European PPP Expertise Centre

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PPPs and State aid

European Investment Bank

The EU bank

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Glossary of key acronyms and terms

EU	European Union
Commission	European Commission
CJEU or Court	Court of Justice of the European Union
GBER	General Block Exemption Regulation
MEAT	Most economically advantageous tender
MEOP	Market Economy Operator Principle
OJEU	Official Journal of the European Union, used to publicise all relevant EU procurements over a certain threshold
PPP	Public-private partnership
Private partner	The private body responsible for delivering the PPP
PSO	Public Service Obligation
Procuring authority	The public body responsible for procuring the PPP
SGEI	Services of General Economic Interest
TFEU	Treaty on the Functioning of the European Union

Executive summary

There is a significant interaction between PPPs and EU State aid policy. However, this need not seriously impede procuring authorities in taking PPPs forward if the issue is addressed at an early stage of project preparation. This is partly because many of the solutions to avoiding the presence of State aid in projects stem from effective public sector procurement and decision-making. In addition, the European Commission has set out additional rules, in particular exemptions from notification of State aid, to further reduce the burden on procuring authorities should State aid be present.

Therefore, if a number of key approaches are followed, the risk of State aid being applicable to a PPP project, or even the need to notify such aid, can, and is, usually significantly reduced by taking a number of, often common sense, steps in preparing a PPP project. In particular procuring authorities should seek to:

- address any potential State aid issues as soon as possible in the project preparation process and ensure appropriate time is allowed in the project plan for potential interactions with advisers, other national public bodies and, if necessary, the Commission;
- seek impartial legal advice on potential State aid issues;
- notify the Commission in a timely fashion of projects or initiatives where State aid may be an issue and which are not exempted from prior notification to the Commission;
- in order to avoid over-compensation and therefore State aid arising:
  - run a fair and transparent public procurement process in line with EU Directives;
  - ensure that any State guarantees offered to PPP projects and programmes are compliant with the relevant guidance on how to exclude State aid (e.g. charge a risk-adjusted price for the provision of a guarantee); and
  - in commercial decisions (e.g. the sale or leasing of land) strive to act in the same way as a private operator (i.e. seek best value);
- if State aid is present, in order to avoid the potential need to notify the Commission of State aid:
  - link the services being provided by the private sector under a PPP to a Member State's pre-determined Services of General Economic Interest (SGEIs); and
  - make use of the exemptions offered by the General Block Exemption Regulation (GBER) for specified sectors where PPPs may be used.

Introduction

Structure of the report

This report has been written to help PPP practitioners understand more about how State aid policy interacts with the procurement and delivery of PPPs. The intention of the report is to be as straightforward as possible for PPP practitioners, cutting out some of the wider State aid framework, which is often of a technical legal nature, in order to focus on the key topics of relevance to PPPs.

The report is therefore not designed to be an exhaustive or detailed study of State aid issues in PPP projects. Rather, it indicates key elements that can help PPP practitioners to identify potential State aid issues in their projects and programmes and to consider how they can use exemptions to avoid the need to notify the Commission. The report in no way substitutes for procuring authorities seeking their own legal advice, or that of the Commission, when preparing PPP projects or programmes. Therefore, as always, it is advisable for PPP procuring authorities to seek professional advice for their projects at an early stage.

This report has the following structure:

- this **introduction** introduces the overall purpose and definition of State aid and highlights where State aid is most likely to be found in PPPs;
- the chapters that follow then set out how some of the key State aid issues for PPPs can best be addressed or avoided in different circumstances:
  - by correctly calculating the ***"Remuneration allocated from the public sector to the private partner"*** as discussed in **Chapter 1**;
  - by classifying remuneration to the private partner as ***"Public Service Obligations for Services of General Economic Interest"*** as discussed in **Chapter 2**;
  - by using ***"State guarantees"*** properly as discussed in **Chapter 3**;
  - by administering the ***"Sale of land and buildings"*** properly in **Chapter 4**; and
  - by utilising the exemptions allowed under the ***"General Block Exemption Regulation"*** in **Chapter 5**;
- **annexes I to III** provide more detail on specific issues.

What is State aid?

The EU's main objective through its State aid policy is to create an internal market without barriers, where enterprises can compete freely in any other Member State without hindrance.

The starting point of State aid policy is that competition can be distorted by any public funding or support that gives, for example, recipients an unfair advantage over their competitors. Any public resources that are seen as creating such an unfair advantage (for example, subsidies or guarantees) may be defined as State aid under EU law. State aid can therefore consist of any kind of support in any form and any means by which it is granted. The definition of State aid is, therefore, very wide and it is the purpose of this report to examine how such a definition might affect PPP projects.

State aid policy is based on Articles 107 and 108 of the Treaty on the Functioning of the European Union (TFEU) (see Boxes 1, 2 and 3 below). Article 108 of the TFEU specifically requires Member States to inform the Commission of any public funding that may appear to be encompassed within the broad definition of State aid. Furthermore, Member States must avoid making the relevant resources available until the Commission takes its decision as to whether the aid may be granted. In other words EU law lays down a notification obligation which, if it is not respected, may result in retrospective action against the Member State in the event of a complaint being made to the Commission.[1] Such a complaint can be filed by what is defined as an "interested party", usually a competitor to the recipient of State aid. The Commission can also independently decide to investigate cases if it wishes (on its own motion).

It is notable that Article 107 of the TFEU (see Box 1 below) is a general article that covers all kinds of State aid. However, there is guidance for assessing the existence of State aid in specific areas, such as State guarantees.

[1] As all State aid provisions and procedures related to PPPs cannot be included in this report, the Commission's webpage is a very important source of information that gathers all the relevant provisions on State aid. The link to the Commission's State aid webpage is as follows: **ec.europa.eu/competition/state_aid/overview/index_en.html**

Box 1: Art. 107(1) of the TFEU: key terms for State aid in PPPs

"Save as otherwise provided in the Treaties, ***any aid*** *granted by a Member State or* ***through State resources*** *in any form whatsoever* ***which distorts or threatens to distort competition*** **by favouring certain undertakings** *or the production of certain goods shall,* ***in so far as it affects trade between Member States****, be incompatible with the internal market."*

This definition covers almost every public resource that goes to an enterprise (private or public). Therefore whenever a public authority pays money to an enterprise or gives an advantage (e.g. a guarantee or favourable contract conditions), State aid provisions should be taken into consideration. The key terms referred to in the TFEU (in blue bold above) are explained in more detail below in the context of PPPs:[2]

