastructure. It observed, inter alia, first, that the construction of the new southern runway was a precondition for its operation, second, that the entities concerned were in the present case the same, third, that, by basing its findings on the fact that the infrastructure at issue was operated by FLH for commercial purposes and that it was therefore infrastructure which could be used for such a purpose, the Commission had adduced enough evidence to substantiate the link between the construction and the operation of the new southern runway and, fourth, that the construction of that new southern runway was an activity which could be directly linked with the management of airport infrastructure and the fact that an activity was not carried out by private operators or the fact that it was not profitable were not relevant criteria for the purposes of ruling out characterisation of it as an economic activity.

16 Lastly, the General Court discounted, at paragraphs 117 to 119 of the judgment under appeal, the applicants' arguments seeking to cast doubt on the relevance of the *Aéroports de Paris* judgments before concluding, at paragraph 120 of that judgment, that the Commission had been fully entitled to consider the capital contributions to be State aid for the purposes of Article 87(1) EC.

17 In dismissing the fourth plea raised by the applicants in Case T-455/08 and alleging the infringement of the principles of non-retroactivity, legal certainty, protection of legitimate expectations and equal treatment, the General Court observed, at paragraphs 157 to 164 of the judgment under appeal, that the Commission had not, contrary to what the applicants claimed, applied the 2005 Guidelines, but that it had implemented the principles stemming from the *Aéroports de Paris* judgments. Consequently, at paragraphs 166 to 172, 181 and 182 of the judgment under appeal, the General Court also dismissed the claims relating to infringement of the principles of protection of legitimate expectations, legal certainty and equal treatment, and the fifth plea put forward in that case, alleging an infringement of primary law by the 2005 Guidelines.

18 The General Court also rejected, at paragraphs 192 and 201 to 209 of the judgment under appeal, the applicants' sixth plea in that case, alleging a breach of procedure, in which the applicants argued, in the alternative, that the capital contributions should be treated as 'existing aid' within the meaning of Article 1(b)(v) of Regulation No 659/1999, and the seventh plea that they submitted in that case, alleging an infringement of the division of competences as it follows from the EC Treaty.

19 By contrast, the General Court upheld the eighth plea put forward by the applicants in support of their action in Case T-455/08, which alleged that the decision on the amount of the aid was inherently contradictory and that insufficient reasons were stated for it. The General Court held, in that connection, at paragraph 230 of the judgment under appeal, that the amount of EUR 350 million, set out in the operative part of the contested decision, was incorrect in the light of the recitals in the preamble to that decision in so far as it was apparent from those recitals that the sums covering public service duties did not constitute State aid and should therefore be deducted from the capital contributions.

Forms of order sought

20 MF, FLH and ADV claim that the Court should:

– set aside point 4 of the operative part of the judgment under appeal, by which the action brought in Case T−455/08 was dismissed as to the remainder, and the decision as to the costs;

– rule definitively on the dispute, allowing the action brought in Case T−455/08 in so far as that action seeks the annulment of the contested decision in so far as the Commission declares therein that the measure by which the Federal Republic of Germany provided capital contributions for the construction of the new southern runway and related airport infrastructure constitutes State aid for the purposes of Article 87(1) EC, and

– order the Commission to pay the costs relating to the appeal and to the proceedings at first instance.

21 The Commission contends that the Court should dismiss the appeal and order the appellants to pay the costs of the appeal.

Appeal

22 In support of their appeal, the appellants raise five grounds alleging, first, infringement of Article 87(1) EC, second, infringement of the principles of non−retroactivity, the protection of legitimate expectations and legal certainty, third, infringement of Article 1(b)(v), Article 17 and Article 18 of Regulation No 659/1999, fourth, infringement of the division of competences as it follows from the EC Treaty and, fifth, infringement of the obligation to state sufficient reasons for judgments.

First ground of appeal, alleging infringement of Article 87(1) EC

Arguments of the parties

23 The appellants criticise the General Court for having characterised the financing of the construction of the new southern runway as State aid by holding that FLH should be regarded, in this respect, as an undertaking inasmuch as that construction was an economic activity for the purpose of the rules on State aid.

24 In their view, it is necessary to distinguish the activity of construction of airport infrastructure from that of its operation. Contrary to what is required under the consistent case-law of the EU judicature, the General Court failed to examine those activities separately and presumed that they were indissociable, merely stating, at paragraph 96 of the judgment under appeal, that runways are ‘essential’ for the purposes of the economic activities performed by the operator of an airport and that the construction of such runways allows that operator to carry out his main economic activity. Thus, the General Court did not check whether those activities could be differentiated from each other and disregarded the fact that they concerned different actors and sectors.

25 It is of little importance, in the assessment of whether an activity is economic in nature, whether that activity is a ‘pre-condition’ for another activity and there should be no distinction made between the main activities and the ancillary activities of the entity under consideration, the case-law requiring that that assessment be made in respect of each activity carried out by that entity.

26 Moreover, the distinction between the construction and the operation of infrastructure is a fundamental principle of the Commission's practice and stems, so far as airports are concerned, from point 12 of the 1994 Communication, which was not annulled, but merely completed by the 2005 Guidelines. The General Court was therefore incorrect to hold that the Commission was not required to apply the 1994 Communication, where that communication is not contrary to primary law, since the EC Treaty does not confer any exclusive competence on the European Union in respect of infrastructure policy.

27 Furthermore, in the interpretation of primary law, the EU judicature does not in any way require the application of the rules on State aid to measures relating to airport infrastructure and take the view that those rules need only apply in the case of the operation of the airport. The appellants refer, in this connection, to the judgments in Case T-238/98 *Aéroports de Paris* v *Commission* and Case T-196/04 *Ryanair* v *Commission* [2008] ECR II-3643, pointing out that the facts which gave rise to the first of those judgments concerned the activities of a big international airport whose economic situation was diametrically opposed to that of a regional airport such as Leipzig-Halle airport.

28 In addition, the General Court was incorrect to hold, at paragraph 115 of the judgment under appeal, that the fact that the activity of infrastructure construction was not performed by private operators was irrelevant, where the existence of a market presupposes that the activity concerned could theoretically be performed by such operators. The General Court merely assumed that the activity of the construction of the new southern runway was economic in nature without examining either the arguments put forward to dispute that there was a market in respect of that activity or the economic reality.

29 The activity of airport infrastructure construction could not be an economic activity by nature where there was no prospect of making a profit, it being impossible to pass on the construction costs to users of that infrastructure by means of airport charges, contrary to what the General Court observed at paragraph 94 of the judgment under appeal. Private investors could not freely pass on those costs to the users, since those charges must be authorised by the competent authorities of the Land in which the airport concerned is located, which base their authorisation on criteria with no connection to the airport infrastructure construction costs. The construction of such infrastructure therefore is included among activities which have always been and are necessarily exercised by public entities.

30 Like the appellants, ADV, which is an association of undertakings operating German airports, considers that characterising the activity of the financing or the construction of airport infrastructure as an economic activity is contrary to European Union law.

31 According to that party, it is necessary, both legally and in the light of the facts, to make a functional distinction between the construction and the operation of such infrastructure. It observes, inter alia, that the General Court's finding that the construction of the new southern runway is essential to the operation of the airport and cannot be considered separately from it is too general and leads to regarding as economic all the activities upon which the activity of an airport operator is contingent, including measures falling within the exercise of State authority.

32 In practice, there is no private financing of the construction of new airport infrastructure, at least in small and medium-sized airports, and the involvement of private undertakings is limited to the acquisition and operation of infrastructure which already exists or has been constructed by the State. It is still impossible, despite developments in the airports sector, to finance the construction of costly airport infrastructure by income from its operation. Since it is not profitable, the activity therefore cannot be considered an economic activity.

33 ADV also claims that the General Court erred and contradicted itself in referring, like the Commission, to the *Aéroports de Paris* judgments. The finding that the economic nature of the airport infrastructure's construction stems from the economic nature of its operation cannot be inferred from that case-law. Neither the Commission nor to the General Court have explained in an acceptable manner, in law, why, contrary to the 1994 Communication, the financing of the construction of an airport should be subject to examination by the Commission. In actual fact, airport infrastructure construction is an essential element of services of general interest, so that that task typically falls within the exercise of State authority.

34 The Commission submits, primarily, that the argument adopted by the appellants, that the airport infrastructure construction constitutes an activity which must be assessed independently of the airport's operation, is manifestly inaccurate. In its view it has been shown, since the *Aéroports de Paris* judgments, that making airport facilities available in return for consideration constitutes an economic activity falling within the European Union competition rules. The construction costs of the facilities used by the airport operator are therefore investment costs which a commercial undertaking must normally bear. Therefore, in the opinion of that institution, the General Court did not err in law in holding that FLH was an undertaking and that the construction of the new southern runway constituted a matter which was indissociable from its economic activity.

Findings of the Court

35 In support of their first ground of appeal, the appellants, supported by ADV, essentially repeat the arguments which they expounded before the General Court, according to which the construction or extension of airport infrastructure does not constitute an economic activity falling within the scope of European Union law on State aid, so that financing of it by means of public funds is not liable to constitute State aid.

36 In the appeal, it is necessary to consider whether, in the present case, the General Court infringed Article 87(1) EC in holding that the activity of FLH, operator of the Leipzig-Halle airport and recipient with MF of the capital contributions intended to finance the construction of the new southern runway, was, so far as concerns that construction, economic in nature and that therefore the Commission was fully entitled to find that those capital contributions constituted State aid for the purposes of that provision.

37 It must be pointed out at the outset, as the appellants and ADV argue, that the 1994 Communication states, in point 12 thereof, that '[t]he construction o[r] 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'.

