

The European Commission publishes a notice on the notion of State aid

Gómez-Acebo & Pombo, Brussels

1. Introduction

As part of the State Aid Modernisation Initiative, on May 19th, the Commission issued new guidance on the notion of State aid¹ aimed at assisting public authorities and companies to identify when a public measure may be implemented without the need for the Commission to carry out an assessment on its compatibility with State Aid rules.

This notice is expected to foster public investment in the EU by helping to create public funding schemes that do not distort competition. This instrument stems, in particular, from the recent State aid decisions on tax rulings.

Aside from providing clarifications on issues particularly important for public investment, the notice gives guidance on the definition of State aid by summarising recent EU case law and Commission decisions on the matter.

2. Key aspects addressed by the notice

The most important clarifications can be summarised as follows:

2.1. *Public investment*

EU case law has developed the “market economy investor” principle to identify the presence of State aid in cases of public

investment: to determine whether a public investment constitutes State aid, it is necessary to assess whether, in similar circumstances, a private investor of a comparable size operating under normal market economy conditions would have been willing to make such an investment.

On the basis of this principle, the notice addresses different scenarios in which public investment could entail State aid.

- Construction or upgrade of infrastructure

Public investment in infrastructure projects would not qualify as State aid as long as such projects do not compete with other infrastructure of the same kind or other infrastructure of a different kind offering services with a significant degree of substitutability. This is normally the case of roads, waterways, railway or water supply and water waste networks: while the operation of this infrastructure may be or may not be an economic activity (i.e. toll roads vs public roads), the construction of the same is prominently characterised by: (i) the fact that the infrastructure faces no direct competition, (ii) private financing is insignificant in the sector and Member State concerned and (iii)

¹ The full text of the notice on the notion of State Aid can be accessed at the following link: http://ec.europa.eu/competition/state_aid/modernisation/notice_aid_en.html

the infrastructure is not designed to selectively favour a specific undertaking or sector but provides benefits for society at large.

By contrast, there are other types of infrastructure which compete with each other. As a consequence, public investment may entail market distortions and therefore the presumption of absence of State aid does not apply. As an example, the notice mentions the following:

- Energy infrastructure (which includes transmission, distribution and storage infrastructure for electricity, gas and oil): used for the provision of energy against payment, which amounts to an economic activity. To a large extent, it is built by market actors 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, for which reason it is subject to State aid rules.
- Broadband infrastructure: 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. By contrast, connecting public authorities is a non-economic activity and the public funding of such “closed networks” does not constitute State aid.
- Airport infrastructure: most airport infrastructure is intended for the provision of services to airlines against payment, which qualify as economic activities; in addition, airports often compete with one another, so the financing of airport infrastructure is likely to affect trade between Member States.
- Research infrastructure: activities such as renting out equipment or laboratories to undertakings,

supplying services to undertakings or performing contract research are economic activities and the intervention of public funding in this sense can amount to State aid.

- Harbours: the analysis is very similar to the airport sector.

In addition, the funding of infrastructure that will not be commercially exploited is in principle excluded from the application of the State aid rules. Examples of these projects are military facilities, flood protection, police, customs, etc. If infrastructure is used for both economic and non-economic activities, public funding for the construction will be subject to State aid rules for the portion of costs linked to the economic activities.

The notice also draws a distinction between developers/owners, operators and end-users of infrastructure. In this sense, even in the scenario where infrastructure does use State aid to be built, public authorities shall always ensure that such aid is not passed to its operator or the users of such infrastructure

This would be the case where operators or end-users – that are undertakings – pay a market price for use of the infrastructure. An advantage in such cases can be excluded where the fees for such use have been set through a competitive, transparent, non-discriminatory and unconditional tender.

An example of this situation could be the construction of an airport: first, there is the developer/owner, which need not be the undertaking actually operating the airport, and ultimately there are the end-user undertakings, such as the airlines, which have commercial agreements with the operator. Operators make use of the aided infrastructure to provide services to end-users and receive an advantage if the use of such infrastructure provides them with an economic benefit that they would not have obtained under normal market conditions. This normally applies where the payment for the right to exploit the infrastructure is lower than what would have been paid for

comparable infrastructure under normal market conditions.

As for end-users, if the operator has received State aid, it is in a position to grant an advantage to the users, unless the terms of use comply with the market economy investor principle. The notice offers three methods or scenarios to assess this situation and exclude the granting of an advantage to users: (i) the fees have been set through a tender that meets the above-mentioned conditions; (ii) benchmarking or analyses of the terms and conditions applied to comparable private operators in comparable situations; or (iii) in public funding of open infrastructure not dedicated to any specific users, its users incrementally contribute, *ex ante*, to the profitability of the project/operator. Taking the above-mentioned example of the airports, the Commission considers that arrangements concluded between airlines and an airport can be deemed to satisfy the market economy investor principle when they incrementally contribute, from an *ex ante* standpoint, to the profitability of the airport.

- Public investment with no cross-border effect

Funding made available to local infrastructure or services with very marginal effect on cross-border investment and which typically does not attract customers from other countries will be regarded as free from State aid.

The notice includes some indicative examples, such as sports and leisure facilities, which for the most part, serve local customers; or news media and/or cultural products which, for linguistic and geographical reasons, have a locally restricted audience.

- Public procurement

There is a presumption that assets, goods and services acquired by public authorities by means of a tender that complies with EU legislation on public procurement² are free of State aid, since it is considered that those transactions are in line with market conditions. In this scenario, in the absence of due public procurement procedures, the aid could be in the price paid to the private operator for the assets, good or services provided to the public authority. Cultural activities

Public funding granted to certain activities which are provided for free or via a minimal fee will fall out of the EU State aid rules; for instance reduced tickets for museums, theatres or opera houses.

2.2. Tax measures

- Tax rulings

Following the notice, tax rulings confer a selective advantage, in particular when:

- a) they apply incorrectly national tax law which leads to a lower amount of tax,
- b) they are not available to all undertakings in comparable legal and factual situations,
- c) the tax authorities apply a more favourable tax treatment compared to other companies in similar situations.

- Tax settlements

As for tax settlements, the Commission has warned that they may involve State aid, particularly if the amount of tax due has been reduced without a clear justification (such as optimizing the

² 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.

recovery of debt) or disproportionately to the benefit of the company. The notice indicates two scenarios that may especially involve a selective advantage:

a) if the Administration applies a more favourable discretionary tax treatment compared to the treatment given to

other companies in a similar factual and legal situation, resulting in disproportionate concessions;

b) if the settlement infringes applicable tax provisions and leads to an amount of tax that is lower than what would be reasonable.

For further information please visit our website at www.gomezacebo-pombo.com or send us an e-mail to: info@gomezacebo-pombo.com.

Barcelona | Bilbao | Madrid | Valencia | Vigo | Brussels | Lisbon | London | New York