- **"any aid"**: this includes excessive payments, unbalanced risk sharing, guarantees, preferential tax treatment and land sales at an artificially low price (i.e. any type of advantage);
- **"through State resources"**: this includes resources coming from any public authority or enterprise, even at a local level (i.e. the resources must have a State origin). Moreover, the measure granting an advantage must be the responsibility of the State. The *Commission Notice on the Notion of State aid as referred to in Article 107(1) TFEU* sets out a number of possible indicators of this responsibility at paragraph 43. Such a responsibility is obviously the case where a public authority grants the advantage, or designates a private or public body to administer a measure that confers the advantage.[3] A measure may also be considered as the responsibility of the State where the advantage is granted though a public undertaking;
- **"which distorts or threatens to distort competition"**: there is a strong presumption in State aid law that any aid distorts competition between the recipients of State resources and their competitors which would encompass most PPP transactions;
- **"by favouring certain undertakings"**: broadly, a measure is deemed to "*favour certain undertakings*" or certain sectors if it places such an undertaking or sector in a more favourable situation as compared to other similar undertakings or sectors. There is once again a strong presumption that in a public contract (including any PPP contract for example) this condition will be fulfilled because only one undertaking is selected to have a contract with the procuring authority. However, an undertaking (the private partner) will not be considered to be favoured where its selection takes place in an open, transparent and non-discriminatory procedure; and
- **"affects trade between Member States"**: this is almost always the case as the only way to escape this condition is when the enterprise does not have competitors in other EU Member States or where the activity to which State support is granted is an activity which has a purely local impact (e.g. where the beneficiary of such support supplies goods or services to a limited area within a Member State and is unlikely to attract customers from other Member States).[4]

[2] See Section 3 of **Commission Notice on the Notion of State aid as referred to in Article 107(1) TFEU**

[3] See Joined Cases 67/85, 68/85 and 70/85 Van der Kooy and Others v Commission [1988] ECR 219; Case C-303/88 Italy v Commission [1991] ECR I-1433; Case C-305/89 Italy v Commission [1991] ECR I-1603.

[4] See Sections 6.2 and 6.3 of **Commission Notice on the Notion of State aid as referred to in Article 107(1) TFEU** and European Commission cases SA.37432 Czech Republic – Hradec Králové public hospitals; SA.37904 Germany – Medical centre in Durmersheim; SA.33149 Germany - Städtische Projektgesellschaft "Wirtschaftsbüro Gaarden – Kiel"; SA.38035 Germany – Landgrafen-Klinik; SA.39403 The Netherlands – Investment aid for Lauwersoog port; SA. 37963 United Kingdom - Glenmore Lodge; SA.38208 United Kingdom - Member-owned golf clubs.

It is then important to identify the right principles for assessing the existence of State aid because, on the basis of Article 108 of the TFEU (see Box 2 below), any measure that is qualified as State aid must be notified to the Commission before it is implemented, unless it benefits from an exemption (see Box 3 and later chapters).

Box 2: Art. 108(3) of the TFEU

"The Commission shall be informed, in sufficient time to enable it to submit its comments, of any plans to grant or alter aid. If it considers that any such plan is not compatible with the internal market having regard to Article 107, it shall without delay initiate the procedure provided for in paragraph 2 (of Art. 108 of the TFEU). The Member State concerned shall not put its proposed measures into effect until this procedure has resulted in a final decision."

Simplification of State aid procedures

To reduce the obstacles to State intervention in certain areas, EU law has simplified State aid procedures in several respects (which are set out in more detail and referenced later):

- **first**, **the circumstances in which measures are considered not to constitute State aid have been clarified**. As a broad principle, this will be the case where the procuring authority has adopted an adequate bidding procedure (see Chapter 1) and acted like a Market Economy Operator (see Box 5). Both the Court of Justice of the European Union (CJEU) and the Commission give further general guidance on how the procuring authority should behave in choosing its contracting counterpart and, where appropriate, in changing any of the contract conditions. In certain specific areas, such as State guarantees (see Chapter 3) and the transfer of land (see Chapter 4), Commission guidance explains in more detail the steps a procuring authority should take into consideration in order to act like a Market Economy Operator;
- **second**, **there are some situations where it is difficult to demonstrate that the above requirements have been met, and therefore the measures taken by the procuring authority constitute State aid, but the procuring authority still does not have to notify the Commission**. There are two main categories of measures exempted from notification: the first includes public expenditure in Services of General Economic Interest (SGEIs, see Chapter 2), provided that certain conditions are fulfilled, and the second is a list of specific cases known as the General Block Exemption Regulation (GBER, see Chapter 5), in which EU law provides several exemptions from notification (though, in practice, the application of these exemptions to PPPs is somewhat limited); and

- **third, for measures that do constitute State aid and do require notification, EU law contains provisions that facilitate the notification process for obtaining Commission authorisation** (see Chapter 3).

Box 3: What is aid and what needs to be notified?

There are in principle three stages in assessing whether a measure taken by the public sector is State aid, and if it is, whether it needs to be notified:

Stage 1: Is the measure in question State aid?

A measure can only be deemed to be State aid if it satisfies the conditions set out in Article 107(1) of the TFEU (see Box 1). These conditions are cumulative. Therefore, if one of these conditions is not satisfied, the measure in question is not State aid. There is therefore no requirement to notify the measure.

Stage 2: If the measure in question is State aid, does it fall within any automatic exemptions from notification?

If all the conditions of Article 107(1) of the TFEU are satisfied, then the measure is State aid. However, certain types of State aid are deemed automatically approved and do not need to be notified. This is the case, for example, under the GBER for aid that does not exceed certain thresholds (see Chapter 5).

Stage 3: If the measure in question is State aid and it does not fall within any automatic exemptions from notification, it needs to be notified and cannot be implemented until it is approved as compatible aid by the Commission.

Guidance is available from the Commission, and referenced throughout this report, on the criteria for demonstrating where State aid is compatible with the internal market, as well as on State aid in specific sectors.[5]

[5] A useful diagrammatic description of this box can be found in "*State aid: The Basics Guide*" published by the UK's Department for Business Innovation and Skills which can be found at: **www.gov.uk/government/uploads/system/uploads/attachment_data/file/443686/BIS-15-417-state-aid-the-basics-guide.pdf**

State aid in PPP projects

PPPs are a procurement method that, when used appropriately, can help to structure, and accelerate the implementation and improve the service delivery of infrastructure projects.