38 In dismissing the appellants' arguments derived from that communication, the General Court, at paragraphs 104 to 106 of the judgment under appeal, observed as follows:

> '104 However, it must be recalled that the question whether aid is State aid within the meaning of the Treaty must be determined on the basis of objective elements, which must be appraised on the date on which the Commission takes its decision (see, to that effect, Joined Cases C-182/03 and C-217/03 *Belgium and Forum 187* v *Commission* [2006] ECR I-5479, paragraph 137, and Joined Cases C-341/06 P and C-342/06 P *Chronopost and La Poste* v *UFEX and Others*, ... paragraph 95), and, moreover, that, although the Commission is bound by the guidelines and notices that it issues in the field of State aid, that is so only to the extent that those texts do not depart from the proper application of the rules in the Treaty, since the texts cannot be interpreted in a way which reduces the scope of Articles 87 EC and 88 EC or

which contravenes the aims of those articles (see Joined Cases C−75/05 P and C−80/05 P *Germany and Others* v *Kronofrance* [2008] ECR I−6619, paragraph 65 and the case-law cited).

105 There have been developments in the airports sector, referred to in recitals 169 to 171 of the [contested decision], concerning, in particular, the organisation of the sector, and its economic and competitive situation. Furthermore, the [*Aéroports de Paris* judgments] recognised, as of 2000, that the airport operator, in principle, is engaged in an economic activity within the meaning of Article 87(1) EC, to which the rules of State aid apply and that was confirmed by the judgment in *Ryanair* v *Commission* ... (paragraph 88).

106 Consequently, having regard to the case-law referred to in paragraph 104, the Commission was required, when it adopted the [contested decision], to take account of those developments and that interpretation and their implications for the application of Article 87(1) EC to financing of infrastructure related to airport operations, unless it is not to apply point 12 of the 1994 Communication. Having regard to the foregoing, therefore, the Commission did not err in considering, in recital 174 of the [contested decision], that it was no longer possible a priori to exclude the application of State aid rules to airports as of 2000.'

39 Those assessments by the General Court are not vitiated by any error of law. The Commission was required, having regard to the factual and legal situation prevailing at the time of the adoption of its decision, to examine the capital contributions under the competences conferred upon it under Article 88 EC. The General Court was therefore fully entitled to reject the appellants' arguments relating to the 1994 Communication and also to examine the plea before it by establishing specifically, in the light of that situation and not of that communication, whether the construction of the new southern runway constituted an economic activity.

40 In this respect, having regard to the indissociable nature, in the present case, of the activities of operation and construction, which the appellants dispute, the General Court, after having recalled, in paragraph 89 of the judgment under appeal, that any activity consisting in offering goods or services on a given market is an economic activity (Case C−49/07 *MOTOE* [2008] ECR I−4863, paragraph 22), first observed, correctly, at paragraph 93 of the judgment under appeal, that FLH, in the context of the operation of Leipzig-Halle airport, is engaged in an economic activity where it offers airport services in return for remuneration gained from, inter alia, airport fees (see judgment in Case C−82/01 P *Aéroports de Paris* v *Commission*, paragraph 78) on the regional airport services market. The General Court held, on this issue, in its definitive assessment of the facts, which has not been challenged by the appellants in this appeal, that the existence of such a market was, in the present case, proved by the fact that Leipzig-Halle airport was in competition with other regional airports to become DHL's European hub for air freight.

41 The General Court then held, at paragraph 94 of the judgment under appeal, that the operation of the new southern runway would form part of FLH's economic activity, the Commission having stated, at recital 177 in the preamble to the contested decision, that that infrastructure would be operated for commercial purposes by FLH which would demand fees for its use. It observed that, as the Commission stated at recital 15 in the preamble to the contested decision, those fees would constitute the main source of income for the purposes of financing that runway, which would allow FLH to increase its capacity and to extend its business of operating Leipzig-Halle airport.

42 Lastly, at paragraphs 95 to 100 of the judgment under appeal, the General Court held that it was not appropriate to dissociate the activity consisting in constructing the new southern runway from the subsequent use which would be made of that runway, observing, inter alia, at paragraph 99 of that

judgment, that, having regard to its nature and its purpose, the construction of that runway did not, as such, fall within the exercise of State authority, which, moreover, the applicants were not expressly claiming. It must be observed, in this connection, that, in upholding the plea for annulment alleging that the reasons given for the amount of the aid were contradictory and inadequate, the General Court observed, at paragraphs 225 and 226 of the judgment under appeal, that the Commission had conceded, at recitals 182 and 183 in the preamble to the contested decision, that certain expenses covered by the capital contributions –namely the expenses relating to security and police functions, to fire-protection measures and public security measures, to operating security measures, to the German meteorological service and to the air−traffic control service – fell within the performance of public duties and could not therefore be treated as State aid.

43 It is apparent from those findings that the General Court did not err in law in holding, essentially, that the Commission had correctly considered the construction of the new southern runway by FLH to constitute an economic activity and, consequently, the capital contributions, subject to the amount to be deducted from them in respect of expenses linked to the performance of public duties, to constitute State aid for the purpose of Article 87(1) EC.

44 Contrary to what is asserted by the appellants, supported by ADV, it seems that, for the purposes of establishing whether the construction of the new southern runway could be characterised as an economic activity by the Commission, the General Court, in accordance with the case-law (see Case C−364/92 *SAT Fluggesellschaft* [1994] ECR I−43, paragraph 19; Case C−82/01 P *Aéroports de Paris* v *Commission*, paragraph 75, and *MOTOE*, paragraph 25), made an assessment of that activity and examined its nature. In doing so, it did not assume but established, taking account of the specific circumstances and without erring in law, that that activity could not be dissociated from the operation by FLH of the airport infrastructure, which constitutes an economic activity, the construction of the new southern runway moreover not being linked, as such, by its nature or purpose, to the exercise of State authority.

45 That finding cannot be called into question by the other arguments put forward by the appellants and ADV.

46 First, it is necessary to reject the argument that the construction of the airport infrastructure and the operation of the airport concern different actors and sectors since, on any view, as the General Court definitively held at paragraph 111 of the judgment under appeal, without that finding being called into question in the present appeal, the entities concerned were in actual fact the same.

47 Secondly, it is not important that the General Court observed, at paragraphs 96, 110 and 111 of the judgment under appeal respectively, that ‘runways are essential for the purposes of the economic activities performed by an airport operator’, that ‘the objective of constructing a runway is linked to the main economic activity of an airport’ and that the ‘construction and extension of the runway [are] pre-conditions for its operation’. Those considerations are, admittedly, unsuitable, by reason of their general nature and because they might also apply to certain activities which fall within the exercise of State authority, for establishing the economic nature of a given activity of airport infrastructure construction. However, they do not affect the validity in law of the General Court’s findings set out at paragraphs 40 to 42 above, from which it follows that, in the present case, the construction of the new southern runway constituted an economic activity.

48 Third, in response to ADV’s assertion that airport infrastructure construction represents an essential element of services in the public interest and therefore typically constitutes a public duty, it is sufficient to observe that the General Court stated, at paragraph 99 of the judgment under appeal, that the appellants themselves did not expressly claim that the construction of the new runway fell,

as such, within the exercise of State authority.

49 Lastly, as regards the argument that the activity of airport infrastructure construction could not be carried out by private operators on account of the fact that there was no market for that type of activity because it was not envisaged to be profitable, this was rejected by the General Court. It observed, at paragraph 114 of the judgment under appeal, that it was apparent from its preceding findings that the construction of the new southern runway was an activity which could be directly linked with the operation of the airport, which is an economic activity. That being established, the General Court accordingly did not have to examine whether there was a specific market for the activity of airport infrastructure construction.

50 In addition, at paragraph 115 of the judgment under appeal, the General Court correctly pointed out that, furthermore, the fact that an activity is not carried out by private operators or the fact that it is not profitable were not relevant criteria for the purposes of whether or not it was to be characterised as an economic activity. As the General Court recalled at paragraphs 88 and 89 of that judgment, it is settled-case law that, first, in the field of competition law the concept of an undertaking covers any entity engaged in an economic activity, regardless of its legal status and the way in which it is financed and, secondly, any activity consisting in offering goods or services on a given market is an economic activity (see, inter alia, Case C−82/01 P *Aéroports de Paris* v *Commission*, paragraph 75; *MOTOE*, paragraphs 21 and 22, and Case C−113/07 P *SELEX Sistemi Integrati* v *Commission* [2009] ECR I−2207, paragraph 69). It follows from this that whether or not an activity is economic in nature does not depend on the private or public status of the entity engaged in it or the profitability of that activity.

51 Moreover, in answer to the arguments put forward in this context by the appellants concerning the amount of the airport fees, it is appropriate to point out that, as observed at paragraph 41 above, the General Court held in the present case, at paragraph 94 of the judgment under appeal, that the airport fees would constitute the main source of income for the purpose of financing the new southern runway, as the Commission stated at recital 15 in the preamble to the contested decision. That finding of fact, from which it is apparent that, contrary to what the appellants claim, the construction costs of that runway are in part passed on to users, does not constitute, save where the clear sense of the facts or evidence has been distorted – which is not claimed in the present case – a point of law which is subject as such to review by the Court of Justice on appeal (see, inter alia, to that effect, Case C−487/06 P [2008] *British Aggregates* v *Commission* [2008] ECR I−10515, paragraph 97 and the case-law cited).

52 It follows that the first ground of appeal must be rejected as in part inadmissible and in part unfounded.

Second ground of appeal, alleging infringement of the principles of non−retroactivity, the protection of legitimate expectations and legal certainty

Arguments of the parties

53 The appellants, supported by ADV, are of the opinion that the General Court erred in law in holding that the Commission had not applied the 2005 Guidelines. They submit that, the Commission having *de facto* applied those guidelines, the General Court, by refusing to acknowledge this, infringed the principles of non−retroactivity, protection of legitimate expectations and legal certainty.