A PPP arrangement differs from conventional public procurement in several respects. In a PPP arrangement the public and private sectors collaborate to deliver public infrastructure projects (e.g. roads, railways, hospitals), which would typically share the following features:

- a long-term contract between a public procuring authority[6] (the procuring authority) and a private sector company (the private partner) based on the procurement of services, not assets;
- the transfer of certain project risks to the private sector, notably with regard to designing, building, operating and/or financing the project;
- a focus on the specification of project outputs rather than project inputs, taking account of the whole life cycle implications for the project;
- the application of private financing (often project finance) to underpin the risks transferred to the private sector; and
- payments to the private private partner that reflect the services delivered. The private partner may be paid either by users through user charges (e.g. motorway tolls), by the authority (e.g. availability payments or shadow tolls) or by a combination of both (e.g. low user charges, together with public operating support).

As set out in Box 1, due to their long-term and complex nature, PPP projects can give rise to a wide range of potential State aid issues which can broadly be categorised as:

Remuneration allocated from the public to the private partner: all PPP projects share a common State aid question related to the price paid by the procuring authority to the private partner. How can it be demonstrated that the price paid by the procuring authority is fair and does not give an undue advantage to the private partner (and therefore does not in itself constitute State aid)? This question is treated at the outset, as it is a general question that applies equally to all PPP projects regardless of, for instance, sector (see Chapter 1). If the procuring authority is not able to answer this question satisfactorily, then State aid may be present and further analysis will be needed to see if notification is required. This may be the case with many public services, particularly in demonstrating that the procuring authority is behaving like a Market Economy Operator (as set out in Box 5).

[6] Also referred to as a contracting authority.

In addition, there are two key issues for PPPs which sit underneath this subject area which have been expanded on in this report more thoroughly:

- **Guarantees**: if the procuring authority gives a guarantee to the private partner without charging an appropriate market-based fee (Chapter 3), this is a type of intervention that might constitute State aid. It should be noted, however, that a guarantee is much less likely to constitute State aid if it is part of the contractual package between the public authority and the private partner resulting from an appropriate procurement process in which the private partner was identified as offering the most economically advantageous proposal. By contrast, a State guarantee that is only available to some bidders or that is made available by the State after the procurement procedure is more likely to cause State aid difficulties; and

- **Land Transfer**: State aid needs to be considered where the transaction involves a transfer of land at a sub-market price to the private partner (see Chapter 4).

Supplementary remuneration from the public to the private partner: rather than being a purely commercial private-sector driven transaction, the price being paid to the private partner for its services may involve the procuring authority paying supplementary remuneration, or granting other advantages to the private partner, in order to deliver non-commercial services, what are called Public Sector Obligations[7] (PSOs, see Chapter 2). For example, these can be payments for providing services such as bus services or waste treatment. Where such rights to payment or compensation are overly generous, State aid issues can arise.[8]

Sector exemptions: For any reason, if the procuring authority finds that the issues set out in Chapters 1, 2, 3 and 4 are not applicable to their situation, there is also an extensive list of sector-based provisions that can be used to avoid the requirement for State aid notification. These sectors are primarily contained in Chapter 5 of the GBER.

[7] For example, in public transport projects the PPP contract often imposes obligations on the private partner to ensure that the service will operate, even in areas where such a service is not profitable, for instance because of the lack of users. This type of obligation is seen as a Public Service Obligation that can be compensated for by the procuring authority without being seen as State aid (as explained in Chapter 2).

[8] In the case of complex contractual arrangements rules require that the public authority should check for overcompensation only using elements that have a clearly quantifiable commercial value.

Box 4: How State aid arises in PPPs using EU funds[9]

To be considered as State aid, funding has to originate from an EU Member State's public resources (be they national, local or even from a publicly controlled enterprise). The question arises whether EU funds can also be considered to be national/Member State's public resources controlled by the State and therefore potentially subject to State aid notification.

The key element in determining whether the funding of PPPs with EU resources is State aid is whether a public authority can determine how the EU contribution is spent. Member State authorities normally exercise control over EU funds, especially structural funds, because they have discretion in determining eligible beneficiaries and because they lay down conditions for their use (e.g. from European Structural and Investment Funds such as the European Regional Development Fund or the Cohesion Fund). Such resources may therefore be considered as State aid.

However, funds managed directly by an EU institution or body, such as the Commission (for example the Connecting Europe Facility), the European Investment Bank or the European Investment Fund, are not in principle considered to be State resources where such resources are transferred directly from the EU institution to the final beneficiary in accordance with EU rules and without the intervention of a national authority.[10]

[9] Adapted from **ec.europa.eu/competition/state_aid/modernisation/joint_statement_en.pdf**

[10] See paras 57- 60 of the **Commission Notice on the Notion of State aid as referred to in Article 107(1) TFEU**. Also see EPEC guidance note on Blending EU Structural and Investment Funds in the 2014-2020 Programming Period available at: **www.eib.org/epec/resources/blending-ue-structural-investment-fund-ppp**

1. Remuneration allocated from the public sector to the private partner

1.1. Introduction

One of the main State aid issues for most public procurements, and PPPs in particular, is the level of remuneration paid to private partners in return for their services. **If the remuneration is *excessive* compared to what is judged to be the market price (i.e. the price that should be paid) under open, transparent and fair market conditions, the overcompensation would be considered as a subsidy and therefore State aid.** It is therefore important to know what level would be deemed *excessive* and how this can be avoided.

The question here is how to determine a market price for the remuneration of the private partner. The answer is relatively straightforward as **it is an assumption of Commission practice that a public procurement procedure that is followed correctly normally leads to the establishment of a market price**[11] (how this assumption might apply in the case of the competitive dialogue procedure is set out in Box 6).

To explain further, as PPPs are public contracts subject to EU public procurement provisions, the observance of an open, transparent and non-discriminatory procedure will, in principle, mean that the level of any public sector remuneration can be regarded as representing the market price. As long as such remuneration is strictly limited to the amount which would be needed to compensate an efficient operator for the performance of the PPP service, it will not fulfil Article 107 of the TFEU condition of "*favouring certain undertakings*" and will therefore not constitute State aid.

The Commission guidance and CJEU case law have expanded on this issue by offering some key indicators that the above conditions have been satisfied. These are set out in the following sections.

1.2. Set a fair market price

For the private partner's remuneration, there is no specific definition or precise method that should be followed in order to determine how to set a fair price. However, it appears from the Commission and CJEU decisions that **two main conditions need to be fulfilled by the procuring authority to be deemed to reach a fair price: (i) establish the right (i.e. transparent and non-discriminatory) procurement procedures, as set out above, and (ii) the procuring authority should behave like a Market Economy Operator** (see Box 5).