54 Concerning, first of all, the first of those principles, they point out that the decision on the capital

contributions in favour of FLH was adopted at a time when the 1994 Communication was exclusively applicable. It was only at the end of 2005 that the Commission's policy changed, and that institution did not annul that communication but completed it by the 2005 Guidelines. Those guidelines expressly exclude any retroactive application.

55 As regards, next, the alleged infringement of the principles of protection of legitimate expectations and legal certainty, the appellants submit that, contrary to the considerations set out by the General Court at paragraph 167 of the judgment under appeal, there was neither, before the adoption of the decision of 4 November 2004 on the construction and the financing of the new southern runway, any decision-making practice which differed from the 1994 Communication nor any case-law providing that the rules on State aid were applicable to the financing of airport infrastructure construction, so that the sudden change in the Commission's approach was not foreseeable.

56 An analysis of the decisions taken by the Commission concerning the measures for financing of airport infrastructure confirms that, before the publication of the 2005 Guidelines, that institution had not taken any decision to that effect. It previously expressly dealt with those measures as general measures of economic policy not falling within the scope of the rules on State aid, even after the delivery of the *Aéroports de Paris* judgments. It was only in its decision of 19 January 2005 concerning State aid N 644i/2002 (Germany – Construction and development of regional airports) and its decision of 20 April 2005 concerning State aid N 355/2004 on Antwerp airport that the Commission envisaged for the first time the application of those rules to the construction and the development of airport infrastructure, while observing that those rules were in principle not applicable. However, assuming that those decisions were relevant, they could not have affected the legitimate expectations of the economic operators concerned, given that they were published in full not in the *Official Journal of the European Union* but, subsequently, on the Commission's internet site only in the language of procedure.

57 The General Court erroneously referred, in this connection, first, to the judgments in *Aéroports de Paris* and *Ryanair* v *Commission*, which concerned only the operation of such infrastructure, secondly, to the Commission's decision of 13 March 2001 on State aid N 58/2000 (Italy – Promotion of the Piedmont airport system) ('the Commission's decision of 13 March 2001'), which did not in any way call into question the fact that airport infrastructure financing measures constituted measures of general policy and, lastly, the notification made by the German government of State aid N 644i/2002, which concerned not an individual measure but an aid scheme. Member States often notify their national legislation, in the interest of legal certainty, even when they do not consider that legislation to contain any aid.

58 At the hearing, the appellants added that there was only a limited publication of the *Aéroports de Paris* judgments and the Commission's decision of 13 March 2001 in the *Official Journal*, that they were not available in German on the Commission's internet site and that the exchanges between the Commission and the Member States had not been published.

59 Lastly, the appellants claim that the General Court failed to examine the arguments which they put forward to argue that the 2005 Guidelines were not lawful. They submit that, apart from the fact that those guidelines are contrary to primary law in so far as they characterise the activity of airport infrastructure construction as economic activity, they are intrinsically contradictory inasmuch as they confirm the 1994 Communication while differing from it and thus infringe the principle of legal certainty.

60 The Commission disputes all of those arguments which, in its view, do not stand up against a straightforward reading of the contested decision, from which it is apparent that it relied, in order to

prove that there was aid, not on the 2005 Guidelines but on Article 87(1) EC, as interpreted in the *Aéroports de Paris* judgments. It states that, in the light of the clarification in those judgments of the concept of State aid, which is an objective legal concept, it could not continue, without infringing that article, to apply point 12 of the 1994 Communication.

61 Furthermore, having regard to the *Aéroports de Paris* judgments and the decision-making practice which followed those judgments, there was no longer, in the Commission's view, any legitimate reason to believe, at the end of 2004, that the financing by the State of an airport runway could not under any circumstances constitute State aid. The principle of the protection of legitimate expectations was therefore not infringed. Moreover, since the 2005 Guidelines were not applied, the part of the ground of appeal relating to the infringement of the principle of legal certainty is manifestly redundant.

Findings of the Court

62 As regards, in the first place, the allegation relating to the infringement of the principle of non-retroactivity, the General Court, at paragraphs 157 to 160 of the judgment under appeal, observed as follows:

> '157 ... it must be held that, as regards the classification of the capital contributions as State aid within the meaning of Article 87(1) EC, there is nothing in the [contested decision] which leads to the conclusion that the Commission applied the provisions of the 2005 Guidelines.
>
> 158 With regard, first, to the 'undertaking' and economic activity criterion, the Commission pointed out in recital 173 of the [contested decision] that it is clear from the [*Aéroports de Paris* judgments] that the airport operator, in principle, is engaged in an economic activity within the meaning of Article 87(1) EC, to which the rules of State aid apply. Given the recent developments in the sector, the Commission considered, as indicated in recital 174 of the [contested decision], that it was no longer possible a priori to exclude the application of State aid rules to airports as of 2000, the year [of the judgment in Case T-128/98] *Aéroports de Paris* v *Commission* ... The Commission therefore concluded, in recital 176 of the [contested decision], that from the date of that judgment the State aid rules should apply in this sector, emphasising that that did not constitute retroactive application of the 2005 Guidelines inasmuch as the Court of Justice had simply clarified the concept of State aid.
>
> 159 That approach must be approved since the interpretation which the Court of Justice gives of a provision of European Union law is limited to clarifying and defining the meaning and scope of that provision as it ought to have been understood and applied from the time of its entry into force (Case T-289/03 *BUPA and Others* v *Commission* [2008] ECR II-81, paragraph 159, and the case-law cited).
>
> 160 It follows that, with regard to the assessment of the economic activity criterion, the Commission was entitled to implement the principles flowing from the [*Aéroports de Paris* judgments] by applying them to the circumstances of the present case, in particular as regards the financing of airport infrastructures and that does not constitute retroactive application of the 2005 Guidelines.'

63 At paragraph 161 of the judgment under appeal, the General Court also observed that the statement, at recital 174 in the preamble to the contested decision, that, having regard to the developments in the airport sector, the Commission had, in its 2005 Guidelines, 'extended' the approach followed in the *Aéroports de Paris* judgments to all types of airports did not permit the inference that the

Commission had applied those guidelines in the present case. Noting, at paragraphs 162 and 163 of the judgment under appeal, that the Commission had not applied the 2005 Guidelines either in its examination of the criteria of economic benefit and imputability to the State, the General Court concluded, at paragraph 164 of that judgment, that, as regards the characterisation of the capital contributions as 'State aid' for the purpose of Article 87(1) EC, the Commission had not applied the 2005 Guidelines. Consequently, it rejected the claim.

64 In doing so, the General Court did not err in law. First, as it follows from the examination of the first ground of appeal, it was fully entitled to hold, essentially, for the reasons referred to at paragraph 38 of this judgment, that the Commission had legitimately departed from the 1994 Communication. Secondly, it also correctly stated, essentially, that the Commission had not applied the 2005 Guidelines in order to characterise the capital contributions as State aid, but had assessed those contributions on the basis of conclusions which it had drawn from the *Aéroports de Paris* judgments as regards the application of Article 87(1) EC.

65 Accordingly, the General Court was likewise fully entitled not to examine the arguments put forward by the applicants as regards the lawfulness of the 2005 Guidelines, considering, at paragraph 182 of the judgment under appeal, the claims relating to those arguments to be ineffective.

66 Concerning, in the second place, the claims relating to the infringement of the principles of the protection of legitimate expectations and legal certainty, the General Court rejected them at paragraph 166 of the judgment under appeal on the grounds that they were based on the incorrect premise that the 2005 Guidelines had been applied retroactively. At paragraph 167 of that judgment, it also observed as follows:

'In any event, those complaints do not appear to be well founded. The [*Aéroports de Paris* judgments], from which it follows that the operation of an airport is an economic activity, date from 2000. In addition, the judgment in *Ryanair* v *Commission*, ... which concerns the situation before the adoption of the 2005 Guidelines, confirmed the [*Aéroports de Paris* judgments] in the context of the operation of a regional airport. Furthermore, it is clear from [the Commission's decision of 13 March 2001] that, at that date, the Commission did not exclude the possibility that a measure in favour of the development of regional airport infrastructure might constitute State aid. In that decision, which, contrary to what the applicants claim, also concerned the financing of airport infrastructure, the Commission considered, essentially, in particular in recital 17, that although the measure in question must be regarded as State aid, it was compatible with the common market under Article 87(3)(c) EC. Finally, it must be pointed out that if the German authorities notified State aid N 644i/2002 in 2002 for reasons of legal certainty, as the applicants state ..., it is because they envisage the possibility that the measures in question, which are intended to improve regional airport infrastructure, could constitute State aid. Furthermore, in the context of the procedure concerning that aid, the Commission, on the basis of the [*Aéroports de Paris* judgments], informed the German authorities on 30 June 2003, essentially, that it was not certain that "aid for the construction and development of regional airports could be … regarded as a general infrastructure measure which is irrelevant for the purposes of State aid".'

67 It must be observed in this connection, as the General Court correctly held at paragraph 166 of the judgment under appeal, that the appellants' arguments in respect of those claims is based on the incorrect premise that the Commission applied the 2005 Guidelines retroactively in the contested decision. The General Court was therefore fully entitled to reject those claims at paragraph 169 of the judgment under appeal.

68 As to the remainder, in so far as those arguments seek to call into question paragraph 167 of the judgment under appeal, they must be rejected as ineffective since they concern grounds included in that judgment purely for the sake of completeness (see, to that effect, Case C−431/07 P *Bouygues and Bouygues Télécom* v *Commission* [2009] ECR I−2665, paragraph 148 and the case−law cited).