[11] See paras. 89-96 of the **Commission Notice on the Notion of State aid as referred to in Article 107(1) TFEU**. Also, for example, see the Commission Decision in Case No 264/2002 – United Kingdom - London Underground Public Private Partnership, where the Commission "*considers that when these types of infrastructure arrangements are concluded after the observance of an open, transparent and non-discriminatory procedure, it is, in principle, presumed that the level of any public support can be regarded as representing the market price*" (C (2002) 3578fin, p.35).

Box 5: Market Economy Operator Principle

The Market Economy Operator Principle (MEOP)[12] is a tool used by the Commission as a means of deciding whether assistance granted by a Member State confers an advantage on an undertaking. The essence of the MEOP is that when a public authority contributes to a project on terms and in conditions which would be acceptable to a private investor operating under normal market economy conditions, the funding is not State aid.

Given the non-commercial nature of many public services, it can be difficult to apply the MEOP methodology to many public services and therefore to PPP contracts. Almost by definition many public goods or universal obligations have minimal commercial value (for a variety of reasons related to issues such as profitability, set-up costs or the nature of demand). Therefore, establishing that a public entity has acted in the same way as a market operator is challenging, making it in turn difficult to exclude the existence of State aid purely on the basis of the MEOP. In these situations, even though a correct procurement procedure has been followed, it would be necessary to consider applying the rules that are described in Chapters 2 and 5.

The MEOP plays a key role in many areas of the assessment of State aid in PPP projects: in the case of State aid control, the procuring authority should be able to justify its decisions by proving that it acted as a Market Economy Operator. This applies to all phases of the PPP, from its inception to its termination or natural expiry. **In other words, the procuring authority should take into consideration the fact that the PPP is a deal in which the counterparts have to do their best to avoid giving an advantage to each other, just as a Market Economy Operator, acting commercially, in any commercial transaction would do.** An example of the application of how the MEOP can be interpreted is provided in Annex I.[13] This not only includes the need to adopt all appropriate measures for calculating the remuneration that will be paid to the private partner, but also all contractual conditions and changes, including changes in risk sharing during the project's life. Some areas such as State guarantees (see Chapter 3) and the transfer of land (see Chapter 4) are subject to specific provisions explaining how the procuring authority can comply with the MEOP in these areas.

1.3. Advertise and publish properly

This criterion means that the principles of transparency and equality of treatment have to be respected by procuring authorities. **The Commission has decided that what this means in practice is that proposed public contracts have to fulfil all**

[12] Previously referred to as the Market Economy Investor test.

[13] Although the example in Annex I is not a PPP project itself (but involves contracting out services), it provides an example of what is required to be classified as acting commercially between a state owned entity and its subsidiary that has entered into a commercial arrangement with a private sector entity.

advertisement and publication obligations set out in EU law[14] (i.e. publication in the Official Journal of the European Union).

Any modification or new elements introduced during negotiations have to respect the parameters of advertisement and publication of the initial notices and contract documents (e.g. the size or nature of a contract cannot change at a late stage without following public procurement rules).

1.4. Use a robust methodology to assess the most advantageous tender

Bids have to be evaluated on the basis of the most economically advantageous tender (MEAT), including all upfront costs and all known potential future expenses. Clearly there are often non-cash differences between the bidders (e.g. differences in the scope of work covered in their proposals, differences in the level of performance that could be expected and differences in the proposed allocation of risk between bidders). In these situations a more complex methodology can be developed under the principle of MEAT and allow for the expression of these differences in financial terms. This will then enable bids to be compared fairly and a preferred bidder to be selected. The Commission considers that, in the context of PPPs, this appears to be an appropriate framework for the selection of a private partner, without the need to notify with regard to the presence of State aid.

Recognising the level of flexibility that the competitive dialogue procedure offers for procuring PPPs, it is important for procuring authorities to consider how to use and manage the competitive dialogue procedure so as to ensure the high degree of transparency and openness required to comply with State aid requirements. In the past there has been some discussion around how consistent the competitive dialogue procedure is with State aid (Box 6 below attempts to give some further background on competitive dialogue). The latest advice from the Commission published in 2016 strives to clarify the position of how compliant procedures which use negotiation are with State aid policy:

"using and complying with the procedures provided for in the Public Procurement Directives can be considered sufficient to meet the requirements above provided that all the conditions for the use of the respective procedure are fulfilled."[15]

[14] See, for example, **Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement** (OJ L 94, 28.3.2014, p. 65-242) and **Directive 2014/23/EU of the European Parliament and of the Council of 26 February 2014 on the award of concession contracts** (OJ L 94, 28.3.2014, p. 1-64).

[15] See para. 93 of the **Commission Notice on the notion of State aid as referred to in Article 107(1) TFEU**

Box 6: State aid and competitive dialogue

Alongside the MEOP, the key issue in assessing the presence of State aid in PPPs is the quality of the public procurement procedure. In large infrastructure projects such as PPPs, competitive dialogue has increasingly become the procurement procedure of choice.[16] Competitive dialogue, for example, allows procuring authorities to negotiate with multiple bidders in stages and adapt solutions to best meet the authority's needs. Such flexibility is welcomed by many procuring authorities. Competitive dialogue is seen as improving the quality of the ultimate project and an effective way of dealing with the uncertainties associated with a complex or large infrastructure project where, for example, the procuring authority's understanding of potential market solutions or capacity and/or the market's understanding of the procuring authority's requirements may be difficult to establish up-front.[17]

The new guidance from the Commission helpfully endorses all procurement procedures as long as the Directive is followed correctly. This removes some of the uncertainty procuring authorities had in using procedures which use negotiation to interrogate and improve bids. It is still useful to recognise that competitive dialogue has some specific areas of risk that procuring authorities need to be aware of in using this procedure in the context of State aid. This is to ensure that they meet the requirements of a proper public procurement process that is competitive, transparent, non-discriminatory and unconditional.

First, there are some constraints set out in EU law concerning the type of projects for which the competitive dialogue procedure can be used.[18] The 2014 Public Procurement Directive envisages a number of reasons such as:

- the absence of readily available solutions;
- the need for design or innovative solutions;
- the complex legal and financial make-up of solutions; and
- technical standards that cannot be specified easily.[19]

PPPs are often able to justify their use of competitive dialogue using these criteria due to their size and complexity but this rationale needs to be made clear from the outset.

Second, in State aid terms, competitive dialogue can cause difficulties in that it is perceived as having the potential to confer a large amount of discretion on the procuring authority as to how it conducts the procurement. It is good practice to ensure, among other issues associated with a well-run procurement, that:

[16] See Recital 42 of **Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement** (OJ L 94, 28.3.2014, p.65-242)

[17] See EPEC's review of competitive dialogue at **www.eib.org/epec/resources/epec-procurement-and-cd-public.pdf**

[18] Which will also apply to the new *competitive procedure with negotiation* added to EU law in 2014.

[19] Article 26(4)(a) of **Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement** (OJ L 94, 28.3.2014, p.65-242).

- interested operators should not be prevented from bidding without good cause. This suggests that the initial publication of the tender, prior information notices and pre-qualification periods should be seen to be open, fair and transparent;
- interested operators should not be restricted from participating, particularly in later stages of the dialogue process, without good cause. This suggests that the evaluation criteria for reducing the number of bidders needs to be clear to all participants well in advance and the subsequent dialogue needs to be clearly open, fair and transparent; and
- the award criteria set out in the original tender are able to ensure that the award of the contact at the end of procurement is based on the principles of MEAT. This means that a strong sense of competition needs to be maintained throughout the competitive dialogue process (e.g. by including a dialogue phase with a number of suitable candidates, inviting tenders from suitable bidders, parallel negotiations and final selection or a preferred bidder based on the tender presenting the best price-quality ratio). It also means that the award criteria should not change significantly (e.g. in a way that could have led excluded bidders to make different bidding decisions) and should remain closely related to the scope of the original invitation to tender.

Examples where problems with State aid will emerge are when:

- there are limited/single bidders; either at the outset (a restricted market) or later in the dialogue (for example, if too many bidders drop out);
- the project changes significantly during the dialogue (e.g. in size, scope or price); or
- key infrastructure or land required to deliver the project is already owned by one of the bidders.

2. Remuneration for Public Service Obligations: Services of General Economic Interest

2.1. Introduction

SGEIs are economic activities that public authorities identify as being of particular importance to citizens and that would not be supplied, or would be supplied under different conditions, if there were no public intervention. Examples are transport networks, social services (e.g. hospitals) and other key infrastructure (e.g. waste treatment).

Chapter 1 considered the need for the procuring authority to demonstrate no State aid is present by: (i) setting a fair price, which is best achieved by a public tender that complies with public procurement rules administered by a public authority acting under the same conditions as a Market Economy Operator; (ii) ensuring the proposed public contract is advertised and published properly, which is achieved by publishing in OJEU; and (iii) using a robust methodology to assess the most advantageous tender. As discussed in Box 5, this may be difficult to demonstrate in the case of a PPP project involving a public good or service that is not commercially attractive. In such cases, it may be possible to apply the special State aid regime for SGEIs. Depending on the circumstances, this may allow avoiding notification to the Commission or requiring approval by the Commission. An open, transparent and non-discriminatory public procurement procedure increases the chances of successfully applying the SGEI regime. However, as explained in this Chapter, it is not the sole requirement and there are also a number of other conditions that must be satisfied in order to benefit from the SGEI regime. Therefore State aid rules concerning SGEIs are particularly relevant for PPPs, as the use of this concept is relatively common in strategic infrastructure sectors.

2.2. Using SGEI provisions

Providing an SGEI often requires the public authority to impose PSOs on the private sector (e.g. services at anti-social hours for transport services and hospitals). This is why these types of services, when associated with PSOs, require the public authority to allocate additional remuneration to the private sector to compensate for the costs borne by the private sector to meet the PSO in performing tasks it would not do if it was acting purely in its own commercial interest.

The scope and organisation of SGEIs vary considerably from one Member State to another, depending on the history and culture of public intervention in each Member State. The use made of SGEIs is therefore very diverse across the EU, and differences may exist in relation to how user needs and preferences are met in different geographical, social and cultural situations. It is therefore the responsibility of the public authorities at national, regional or local level to decide the nature and scope of an SGEI.

The only two constraints on the freedom of Member States to define SGEIs are:

- in sectors that have already been harmonised at the EU level (which are unlikely to include PPPs[20]), and where objectives of general interest have already been taken into account.[21] In this case the Member States' discretion cannot contradict the EU rules; and
- if Member States commit a "*manifest error*" when defining their SGEIs, which occurs particularly if the public authority decides to regard as an SGEI a service that is normally provided in a competitive market without public intervention, by imposing artificial PSOs and allocating aid in the form of PSO compensation to the private sector.

2.3. Core features of the SGEI regime

Aside from these two constraints, the public authority should compensate for the PSOs carried out by the private sector in accordance with the specific requirements of the SGEI regime established by the Commission.

There are three different approaches to applying the SGEI regime and although each of the approaches has its own distinct use and foundations in EU case law and Commission communications, there are a number of core features that apply to all three. These include:

Clearly defining the public service and potential users of the service:

- The recipient undertaking, in the case of PPPs the private partner, must have been entrusted with an SGEI. Entrustment with an SGEI is generally perceived as an entrustment with 'a particular task',[22] or a 'particular public service task', which the private partner would not assume to the same extent or under the same conditions, had it been considering its own commercial interest;[23]
- The private partner's obligations in the provision of the particular SGEI must be clearly defined. This is usually achieved by way of an act (in the form of legislation, legislative or regulatory instrument, or a contract), which specifies certain details, including:
  - the content and duration of the PSO;
  - the private partner (and, where applicable, the territory) concerned;
  - the nature of any exclusive or special rights assigned to the private partner;
  - the parameters for calculating, controlling and reviewing the compensation; and
  - the arrangements for avoiding and recovering any over-compensation.

[20] For example, telecommunications and the postal and energy sectors have been harmonised at EU level.

[21] See, for example, Case C-206/98 *Commission v Belgium* [2000] ECR I-3509, paragraph 45.

[22] See, in particular, Case C-127/73 *BRT v SABAM* [1974] ECR-313.

[23] See, in particular, Article 2 of 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).

- The services to be classified as SGEIs must be for the benefit of citizens or be in the interest of society as a whole.

Establishing a transparent and objective compensation mechanism:

- The compensation parameters for the provision of the SGEI must be established in an objective and transparent manner. This is in order to ensure an economic advantage is not conferred that could favour the recipient undertaking over other competing undertakings;

- Generally, this would entail specifying which types of costs are to be taken into consideration (normally comprising all costs incurred in providing the SGEI) and the principles (e.g. accounting principles) which must be used for the compensation calculations.