69 The second ground of the appeal must therefore be dismissed as in part ineffective and in part unfounded.

Third ground of appeal, alleging infringement of Articles 1(b)(v), 17 and 18 of Regulation No 659/1999

Arguments of the parties

70 According to the appellants, supported by ADV, if the capital contributions are to be regarded as State aid, they should, in any event, be characterised as existing aid since, at the date of the adoption of the decision in 2004 to extend Leipzig-Halle airport, there was no market; regional airports were not engaged in economic activity and were not in competition with other airports. Therefore, the measure at issue only became aid because of the subsequent development of the airports market. The General Court therefore erred in law in rejecting the plea raised in the alternative on that point.

71 The Commission contends that that ground is manifestly unfounded. First, the market conditions had already undergone a significant alteration at the time of the grant of the capital contributions, so that those contributions should be regarded as new aid. Secondly, Articles 1(b)(v), 17 and 18 of Regulation No 659/1999 are applicable only to aid schemes.

Findings of the Court

72 At paragraphs 191 to 193 of the judgment under appeal, the General Court, after having set out the grounds on which it took the view that the capital contributions at issue had been granted at a time at which the Commission had already indicated that it considered that such financing was liable to constitute State aid, stated as follows:

> ‘191 With regard to the applicants’ argument that, as regards regional airports like Leipzig-Halle, there was no market at the time of the decision to develop the southern runway, since those airports did not engage in an economic activity and did not compete with each other, it is sufficient to recall that, in the context of the first plea in law, it was established that FLH is engaged in an economic activity and it competes with other airports ... and to note that nothing suggests that that was not the case when the capital contributions were granted. The development referred to by the Commission in the 2005 Guidelines took place prior to the decision to finance the southern runway in 2004. In point 5 of those Guidelines, the Commission refers to a development which took place “in recent years”. Furthermore, the Commission already referred to that development in 2001 in [its decision of 13 March 2001], in particular in recital 11.
>
> 192 Under those circumstances, it cannot be considered that the capital contributions did not constitute aid at the time at which they were granted but became aid later as a result of the development of the common market.
>
> 193 It follows from the foregoing that the capital contributions were not existing aid within the meaning of Article 1(b)(v) of Regulation No 659/1999.’

73 By the present ground of appeal, the appellants are not in any way arguing that that reasoning is

vitiated by one or a number of errors of law or a clear distortion of the sense of the facts but are merely disputing, by essentially repeating the arguments already submitted at first instance, the findings of fact made by the General Court at paragraph 191 of the judgment under appeal, claiming that there was no market at the time of the adoption of the decision to extend Leipzig−Halle airport in 2004.

74 It follows that the appellants are in fact seeking, by those arguments, a re−examination of the application submitted to the General Court and of the assessment of the facts made by that court in the judgment under appeal, which the Court of Justice does not have jurisdiction to undertake in appeal proceedings (see the case-law cited at paragraph 51 above and Cases C−352/98 P *Bergaderm and Goupil* v *Commission* [2000] ECR I−5291, paragraphs 34 and 35, and C−76/01 P *Eurocoton and Others* v *Council* [2003] ECR I−10091, paragraphs 46 and 47).

75 The third ground of appeal must therefore be dismissed as inadmissible.

Fourth ground of appeal, alleging infringement of the division of competences resulting from the EC Treaty

Arguments of the parties

76 The appellants, supported by ADV, claim that by holding, at paragraph 203 of the judgment under appeal, that the Commission had not overstepped its competences in treating the capital contributions as State aid, the General Court erred in law. It failed to have regard to the fact that the decision on transport infrastructure construction constitutes a decision on land use, adopted on the basis of provisions of public law of the Member State. By making the financing of extensions to infrastructure subject to State aid law, the General Court is conferring on the Commission competences which restrict the Member States' prerogatives as regards land use. That is also contrary to the principle of subsidiarity.

77 According to the Commission, the General Court was fully entitled to hold that Article 88 EC authorises, and even obliges, it to examine and review State aid and that the examination of the aid's compatibility with the common market falls within its exclusive competence. The appellants' arguments are therefore, in its view, unfounded.

Findings of the Court

78 It is apparent from the examination of the first ground of appeal that the General Court did not err in law in holding that the Commission had legitimately considered the capital contributions to constitute State aid for the purpose of Article 87(1) EC. It was therefore also without vitiating its judgment by an error in law that the General Court, in dismissing the plea raised before it alleging an infringement of the division of competences stemming from the EC Treaty, stated, at paragraphs 203 to 205 of the judgment under appeal, as follows:

'203 In the present case, with regard ... to the complaint that the Commission infringed the powers of the Member States, it must be pointed out that, as is clear from consideration of the first plea in law, the Commission did not err when it considered that the capital contributions constituted State aid within the meaning of Article 87(1) EC. Consequently, it had power under Article 87(2) and (3) to assess the capital contributions ... It thus cannot have infringed the powers of the Member States in that regard.

204 With regard to the allegation that regional and economic policies, of which the development

of the southern runway is part, are within the exclusive jurisdiction of the Member States, it must be stated that, even if that were true, the consequence of that fact would not be to deprive the Commission of its power to supervise State aid pursuant to Articles 87 and 88 EC where financing granted under such policies constitutes State aid within the meaning of Article 87(1) EC.

205 Finally, with regard to the fact that the Commission is unable to provide better supervision than that exercised at national level as is required by the second paragraph of Article 5 EC, it must be said that that argument is irrelevant since it is established that the Commission had the power under the EC Treaty to supervise the measure at issue in the present case since the measure in question was State aid.'

79 Having held that the Commission had correctly found that the measure at issue constituted State aid, the General Court could lawfully infer from this that the Commission had carried out the review of that measure which it was entrusted to perform under Article 88 EC and had therefore not overstepped its competences nor, consequently, those attributed to the European Union. Moreover, since the assessment of the compatibility of aid with the common market falls within its exclusive competence, subject to review by the EU judicature (see inter alia, to that effect, Case C−17/91 *Lornoy and Others* [1992] ECR I−6523, paragraph 30, and Case C−237/04 *Enirisorse* [2006] ECR I−2843, paragraph 23), the General Court was fully entitled to hold that the Commission could not have infringed the principle of subsidiarity.

80 It follows that the fourth ground of appeal must be dismissed as unfounded.

Fifth ground of appeal, alleging infringement of the obligation to state sufficient reasons for judgments

Arguments of the parties

81 The appellants, supported by ADV, allege that the judgment under appeal lacks sufficient grounds, in so far as the General Court assumes that there is an economic activity by referring only to the contested decision, without examining the arguments to the contrary which they put forward or the economic reality.

82 The Commission observes that the General Court made a detailed examination of the arguments alleging infringement of Article 87(1) EC. In its view, that court therefore satisfied the obligation to state sufficient reasons for judgments.

Findings of the Court

83 It must be observed that the obligation to state the reasons on which a judgment is based arises under Article 36 of the Statute of the Court of Justice of the European Union, which applies to the General Court by virtue of the first paragraph of Article 53 of the Statute, and Article 81 of the Rules of Procedure of the General Court. It has consistently been held that the statement of the reasons on which a judgment of the General Court is based must clearly and unequivocally disclose that court's reasoning in such a way as to enable the persons concerned to ascertain the reasons for the decision taken and the Court of Justice to exercise its power of review (Case C−280/08 P *Deutsche Telekom* v *Commission* [2010] ECR I−9555, paragraphs 135 and 136).

84 The General Court satisfied that requirement by setting out clearly and unequivocally, at paragraphs 87 to 121 of the judgment under appeal, the grounds on which it rejected the appellants' arguments

and held that the Commission had been fully entitled to find that the capital contributions constituted State aid for the purposes of Article 87(1) EC.

85 The fifth and last ground of appeal being, consequently, unfounded, it must be disregarded and, accordingly, the appeal must be dismissed.

Costs

86 Under Article 138(1) of the Rules of Procedure of the Court of Justice, which applies to appeal proceedings pursuant to Article 184(1) of those rules, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the appellants have been unsuccessful, they must be ordered to pay the costs incurred by the Commission, in addition to their own costs, in accordance with the form of order sought by the Commission.

87 In accordance with Article 184(4) of those Rules of Procedure, ADV, as an intervener having participated in the proceedings before the Court of Justice, is to bear its own costs.

On those grounds, the Court (Eighth Chamber) hereby:

1) Dismisses the appeal;

2) Orders Mitteldeutsche Flughafen AG and Flughafen Leipzig−Halle GmbH to bear their own costs and to pay the costs incurred by the European Commission;

3) Orders Arbeitsgemeinschaft Deutscher Verkehrsflughäfen eV (ADV) to bear its own costs.

[Signatures]

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* Language of the case: German

COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels,
SEC (2008)

COMMUNICATION FROM THE COMMISSION

Commission Notice on the application of Articles 87 and 88 of the EC Treaty to State aid in the form of guarantees

05.2008

Commission Notice on the application of Articles 87 and 88 of the EC Treaty to State aid in the form of guarantees

This Notice revises and replaces the present Commission Notice on the application of Articles 87 and 88 of the EC Treaty to State aid in the form of guarantees
(2000/C 71/07 — OJ C 71, 11.3.2000, p. 14).

1. INTRODUCTION

1.1. Background

This Notice updates the Commission's approach to State aid granted in the form of guarantees and aims to give Member States more detailed guidance about the principles on which the Commission intends to base its interpretation of Articles 87 and 88 and their application to State guarantees. These principles are currently laid down in the present Commission Notice on the application of Articles 87 and 88 of the EC Treaty to State aid in the form of guarantees[1]. Experience gained in the application of the Notice since 2000 suggests that the Commission's policy in this area should be reviewed. In this connection, the Commission wishes to recall for instance its recent practice in various specific decisions[2] with respect to the need to undertake an individual assessment of the risk of losses related to each guarantee in the case of schemes. The Commission intends to further make its policy in this area as transparent as possible so that its decisions are predictable and that equal treatment is ensured. In particular, the Commission wishes to provide small and medium-sized enterprises (hereafter "SMEs") and Member States with safe harbours predetermining, for a given company and on the basis of its financial rating, the minimum margin that should be charged for a State guarantee in order to be deemed as not constituting aid. Likewise, any shortfall in the premium charged in comparison with that level could be deemed as the aid element.

1.2. Types of guarantee

In their most usual form, guarantees are associated with a loan or other financial obligation to be contracted by a borrower with a lender; they may be granted as individual guarantees or within guarantee schemes.

However, various forms of guarantee may exist, depending on their legal basis, the type of transaction covered, their duration, etc; without the list being exhaustive, the following forms of guarantee can be identified:

- general guarantees, i.e. guarantees provided to undertakings as such vs. guarantees linked to a specific transaction, which may be a loan, an equity investment, etc;

- guarantees provided by a specific instrument vs. guarantees linked to the statute of the undertaking itself;

- guarantees provided directly or counter guarantees provided to a first level guarantor;

- unlimited guarantees vs. guarantees limited in amount and/or time: the Commission also regards as aid in the form of a guarantee the more favourable funding terms obtained by enterprises whose legal form rules out bankruptcy or other insolvency procedures or provides an explicit State guarantee or coverage of losses by the State. The same applies to the acquisition by a State of a holding in an enterprise if unlimited liability is accepted instead of the usual limited liability;

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[1] Commission Notice on the application of Articles 87 and 88 of the EC Treaty to State aid in the form of guarantees (2000/C 71/07 — OJ C 71, 11.3.2000, p. 14).

[2] For example: C 45/98 Guarantee schemes of the *Land* of Brandenburg for 1991 and 1994 (decision of 23.4.2003, OJ L 263, 14.10.2003, p. 1); N 512/03 Guarantee schemes in ship financing — Germany (decision of 16.12.2003, OJ C 62, 11.3.2004, p. 3); C 28/2003 Guarantee scheme in ship financing — Italy (decision of 6.4.2005, OJ L 244, 7.9.2006, p. 17).

- guarantees clearly originating from a contractual source (such as for instance formal contracts, letters of comfort) or another legal source vs. guarantees whose form is less visible (such as for instance side letters, oral commitments), possibly with various levels of comfort that can be provided by this guarantee.

Especially in the latter case, the lack of appropriate legal or accounting records often leads to very poor traceability; this is true both for the beneficiary and for the State or public body providing it and, as a result, for the information available to third parties.

1.3. Structure and scope of the Notice

For the purpose of this Notice:

- a "guarantee scheme" means any tool on the basis of which, without further implementing measures being required, guarantees can be provided to undertakings respecting certain conditions of duration, amount, underlying transaction, type or size of undertakings (such as for instance SMEs);
- an "individual guarantee" means any guarantee provided to an undertaking and not awarded on the basis of a guarantee scheme.

Sections 3 and 4 of this Notice are designed to be directly applicable to guarantees linked to a specific financial transaction such as a loan. The Commission considers that these are the cases where guarantees most need to be classed as constituting State aid or not, owing to their frequency and the fact that they can usually be quantified.

As in most cases the transaction covered by a guarantee would be a loan, the Notice will further refer to the “borrower” as the principal beneficiary of the guarantee and to the “lender” as the body whose risk is diminished by the State guarantee. The use of these two specific terms also aims to facilitate understanding of the rationale underpinning the text, since the basic principle of a loan is broadly understood. However, it does not ensue that sections 3 and 4 are only applicable to a loan guarantee. They apply to all guarantees where a similar transfer of risk takes place such as, for example, an investment in the form of equity, provided the relevant risk profile (including the possible lack of collateralisation) is taken into account.

The Notice applies to all economic sectors, including agriculture, fisheries and transport sectors without prejudice to specific rules related to guarantees in the sector concerned.
This Notice does not apply to export credit guarantees.

1.4. Other types of guarantee

Where certain forms of guarantee (see point 1.2) involve a transfer of risk to the guarantor and where they do not display one or more of the specific features referred to in point 1.3, for instance insurance guarantees, a case-by-case analysis will have to be made for which, as far as is necessary, the applicable sections or methodologies described in this Notice will be applied.

1.5. Neutrality

This Notice applies without prejudice to Article 295 and thus does not prejudice the rules in Member States governing the system of ownership. The Commission is neutral as regards public or private ownership.

In particular, the mere fact that the ownership of an undertaking is largely in public hands is not sufficient in itself to constitute a State guarantee provided there are no explicit or implicit guarantee elements.

2. APPLICABILITY OF ARTICLE 87(1)

2.1. General remarks

Article 87(1) of the EC Treaty states that 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 common market.

These general criteria equally apply to guarantees. As for other forms of potential aid, guarantees given directly by the State, namely by central, regional or local authorities, as well as guarantees given through State resources by other State-controlled bodies such as undertakings and imputable to public authorities[3], may constitute State aid.

In order to avoid any doubts, the notion of State resources should thus be clarified as regards State guarantees. The benefit of a State guarantee is that the risk associated with the guarantee is carried by the State. Such risk-carrying by the State should normally be remunerated by an appropriate premium. Where the State forgoes all or part of such a premium, there is both a benefit for the undertaking and a drain on the resources of the State. Thus, even if it turns out that no payments are ever made by the State under a guarantee, there may nevertheless be State aid under Article 87(1). The aid is granted at the moment when the guarantee is given, not the moment at which the guarantee is invoked or the moment at which payments are made under the terms of the guarantee. Whether or not a guarantee constitutes State aid, and, if so, what the amount of that State aid may be, must be assessed at the moment the guarantee is given.

In this context the Commission would point out that the analysis under State aid rules does not prejudge the compatibility of a given measure with other Treaty provisions.

2.2. Aid to the borrower

Usually, the aid beneficiary is the borrower. As indicated under point 2.1, risk-carrying should normally be remunerated by an appropriate premium. When the borrower does not need to pay the premium, or pays a low premium, it obtains an advantage. Compared to a situation without guarantee, the State guarantee enables the borrower to obtain better financial terms for a loan than those normally available on the financial markets. Typically, with the benefit of the State guarantee, the borrower can obtain lower rates and/or offer less security. In some cases, the borrower would not, without a State guarantee, find a financial institution prepared to lend on any terms. State guarantees may thus facilitate the creation of new business and enable certain undertakings to raise money in order to pursue new activities.

[3] Cf. Case C-482/99 *France v Commission* (Stardust) [2002] ECR I-4397.

Likewise, a State guarantee may help a failing firm remain active instead of being eliminated or restructured, thereby possibly creating distortions of competition.

2.3. Aid to the lender

2.3.1. Even if usually the aid beneficiary is the borrower, it cannot be ruled out that under certain circumstances the lender, too, will directly benefit from the aid. In particular, for example, if a State guarantee is given *ex post* in respect of a loan or other financial obligation already entered into without the terms of this loan or financial obligation being adjusted, or if one guaranteed loan is used to pay back another, non-guaranteed loan to the same credit institution, then there may also be aid to the lender, in so far as the security of the loans is increased. Where the guarantee contains aid to the lender, attention should be drawn to the fact that such aid might, in principle, constitute operating aid.

2.3.2. Guarantees differ from other State aid measures, such as grants or tax exemptions, in that in the case of a guarantee the State also enters into a legal relationship with the lender. Therefore, consideration has to be given to the possible consequences for third parties of State aid that has been illegally granted. In the case of State guarantees for loans, this concerns mainly the lending financial institutions. In the case of guarantees for bonds issued to obtain financing for undertakings, this concerns the financial institutions involved in the issuance of the bonds. The question whether the illegality of the aid affects the legal relations between the State and third parties is a matter which has to be examined under national law. National courts may have to examine whether national law prevents the guarantee contracts from being honoured, and in that assessment the Commission considers that they should take account of the breach of Community law. Accordingly, lenders may have an interest in verifying, as a standard precaution, that the Community rules on State aid have been observed whenever guarantees are granted. The Member State should be able to provide a case number issued by the Commission for an individual case or a scheme and possibly a non-confidential copy of the Commission's decision together with the relevant reference to the *Official Journal of the European Union*. The Commission for its part will do its utmost to make available in a transparent manner information on cases and schemes approved by it.

3. CONDITIONS RULING OUT THE EXISTENCE OF AID

3.1. General considerations

If an individual guarantee or a guarantee scheme entered into by the State does not bring any advantage to an undertaking, it will not constitute State aid.

In this context, in order to determine whether an advantage is being granted through a guarantee or a guarantee scheme, the Court has confirmed in its recent judgments[4] that the Commission should base its assessment on the principle of an investor operating in a market economy (the "market economy investor principle", or "MEIP"). Account should therefore be taken of the effective possibilities for a beneficiary undertaking to obtain equivalent financial resources by having recourse to the capital market. State aid is not

[4] See Case C-482/99, op. cit.

involved where a new funding source is made available on conditions which would be acceptable for a private operator under the normal conditions of a market economy[5].

In order to facilitate the assessment of whether the MEIP is fulfilled for a given guarantee measure, the Commission sets out in this section a number of sufficient conditions for the absence of aid. Individual guarantees are covered in point 3.2 with a simpler option for SMEs in point 3.3. Guarantee schemes are covered in point 3.4 with a simpler option for SMEs in point 3.5.