Avoiding over-compensation:

- The compensation to the undertaking for the provision of the SGEI must not exceed that which is necessary to cover the net cost incurred in discharging the SGEI, including a *"reasonable profit"*;

- "Reasonable profit" is normally taken to mean the rate of return[24] on capital that would be required by a typical company considering whether or not to provide the equivalent SGEI for the duration of the period of entrustment, taking into account the level of risk (which would depend on the sector concerned, the type of SGEI and the characteristics of the compensation mechanism).[25]

The three approaches to applying the SGEI regime each have further specific requirements that must be met in order that the relevant measures can either not be considered state aid or can qualify for exemption from notification. The approaches are as follows and described in more detail in Annex II:

- **Altmark judgement** - measures taken by the public sector that meet the requirements of the CJEU judgment in the Altmark case are not State aid;[26]

- **SGEI Decision** - measures which do not qualify under the Altmark criteria, but nevertheless meet the conditions of the so-called SGEI Decision, are automatically exempted from the notification requirement;[27] and

- **SGEI Framework** - measures which meet neither the Altmark nor the SGEI Decision criteria need to be notified through the so-called SGEI Framework.[28]

[24] The "*rate of return on capital*" means the Internal Rate of Return (IRR) that the undertaking makes on its invested capital over the lifetime of the project (i.e. the IRR over the cash flows of the contract).

[25] It is unclear what happens in a situation where there is one bidder with high underlying cost base and a low (reasonable) profit and another bidder with a low underlying cost and a higher (unreasonable) profit whereby the most economically advantageous tender was the latter. It would be questionable if EU State aid law obliged the authority to choose a private partner solely on the basis of the lower level of profit even if the total price is higher as a consequence of higher costs.

[26] See **C-280/00 Altmark Trans GmbH and Regierungspräsidium Magdeburg v. Nahverkehrsgesellschaft Altmark GmbH and Oberbundesanwalt beim BVerWG** [2003] ECR I-07747.

[27] See the **SGEI Decision**

2.4. Comparing the three approaches

It should be noted that the three approaches are procedurally very different. Measures that meet the Altmark criteria do not need to be notified because they do not qualify as State aid. Measures that do not meet the Altmark criteria but meet the conditions of the SGEI Decision are State aid but do not need to be notified because they are deemed to be automatically compatible with the internal market. Measures which meet neither the requirements of the Altmark case nor those of the SGEI Decision must be notified to the Commission, which will assess their compatibility with the internal market.

It should be noted that in practice compliance with the Altmark criteria is often difficult to assess. However, the advantage of satisfying the Altmark criteria is that the measure that is under consideration is not then considered to be State aid and therefore no State aid issues arise. The conditions of the SGEI Decision, on the other hand, are easier to apply. Measures that meet the SGEI Decision criteria (but not the Altmark criteria) are still considered to be State aid, but have the advantage that no notification of such a measure is required. In practical terms, therefore, where the measure is for a project that is sufficiently small, it would normally be advisable, in the interest of legal certainty, first to ensure that the measure in question fulfils the conditions of the SGEI Decision criteria before an attempt is made to meet the Altmark criteria.

[28] See the **SGEI Framework**

3. State guarantees [29]

3.1. Introduction

A State guarantee in a PPP could be subject to State aid provisions because it may allocate an advantage to the private partner.[30] The benefit for the private partner is that a risk associated with the project is borne by the State. Such risk-carrying by the State on behalf of the private sector 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 potential drain on the resources of the State.

In a PPP context, a State guarantee could be part of a broader set of complex contractual arrangements which is made available to all private parties bidding for a specific PPP contract. Such a State guarantee should not cause State aid difficulties if the overall package does not result in over-compensation and is compatible with the MEOP as set out in Chapter 1, or constitutes reasonable compensation for the provision of an SGEI as set out in Chapter 2. By contrast, a State guarantee that is not inherently linked to a fair, open and transparent PPP procurement process is more likely to be problematic and must be assessed in light of the criteria set out in this Chapter. This would be the case for a State guarantee that is only granted after the completion of the procurement process and/or only one bidder benefits.

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 107 of the TFEU (as set out in the section "*What is State aid"* in the introduction of this report). This is because the aid is granted at the moment when the guarantee is given, not when the guarantee is invoked or when payments are made under the terms of the guarantee.[31]

The Commission Notice on the application of Articles 87 and 88 of the EC Treaty to State aid in the form of guarantees (the Guarantees Notice) provides useful guidance on the qualification of a State guarantee as State aid and on the assessment of compatibility with the internal market of a State guarantee entailing State aid. The questions raised in sections 3.2 and 3.3 below are key.

3.2. When could a State measure be regarded as a guarantee?

At its most basic all types and forms of guarantee can result in State aid regardless of source (e.g. state, region, local public bodies). However, the most common form of a guarantee is a contract guaranteeing a loan or other financial obligation of the borrower (i.e. the private partner). It should be noted that the legal form of the State guarantee does not play a significant role in the assessment. All arrangements

[29] The main provision for State guarantees is the **Commission Notice on the application of Articles 87 and 88 of the EC Treaty to State aid in the form of guarantees (2008/C 155/02)**

[30] For example see EPEC's guidance document around the use of state guarantees at: **www.eib.org/epec/resources/epec-state-guarantees-in-ppps-public.pdf**

[31] See, for example, para. 51 of the **Commission Notice on the Notion of State aid as referred to in Article 107(1) TFEU**

through which a private company's financial risks are transferred to the State (in its broadest sense) could qualify as State aid as they confer a benefit on the company (e.g. through a lower cost of borrowing). This includes laws and regulations that shield a particular type of company from bankruptcy or ensures that the State will cover all losses (in practice companies benefiting from such a special status are often State-owned). Even a side letter or oral commitments could be qualified as a State guarantee resulting in State aid, depending on their legal effects in the circumstances of the case.

3.3. How can an appropriate premium for a guarantee be established?

The benchmark for determining an appropriate premium for a guarantee is the MEOP (see Chapter 1). A guarantee will not constitute State aid when the State obtains remuneration equivalent to the premium a market economy operator would charge for an equivalent guarantee to an equivalent company. If, on the other hand, the guarantee is granted on more favourable conditions than those available in the market, the beneficiary company has clearly obtained an economic advantage.