3.2. Individual guarantees

Concerning an individual State guarantee, the Commission considers that the fulfilment of all the following conditions (a) – (d) will be sufficient to rule out the presence of State aid.

(a) The borrower is not in financial difficulty.

In order to decide whether the borrower is to be seen as being in financial difficulty, the definition set out in the guidelines for rescue and restructuring aid applies[6]. SMEs which have been incorporated for less than three years shall not be considered as being in difficulty for that period for the purposes of this Notice.

(b) The extent of the guarantee can be properly measured when it is granted.

This means that the guarantee must be linked to a specific financial transaction, for a fixed maximum amount and limited in time.

(c) The guarantee does not cover more than 80% of the outstanding loan or other financial obligation; this limitation does not apply to guarantees covering debt securities[7].

The Commission considers that if a financial obligation is wholly covered by a State guarantee, the lender has less incentive to properly assess, secure and minimise the risk arising from the lending operation, and in particular to properly assess the borrower's creditworthiness. Such risk assessment might not always be taken over by the State guarantor, for lack of means. This lack of incentive to minimise the risk of non-repayment of the loan might encourage lenders to contract loans with a greater than normal commercial risk and could thus increase the amount of higher-risk guarantees in the State's portfolio.

This limitation of 80% does not apply to a public guarantee granted to finance a company whose activity is solely constituted by a properly entrusted Service of General Economic Interest[8] and when this guarantee has been provided by the public authority having put in

[5] See, for example, Commission communication on the application of Article 92 and 93 of the Treaty to public shareholdings (Bulletin of the European Communities No 9-1984); Court of Justice of the European Communities, Joined Cases 296 and 318/82 *Netherlands and Leeuwarder Papierwarenfabriek Bv v Commission* [1985] ECR 809, paragraph 17; Application of Articles 92 and 93 of the EC Treaty and Article 61 of the EEA Agreement to State aid in the aviation sector (OJ C 350, 10.12.1994, p. 5), points 25 and 26.

[6] See Community guidelines on State aid for rescuing and restructuring firms in difficulty (OJ C 244, 1.10.2004, p. 2).

[7] For the definition of "debt securities", see Article 2.1.(b) of Directive 2004/109/EC of the European Parliament and of the Council of 15 December 2004 on the harmonisation of transparency requirements in relation to information about issuers whose securities are admitted to trading on a regulated market and amending Directive 2001/34/EC (OJ L 390, 31.12.2004, p.38)

[8] Such a SGEI must be in conformity with Community rules such as the Commission Decision of 28 November 2005 on the application of Article 86(2) of the EC Treaty to State aid in the form of public service compensation granted to certain undertakings entrusted with the operation of services of general economic interest (OJ L 312,

place this entrustment. The limitation of 80% applies if the company concerned provides other SGEI(s) or other economic activities.

In order to ensure that the lender effectively bears part of the risk, due attention must be given to the following two aspects:

- When the size of the loan or of the financial obligation decreases over time, for instance because the loan starts to be reimbursed, the guaranteed amount has to decrease proportionally, such that at each moment in time the guarantee does not cover more than 80% of the outstanding loan or financial obligation.

- Losses have to be sustained proportionally and in the same way by the lender and the guarantor. In the same manner, net recoveries (i.e. revenues excluding costs for claim handling) generated from the enforcement of the debt against securities given by the borrower have to reduce proportionally the losses borne by the lender and the guarantor *(pari passu)*. First-loss guarantees, where losses are first attributed to the guarantor and only then to the lender, will be regarded as possibly involving aid.

If a Member State wishes to provide a guarantee above the 80% threshold and claim that it does not constitute aid, it should duly substantiate the claim, for instance on the basis of the arrangement of the whole transaction, and notify it to the Commission for it to be properly assessed on its possible State aid character.

(d) A market-oriented price is paid for the guarantee.

As indicated under point 2.1, risk-carrying should normally be remunerated by an appropriate premium on the guaranteed or counter-guaranteed amount. When the price paid for the guarantee is at least as high as the corresponding guarantee premium benchmark that can be found on the financial markets, the guarantee does not contain aid.

If no corresponding guarantee premium benchmark can be found on the financial markets, the total financial cost of the guaranteed loan, including the interest rate of the loan and the guarantee premium, has to be compared to the market price of a similar non-guaranteed loan.

In both cases, in order to determine the corresponding market price, the characteristics of the guarantee and of the underlying loan should be taken into consideration; this includes: the amount and duration of the transaction, the security given by the borrower and other experience affecting the recovery rate evaluation, the probability of default of the borrower due to its financial position, its sector of activity and prospects as well as other economic conditions. This analysis should notably allow the borrower to be classified by means of a risk rating. This classification may be provided by an internationally recognised rating agency or, where available, by the internal rating used by the bank providing the underlying loan. Here

29.11.2005, p. 67) or the Community framework for State aid in the form of public service compensation (OJ C 297, 29.11.2005, p. 4).

the Commission wishes to point to the link between rating and default rate made by international financial institutions, whose work is also publicly available[9]. To assess the market-conformity of the premium the Member State can carry out a comparison of prices paid by similarly rated undertakings on the market.

The Commission will therefore not accept that the guarantee premium is set at a single rate deemed to correspond to an overall industry standard.

3.3. Valuation of individual guarantees for SMEs

As an exception, if the borrower is an SME[10], the Commission can by way of derogation from point 3.2.(d) accept a simpler evaluation of whether or not a loan guarantee involves aid; in that case, and provided all the other conditions laid down in points 3.2.(a) to 3.2.(c) are met, a State guarantee would be deemed as not constituting aid if the following minimum annual premium ("safe harbour premium"[11]) is charged on the amount effectively guaranteed by the State, based on the rating of the borrower[12]:

[9] Such as Table 1 on agencies' credit ratings to be found in the Bank for International Settlements Working Paper No 207, available at: http://www.bis.org/publ/work207.pdf.

[10] "SMEs" refer to small and medium-sized enterprises as defined in Annex I to Commission Regulation (EC) No 364/2004 (OJ L 63, 28.2.2004, p. 22) amending Regulation (EC) No 70/2001 on the application of Articles 87 and 88 of the EC Treaty to State aid to small and medium-sized enterprises (OJ L 10, 13.1.2001, p. 33) or any Regulation replacing that Regulation.

[11] These safe-harbour premiums are established in line with the margins determined for loans to similarly rated undertakings in the communication from the Commission on the revision of the method for setting the reference and discount rates adopted on 12 December 2007 (OJ C 14, 19.1.2008, p.6). Following the study commissioned by the Commission on that topic (http://ec.europa.eu/comm/competition/state_aid/studies_reports/full_report.pdf — see pages 23 and 156-159 of the study), a general reduction of 20 basis points has been taken into account. This reduction corresponds to the difference in margin for a similar risk between a loan and a guarantee in order to take into account the additional costs specifically linked to loans.

[12] The table refers to the rating classes of Standard and Poor's, Fitch and Moody's, which are the most frequently used by the banking sector in order to link their own rating system as described in 3.2.(d). However, ratings do not need to be obtained from those specific rating agencies — national rating systems or rating systems used by banks to reflect default rates are equally acceptable provided they supply the one-year probability of default as this figure is used by rating agencies to rank companies; other systems should allow for a similar classification through this ranking key.

Credit quality	Standard and Poor's	Fitch	Moody's	Annual safe-harbour premium
Highest quality	AAA	AAA	Aaa	0.4%
Very strong payment capacity	AA + AA AA –	AA + AA AA –	Aa 1 Aa 2 Aa 3	0.4%
Strong payment capacity	A + A A –	A + A A –	A 1 A 2 A 3	0.55%
Adequate payment capacity	BBB + BBB BBB –	BBB + BBB BBB –	Baa 1 Baa 2 Baa 3	0.8%
Payment capacity is vulnerable to adverse conditions	BB + BB	BB + BB	Ba 1 Ba 2	2.0%
	BB – B +	BB – B +	Ba 3 B 1	3.8%
Payment capacity is likely to be impaired by adverse conditions	B B –	B B –	B 2 B 3	6.3%
Payment capacity is dependent upon sustained favourable conditions	CCC + CCC CCC – CC	CCC + CCC CCC – CC C	Caa 1 Caa 2 Caa 3	No safe-harbour annual premium can be provided
In or near default	SD D	DDD DD D	Ca C	No safe-harbour annual premium can be provided

The safe-harbour premiums apply to the amount effectively guaranteed or counter-guaranteed by the State at the beginning of each year concerned. They must be considered a minimum to be applied with respect to a company whose credit rating is at least equal to those given in the table[13].

In the case of a single upfront guarantee premium, the loan guarantee is deemed to be free of aid if it is at least equal to the present value of the future guarantee premiums as indicated above, the discount rate used being the corresponding reference rate[14].

[13] For example, a company to which a bank assigns a credit rating corresponding to BBB-/Baa 3 should be charged a yearly guarantee premium of at least 0.8% on the amount effectively guaranteed by the State at the beginning of each year.

[14] See the above-mentioned Communication on reference and discount rates stating that: *"The reference rate is also to be used as a discount rate, for calculating present values. To that end, in principle, the base rate increased by a fixed margin of 100 basis points will be used."*.

As outlined in the table above, companies with a rating corresponding to CCC/Caa or worse cannot benefit from this simplified methodology.

For SMEs which do not have a credit history or a rating based on a balance sheet approach, such as certain special purpose companies or start-up companies, the safe-harbour premium is set at 3.8% but this can never be lower than the one which would be applicable to the parent company/companies.

The above margins may be revised from time to time to take account of the market situation.