Determining whether an appropriate market premium is paid for a State guarantee can be very difficult in practice and PPPs are no exception to this. To address these issues, the Commission's Guarantees Notice puts forward a number of specific conditions, the fulfilment of which is sufficient to rule out the presence of State aid (and which do not exclusively relate to the premium). These are set out in section 3.4 below.

3.4. Conditions for ruling out the presence of State aid in a State guarantee

The Commission in its Guarantees Notice gives more detail on how Articles 107 and 108 of the TFEU can be applied to the issue of guarantees and State aid. The Guarantees Notice considers[32] that the fulfilment of all of the following four conditions will be sufficient to rule out the presence of State aid:

a. The borrower is not in **financial difficulty**;[33]

b. The guarantee is linked to a **specific financial transaction**, for a **fixed maximum amount**, and is **limited in time**;

c. In principle the guarantee does **not cover more than 80% of the outstanding loan or other financial obligation** (further provisions are set out in Box 7). The reason behind this condition is that if a financial obligation is wholly covered by a State guarantee, the lender may have less incentive to properly assess, secure and minimise the risk arising from the project. This

[32] See para. 3.2 of the **Commission Notice on the application of Articles 87 and 88 of the EC Treaty to State aid in the form of guarantees (2008/C 155/02) (Commission Guarantee Notice)**

[33] "*Financial difficulty*" is defined by the Commission guidelines on State aid for rescuing and restructuring firms in difficulty (2014/C 249/01).

may increase the risk to the State and confer a benefit on the private partner; and

d. A **market-oriented price** is paid for the guarantee. In order to comply with this condition, the public authority should follow a risk-based approach when calculating the premium it should receive for providing a guarantee. This evaluation is usually accompanied by an analysis of the private partner's creditworthiness. The Commission sets out the steps for facilitating this calculation.

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).[34]

The public authority should look for suitable guarantee premium benchmarks and attempt to classify the private partner by means of a suitable risk rating capable of identifying the price paid by a borrower that has the same risk profile. The two elements can be further explained as follows:

i. Finding a guarantee premium benchmark. In principle, such benchmarks can be found on the financial markets. During the assessment the elements or characteristics that should be taken into account are the following:

- the amount and duration of the transaction;
- the security given by the private partner and relevant previous experience that may affect the recovery rate evaluation;
- the probability of default of the private partner due to its financial position, its sector of activity and prospects; and
- other relevant economic conditions.

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.

ii. Classify the private partner's creditworthiness by means of a risk rating. The public authority should be able to classify the private partner by means of a risk rating. This allows it to determine the right remuneration for the guarantee. This classification may be provided by an internationally recognised rating agency.[35] The classification can also take place through the internal rating used by the bank providing the underlying loan. It is important to mention that EU law remains flexible with regard to the sources of the risk assessment, as long as

[34] See para. 111 of the **Commission Notice on the notion of State aid as referred to in Article 107(1) TFEU**

[35] By "*internationally recognised rating agency*", the Commission refers mainly to Standard & Poor's, Fitch and Moody's. It points to the link between rating and default rate made by international financial institutions, whose work is also publicly available. For example, see Table 1 on agencies' credit ratings to be found in Bank for International Settlements Working Paper No 207, available at: **www.bis.org/publ/work207.pdf**

they are transparent and justifiable. Each private entity may choose the financial body best placed to assess its rating (for instance a local bank granting the loan).

To assess whether the premium is in line with the market, the Member State can carry out a comparison of prices paid by similarly rated undertakings on the market. In all cases, it is important to note that the Commission will not accept the guarantee premium being set at a rate simply calculated using an overall industry standard.

3.5. Validation of a State guarantee

If the guarantee meets the above criteria, it does not qualify as State aid and there is, consequently, no need to notify it to the Commission.

If there is any doubt as to whether a planned guarantee constitutes State aid, it should be notified to the Commission.[36] In other words, where a guarantee does not comply with the MEOP, 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 to be compatible and whether it is exempted from notification under a specific State aid exemption or has to be notified. As a matter of principle, the State aid element will be deemed to be the difference between the appropriate market price of the guarantee and the actual price paid for it.

[36] In the case of State guarantees, the State 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 owners of the bonds and the financial institutions involved in the issuance of the bonds. The question of whether the illegality of the aid affects the legal relations between the State and third parties is a matter that has to be examined in principle under national law. As the CJEU held in Case C 275/10 *Residex Capital IV CV v Gemeente Rotterdam* [2011] ECR I-13043, national courts can cancel a guarantee (or declare it null and void) in circumstances where unlawful aid was implemented by means of such a guarantee, used to secure financing to an undertaking that would not be able to secure such financing under normal market conditions. According to the Commission Guarantee Notice (at 2.3.2.), 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 a breach of EU law. Accordingly, lenders have an interest in verifying, as a standard precaution, that the EU rules on State aid have been observed whenever guarantees are granted. Member States 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.

Box 7: The 80% threshold for State guarantees

Concerning the 80% threshold, it is important to note three things:

1. When the size of the loan or of the financial obligation decreases over time, for instance because the loan starts to be repaid, the guaranteed amount has to decrease proportionally, in such a way that at any given point in time the guarantee does not cover more than 80% of the outstanding loan.[37]

2. The 80% limit does not apply to the following cases, where the guarantee can cover 100% of the private partner's financial obligations:
   - guarantees covering debt securities;[38] and
   - public guarantees granted to finance a company whose activity solely consists in a properly entrusted SGEI (as defined in Chapter 2), insofar as the guarantee is provided by the public authority who had enacted the entrustment. However, the 80% limit can apply if the company concerned provides other SGEIs or other economic activities.

3. If a Member State wishes to provide a guarantee above the 80% threshold and claims that it does not constitute aid, it should notify to the Commission.

[37] If there are losses, they have to be borne by the lender and the guarantor proportionally on a *pari passu* basis. Accordingly, any revenues generated from securities have to be attributed to the lender and the guarantor on a proportional basis. Transactions where losses are fully attributed to the guarantor first (i.e. without immediate and proportional recourse to the lender) do not satisfy the 80% condition.

[38] "*Debt securities*" means bonds or other forms of transferable securitised debts, with the exception of securities which are equivalent to shares in companies or which, if converted or if the rights conferred by them are exercised, give rise to a right to acquire shares or securities equivalent to shares (Art. 2(1)(b) of Directive 2004/109/EC).

4. Sale of land and buildings

4.1. Introduction

PPP projects sometimes involve the sale of land or buildings by a public entity to the private partner. Such a sale of land can be qualified as State aid in the sense that the transaction may have been done in a way that favours the private partner.