3.4. Guarantee schemes

For a State guarantee scheme, the Commission considers that the fulfilment of all the following conditions will rule out the presence of State aid:

(a) The scheme is closed to borrowers in financial difficulty (see details in point 3.2.(a)).

(b) The extent of the guarantees can be properly measured when they are granted. This means that the guarantees must be linked to specific financial transactions, for a fixed maximum amount and limited in time.

(c) The guarantees do not cover more than 80% of each outstanding loan or other financial obligation (see details and exceptions in point 3.2.(c)).

(d) The terms of the scheme are based on a realistic assessment of the risk so that the premiums paid by the beneficiaries make it, in all probability, self-financing. The self-financing nature of the scheme and the proper risk orientation are viewed by the Commission as indications that the guarantee premiums charged under the scheme are market conform.
This entails that the risk of each new guarantee has to be assessed, on the basis of all the relevant factors (quality of the borrower, securities, duration of the guarantee, etc). On the basis of this risk analysis, risk classes[15] have to be defined, the guarantee has to be classified in one of these risk classes and the corresponding guarantee premium has to be charged on the guaranteed or counter-guaranteed amount.

(e) In order to have a proper and progressive evaluation of the self-financing aspect of the scheme, the adequacy of the level of the premiums has to be reviewed at least once a year on the basis of the effective loss rate of the scheme over an economically reasonable time horizon, and premiums adjusted accordingly if there is a risk that the scheme may no longer be self-financing. This adjustment may concern all issued and future guarantees or only the latter.

(f) To be viewed as market conform, the premiums charged have to cover the normal risks associated with granting the guarantee, the administrative costs of the scheme, and a yearly remuneration of an adequate capital, even if the latter is not at all or only partially constituted.
As regards administrative costs, these should include at least the specific initial risk assessment as well as the risk monitoring and risk management costs linked to the granting and administration of the guarantee.

[15] See further details in footnote 12.

As regards the remuneration of the capital, the Commission observes that usual guarantors are subject to capital requirement rules and, in accordance with these rules, forced to constitute equity in order not to go bankrupt when there are variations in the yearly losses related to the guarantees. State guarantee schemes are normally not subject to these rules and thus do not need to constitute such reserves. In other words, each time the losses stemming from the guarantees exceed the revenues from the guarantee premiums, the deficit is simply covered by the State budget. This State guarantee to the scheme puts the latter in a more favourable situation than a usual guarantor. In order to avoid this disparity and to remunerate the State for the risk it is taking, the Commission considers that the guarantee premiums have to cover the remuneration of an adequate capital.

The Commission considers that this capital has to correspond to 8%[16] of the outstanding guarantees. For guarantees granted to undertakings whose rating is equivalent to AAA/AA- (Aaa/Aa3), the amount of capital to be remunerated can be reduced to 2% of the outstanding guarantees; for guarantees granted to undertakings whose rating is equivalent to A+/A- (A1/A3), the amount of capital to be remunerated can be reduced to 4% of the outstanding guarantees.
The normal remuneration of this capital is made up of (1) a risk premium, possibly increased by (2) the risk-free interest rate:

(1) the risk premium must be paid to the State on the adequate amount of capital in all cases. Based on its practice, the Commission considers that a normal risk premium for equity amounts to at least 400 basis points; such risk premium should be included in the guarantee premium charged to the beneficiaries[17];

(2) if, as in most State guarantee schemes, the capital is not provided to the scheme and therefore there is no cash contribution by the State, the risk-free interest rate does not have to be taken into account. Alternatively, if the underlying capital is effectively provided by the State, the State has to incur borrowing costs and the scheme benefits from this cash by possibly investing it. Therefore the risk-free interest rate has to be paid to the State on the amount provided; this charge should however be taken from the financial income of the scheme and does not necessarily have to impact the guarantee premiums[18]. The Commission considers that the yield of the 10-year government bond may be used as a suitable proxy for the risk-free rate taken as normal return on capital.

[16] Corresponding to the Cooke ratio conditions and in line with Article 75 and Annex VI (paragraph 41 *et seq*.) of Directive 2006/48/EC of 14 June 2006 relating to the taking up and pursuit of the business of credit institutions (recast) (OJ L 177, 30.6.2006, p. 1).

[17] For a guarantee to a BBB rated company amounting to 100, the reserves to be constituted thus amount to 8. Applying 400 basis points (or 4%) to this amount results in annual capital costs of 8%*4% = 0.32% of the guaranteed amount, which will impact the price of the guarantee accordingly. If the one-year default rate anticipated by the scheme for this company is, for instance, 0,35% and the yearly administrative costs are estimated at 0,1%, the price of the guarantee deemed as non-aid will be 0,77% per year.

[18] In that case, and provided the risk-free rate is deemed to be 5%, the annual cost of the reserves to be constituted will be, for the same guarantee of 100 and reserves of 8 to be constituted, 8% *(4%+5%) = 0.72% of the guaranteed amount. Under the same assumptions (default rate of 0,35% and administrative costs of 0,1%), the price of the guarantee would be 0,77% per year and an additional charge of 0,4% should be paid by the scheme to the State.

(g) In order to ensure transparency, the scheme must provide for the terms on which future guarantees will be granted, such as eligible companies in terms of rating and, when applicable, sector and size, maximum amount and duration of the guarantees.

3.5. Valuation of guarantee schemes for SMEs

In view of the specific situation of SMEs and in order to facilitate their access to finance, especially through the use of guarantee schemes, two specific possibilities exist for such companies:

- the use of safe harbour premiums as defined for individual guarantees to SMEs;

- the valuation of guarantee schemes as such by allowing the application of a single premium and avoiding the need for individual ratings of beneficiary SMEs;

The conditions of use of both rules are defined as follows:

Use of safe-harbour premiums in guarantee schemes for SMEs

In line with what is proposed for simplification purposes in relation to individual guarantees, guarantee schemes in favour of SMEs can also *a priori* be deemed self-financing and not constitute State aid if the minimum safe-harbour premiums set out in point 3.3 and based on the ratings of undertakings are applied[19]. The other conditions set out in points 3.4.(a) to 3.4.(c) as well as in point 3.4.(g) still have to be fulfilled; conditions set out in points 3.4.(d) to 3.4.(f) are deemed to be fulfilled by the use of the minimum annual premiums set out in point 3.3.

Use of single premiums in guarantee schemes for SMEs

The Commission is aware that carrying out an individual risk assessment of each borrower is a costly process, which may not be appropriate where a scheme covers a large number of small loans for which it represents a risk pooling tool.

Consequently, where a scheme only relates to guarantees for SMEs where the guaranteed amount does not exceed a threshold of 2.5 million euros per company in this given scheme, the Commission may accept, by way of derogation from point 3.4.(d) above, a single yearly guarantee premium for all borrowers. However, in order for the guarantees granted under such a scheme to be regarded as not constituting State aid, the scheme has to remain self-financing and all the other conditions set out in points 3.4.(a) to 3.4.(c) as well as in points 3.4.(e) to 3.4.(g) still have to be fulfilled.

3.6. No automaticity

Failure to comply with any one of the conditions set out in points 3.2 to 3.5 does not mean that such guarantee or guarantee scheme is automatically regarded as State aid. If there is any doubt as to whether a planned guarantee or scheme does constitute State aid, it should be notified to the Commission.

[19] This includes the provision that for SMEs which do not have a credit history or a rating based on a balance sheet approach, the safe-harbour premium is set at 3.8% but this can never be lower than the one which would be applicable to the parent company/companies.

4. GUARANTEES WITH AN AID ELEMENT

4.1. General

Where an individual guarantee or a guarantee scheme does not comply with the market economy investor principle, it is deemed to entail State aid. The State aid element therefore needs to be quantified in order to check whether the aid may be found compatible under a specific State aid exemption. As a matter of principle, the State aid element will be deemed to be the difference between the appropriate market price of the guarantee provided individually or through a scheme and the actual price paid for that measure.
The resulting yearly cash grant equivalents should be discounted to their present value using the reference rate, then added up to obtain the total grant equivalent.

When calculating the aid element in a guarantee, the Commission will devote special attention to the following elements:
(a) In the case of individual guarantees: Is the borrower in financial difficulty? In the case of guarantee schemes, do the eligibility criteria of the scheme provide for exclusion of such undertakings?(see details in point 3.2.(a))?
The Commission notes that for companies in difficulty, a market guarantor, if any, would at the time the guarantee is granted charge a high premium given the expected rate of default; if the likelihood that the borrower will not be able to repay the loan becomes particularly high, this market rate may not exist and in exceptional circumstances the aid element of the guarantee may turn out to be as high as the amount effectively covered by that guarantee.

(b) Can the extent of each guarantee be properly measured when it is granted?
This means that the guarantees must be linked to a specific financial transaction, for a fixed maximum amount and limited in time. In this connection the Commission considers in principle that unlimited guarantees are incompatible with Article 87 of the EC Treaty.

(c) Does the guarantee cover more than 80% of each outstanding loan or other financial obligation? (see details and exceptions in point 3.2.(c))
In order to ensure that the lender has a real incentive to properly assess, secure and minimise the risk arising from the lending operation, and in particular to assess properly the borrower's creditworthiness, the Commission considers that a percentage of at least 20% not covered by a State guarantee should be carried by the lender[20], to properly secure its loans and to minimise the risk associated with the transaction. The Commission will therefore, in general, examine more thoroughly any guarantee or guarantee scheme covering the entirety (or nearly the entirety) of a financial transaction except if a Member State duly justifies it, for instance by the specific nature of the transaction.

(d) Have the specific characteristics of the guarantee and loan (or other financial obligation) been taken into account when determining the market premium of the guarantee, from which the aid element is calculated by comparing it with the premium really paid? (see details in point 3.2.(d))

[20] This is under the assumption that the corresponding level of security is provided by the company to the State and the credit institution.

4.2. Aid element in individual guarantees

For an individual guarantee the cash grant equivalent of a guarantee should be calculated as the difference between the market price of the guarantee and the price really paid.

Where the market does not provide guarantees for the type of transaction concerned, no market price for the guarantee is available. In that case, the aid element should be calculated in the same way as the grant equivalent of a soft loan, namely as the difference between the specific market interest rate this company would have borne without the guarantee and the interest rate obtained thanks to the State guarantee after any premiums paid have been taken into account. If there is no market interest rate and if the Member State wishes to use the reference rate as a proxy, the Commission stresses that the conditions laid down in the communication on reference rates[21] are valid to calculate the aid intensity of an individual guarantee. This means that due attention must be paid to the top-up to be added to the basis rate in order to take into account the relevant risk profile linked to the operation covered, the undertaking guaranteed and the collaterals provided.

4.3. Aid element in individual guarantees for SMEs

For SMEs, the simplified evaluation system outlined above in point 3.3 can also be applied; in that case, if the premium for a given guarantee does not correspond to the value set as a minimum for its rating class, the difference between this minimum level and the premium charged will be regarded as aid. If the guarantee lasts more than a year, the yearly shortfalls are discounted using the relevant reference rate[22].

Only in cases clearly evidenced and duly justified by the Member State concerned may the Commission accept a deviation from these rules; a risk-based approach still has to be respected in such cases.

4.4. Aid element in guarantee schemes

For guarantee schemes, the cash grant equivalent of each guarantee within the scheme is the difference between the premium effectively charged (if any) and the one that should be charged in an equivalent non-aid scheme set up in accordance with the conditions laid down in point 3.4. The aforementioned theoretical premiums from which the aid element is calculated have therefore to cover the normal risks associated with the guarantee as well as the administrative and capital costs[23]. This way of calculating the grant equivalent is aimed at ensuring that, also over the medium and long term, the total aid granted under the scheme is equal to the money injected by the public authorities to cover the deficit of the scheme.

Since, in the case of State guarantee schemes, the specific features of the individual cases may not be known at the time when the scheme is to be assessed, the aid element must be assessed by reference to the provisions of the scheme.

[21] See the above-mentioned communication.

[22] See further details in footnote 14.

[23] This calculation can be summarised, for each risk class, as the difference between (a) the outstanding sum guaranteed, multiplied by the risk factor of the risk class ("risk" being the probability of default after inclusion of administrative and capital costs), which represents the market premium, and (b) any premium paid, i.e. (guaranteed sum × risk) – premium paid.

Aid elements in guarantee schemes can also be calculated through methodologies already accepted by the Commission following their notification under a Regulation adopted by the Commission in the State aid field, such as Commission Regulation (EC) No 1628/2006 of 24 October 2006 on the application of Articles 87 and 88 of the Treaty to national regional investment aid[24] or Commission Regulation (EC) No 1857/2006 of 15 December 2006 on the Application of Articles 87 and 88 of the Treaty to State aid to small and medium-sized enterprises active in the production of agricultural products and amending Regulation (EC) n° 70/2001[25], provided that the approved methodology explicitly addresses the type of guarantees and the type of underlying transactions at stake.

Only in cases clearly evidenced and duly justified by the Member State concerned may the Commission accept a deviation from these rules; a risk-based approach still has to be respected in such cases.

4.5. Aid element in guarantee schemes for SMEs

The two simplification tools exposed in point 3.5 and relating to guarantee schemes for SMEs can also be used for aid calculation purposes; the conditions of use of both rules are defined as follows:

Use of safe-harbour premiums in guarantee schemes for SMEs

For SMEs, the simplified evaluation system outlined above in point 3.5 can also be applied; in that case, if the premium for a given category in a guarantee scheme does not correspond to the value set as a minimum for its rating class[26], the difference between this minimum level and the premium charged will be regarded as aid[27]. If the guarantee lasts more than a year, the yearly shortfalls are discounted using the reference rate[28].

Use of single premiums in guarantee schemes for SMEs

In view of the more limited distortion of competition that may be caused by State aid provided in the framework of a guarantee scheme for SMEs, the Commission considers that if an aid scheme only relates to guarantees for SMEs where the guaranteed amount does not exceed a threshold of 2.5 million euros per company in this given scheme, the Commission may accept, by way of derogation from point 4.4 above, a valuation of the aid intensity of the scheme as such, without the need to carry out a valuation for each individual guarantee or risk class within the scheme[29].

[24] OJ L 302, 1.11.2006, p. 29.
[25] OJ L 358, 16.12.2006, p.3
[26] This includes the provision that for SMEs which do not have a credit history or a rating based on a balance sheet approach, the safe-harbour premium is set at 3.8% but this can never be lower than the one which would be applicable to the parent company/companies.
[27] This calculation can be summarised, for each risk class, as the outstanding sum guaranteed multiplied by the difference between (a) the safe-harbour premium percentage of that risk class and (b) the premium percentage paid, i.e. guaranteed sum × (safe-harbour premium – premium paid).
[28] See further details in footnote 14.
[29] This calculation can be summarised, irrespective of the risk class, as the difference between (a) the outstanding sum guaranteed, multiplied by the risk factor of the scheme ("risk" being the probability of default after inclusion of administrative and capital costs), and (b) any premium paid, i.e. (guaranteed sum × risk) – premium paid.

5. COMPATIBILITY WITH THE COMMON MARKET OF STATE AID IN THE FORM OF GUARANTEES

5.1. General

State guarantees within the scope of Article 87(1) must be examined by the Commission with a view to determining whether or not they are compatible with the common market. Before such assessment of compatibility can be made, the beneficiary of the aid must be identified.

5.2. Assessment

Whether or not this aid is compatible with the common market will be examined by the Commission according to the same rules as are applied to aid measures taking other forms. The concrete criteria for the compatibility assessment have been clarified and detailed by the Commission in frameworks and guidelines concerning horizontal, regional and sectoral aid[30]. The examination will take into account, in particular, the aid intensity, the characteristics of the beneficiaries and the objectives pursued.

5.3. Conditions

The Commission will accept guarantees only if their mobilisation is contractually linked to specific conditions which may go as far as the compulsory declaration of bankruptcy of the beneficiary undertaking, or any similar procedure. These conditions will have to be agreed between the parties when the guarantee is initially granted. In the event that a Member State wants to mobilise the guarantee under conditions other than those initially agreed at the granting stage, then the Commission will regard the mobilisation of the guarantee as creating new aid which has to be notified under Article 88(3).

6. REPORTS TO BE PRESENTED TO THE COMMISSION BY THE MEMBER STATES

In accordance with general monitoring obligations[31], in order to further monitor new developments on the financial markets and since the value of State guarantees is difficult to assess and changes over time, the constant review pursuant to Article 88(1) of State guarantee schemes approved by the Commission is of particular importance. Member States shall therefore submit reports to the Commission.

For aid guarantee schemes, these reports will have to be presented at least at the end of the existence of the guarantee scheme and for the notification of an amended scheme. The Commission may however consider it appropriate to request reports on a more frequent basis, depending on the case.

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[30] See Competition law applicable to State aid in the European Community, available on the Internet: http://ec.europa.eu/comm/competition/state_aid/legislation/. For sector specific State aid legislation, see for agriculture: http://ec.europa.eu/agriculture/stateaid/leg/index_en.htm and for transport: http://ec.europa.eu/dgs/energy_transport/state_aid/transport_en.htm

[31] Such as those laid down in particular by Commission Regulation (EC) No 794/2004 of 21 April 2004 implementing Council Regulation (EC) No 659/1999 laying down detailed rules for the application of Article 93 of the EC Treaty (OJ L 140, 30.4.2004, p. 1).

For guarantee schemes, for which the Commission has taken a non-aid decision, and especially when no solid historic data exist for the scheme, the Commission may ask when taking its non-aid decision for such reports to be presented, thereby clarifying on a case-by-case basis the frequency and the content of the reporting requirement.

Reports should include at least the following information:

(a) Number and amount of guarantees issued;

(b) Number and amount of guarantees outstanding at the end of the period;

(c) Number and value of defaulted guarantees (displayed individually) on a yearly basis;

(d) Yearly income:

  (1) Income from the premiums charged;

  (2) Income from recoveries;

  (3) Other revenues (e.g. interest received on deposits or investments etc);

(e) Yearly costs:

  (1) Administrative costs;

  (2) Indemnifications paid on mobilised guarantees;

(f) Yearly surplus/shortfall (difference between income and costs);

(g) Accumulated surplus/shortfall since beginning of the scheme[32].

For individual guarantees, the relevant captions, mainly (d) to (g), should be similarly reported.

In all cases, the Commission draws the attention of Member States to the fact that correct reporting at a remote date presupposes correct collection of the necessary data from the beginning of the use of the scheme and their aggregation on a yearly basis.

The attention of Member States is also drawn to the fact that for non-aid guarantees provided individually or under a scheme, and although no notification obligation exists, the Commission may have to verify that such a guarantee/such a scheme entails no aid elements, for instance following a complaint. In such a case, the Commission will request information similar to that set out above for reports from the Member State concerned.

Where reports already have to be presented following specific reporting obligations established by block exemption regulations, guidelines or frameworks applicable in the State aid field, these specific reports will replace this guarantee reporting obligation provided the information listed above is included.

7. IMPLEMENTING MEASURES

The Commission invites Member States to adjust their existing guarantee measures to the stipulations of the present Notice by 1.1.2010 as far as new guarantees are concerned.

[32] If the scheme has been active for more than 10 years only the last 10 annual amounts of shortfall/surplus are to be provided.