The previous guidance regarding the Sales of Land[39] has now been subsumed within broader State aid principles based around the MEOP. Therefore, in order to avoid State aid arising in land transactions, public authorities should, in line with the MEOP, behave in the same way as private market investors would do in similar circumstances. Whilst the detailed rules have been replaced by the over-arching MEOP, based on the previous approach it is likely that following one of the two procedures below, the land transaction would be considered to have taken place at market value and therefore not involve State aid.

4.2. Sale conducted via an unconditional bidding procedure

A sale of land following a sufficiently well-publicised, open and unconditional bidding procedure, comparable to an auction, in which the best is accepted, is by definition at market value and consequently does not involve State aid.

"When public bodies sell assets, goods and services, the only relevant criterion for selecting the buyer should be the highest price, also taking into account the requested contractual arrangements (for example the vendor's sales guarantee or other post-sale commitments). Only credible and binding offers should be considered."[40]

Where a sale of publicly-owned land is only one element of a wider PPP transaction, the private sector bidders should factor this into their overall bid for the PPP project. If the public authority selects the bidder which gives it the most economically advantageous deal overall, pursuant to a transparent and non-discriminatory tendering procedure, the land sale should not give rise to State aid.

When an unconditional bidding procedure for the sale of land is used, valuation of the land or buildings prior to the bidding procedure (e.g. for accounting purposes or to provide a proposed initial minimum bid) is irrelevant.

4.3. Sale price set by an independent asset evaluator

If the land transaction is not incorporated into the overall PPP bidding process, as described above, a valuation can be determined by one or more independent asset valuations prior to the sale negotiations. This should be done in order to establish the

[39] For reference only see the now superseded **Commission Communication on State aid elements on sales of land and buildings by public authorities (97/C 209/03)**

[40] See para. 95 of **Commission Notice on the notion of State aid as referred to in Article 107(1) TFEU**

market value[41] on the basis of generally accepted market indicators and valuation standards. The market price thus established is the minimum purchase price that can be agreed without granting State aid.

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.[42]

4.4. Other uses of land

In PPPs there are sometimes more complex arrangements relating to land. For instance, the private partner may be granted the use of land for a very small, symbolic (sometimes termed, peppercorn) rent as part of a package in exchange for obligations that the private partner must perform in the PPP project. In such situations, the peppercorn rents cannot be considered in isolation for the purpose of State aid assessment. These peppercorn rents must instead be assessed as part of this wider package of rights and obligations of the private partner.

[41] "*Market value*" means the price at which land and buildings could be sold under private contract between a willing seller and an arm's length buyer on the date of valuation, it being assumed that the property is publicly exposed to the market, that market conditions permit orderly disposal and that a normal period, having regard to the nature of the property, is available for the negotiation of the sale.

[42] See para. 103 of **Commission Notice on the notion of State aid as referred to in Article 107(1) TFEU**

5. General Block Exemption Regulation

The General Block Exemption Regulation[43] (GBER) sets out twelve areas in which specific State aid measures are declared compatible with the internal market and therefore exempted from the Commission notification requirement for State aid. Each policy area includes different specific State aid situations.

These exemptions usually set an absolute cap on the amount of aid that does not need to be notified and a cap on the overall project size below which aid would not need to be notified. This means that large projects and large amounts of aid in these policy areas usually still need to go through the notification process.

The aid amount should not exceed the difference between the eligible costs and the operating profit of the investment. This eligible aid amount therefore usually needs to take account of any operating profit being generated by the project, either by deducting the operating profit from the eligible costs *ex ante* (on the basis of reasonable projections) or through a clawback mechanism (to allow a balanced sharing of unanticipated gains, e.g. if profits exceed expectations).

The types of exemption areas that are most likely to have the potential to be utilised by PPP projects of a suitable size are described in Annex V. It should be noted that due to the constraints on the amount of aid that can be exempted, these rules may in practice have only limited usefulness to most PPPs.[44]

[43] See: **ec.europa.eu/competition/state_aid/legislation/block.html** for Commission Regulation (EU) No 651/2014 of 17 June 2014 declaring certain categories of aid compatible with the internal market in application of Articles 107 and 108 of the TFEU; p. 15.

[44] The Commission has also released a practical guide to GBER which can be found here: **ec.europa.eu/competition/state_aid/legislation/practical_guide_gber_en.pdf**

Annex I: Finavia, Airpro and Ryanair at Tampere-Pirkkala Airport

The Tampere-Pirkkala Airport (TPA) in Finland is owned and operated by Finavia, which was, at the time of the case, a State enterprise. Terminal 2 (T2) is rented out by Finavia to its 100% subsidiary Airpro, which operates the terminal and provides ground-handling services at this terminal.

Airpro pays a monthly rent for the use of the facilities. The agreement provides that, in addition to the basic rent, Airpro will bear the cost of converting T2 from a cargo hangar into a low-cost passenger terminal. After a public procurement procedure, Ryanair was selected as sole operator for the use of T2.

In order to assess Finavia's and Airpro's low-cost strategy via an integrated approach, the Commission considered the inter-company payments (such as the rent paid by Airpro to Finavia for the use of T2), and payments for landing and terminal navigation charges, to be revenue. The MEOP can apply to transactions between a parent public company and its subsidiary. It means that Finavia, as the owner and overall manager of TPA, has to treat its wholly-owned subsidiary Airpro at arm's length.

In calculating the inter-company payments it was clear that the *ex-ante* business plan had a positive net present value (NPV) and was therefore in line with the behaviour of a market economy operator. The revenues from the agreement covered all costs of Airpro and all costs of Finavia that could be attributed to the latter on a "*full-cost*" basis. "*Full-cost allocation*" means that all variable costs, plus an appropriate share of fixed costs, are taken into account. In this particular case the relevant costs included the following: the cost of infrastructure (i.e. depreciation costs for the airport infrastructure); operating costs (e.g. the cost of personnel, energy, materials); and the cost of security and safety measures.

Annex II: Approaches to applying the SGEI regime in PPPs

The SGEI regime can be approached in three ways, each of which is considered in detail here, starting with the most stringent (the Altmark judgment criteria), followed by the "SGEI Decision" and the "SGEI Framework".

1. Classification as non-State aid using the CJEU Altmark judgment and the Commission SGEI Communication

The judgment in the Altmark case[45] is very brief and should be read alongside the explanation provided by the Commission in the following document: *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*[46] *(2012/C 8/02).*

To benefit from the Altmark judgment, and therefore that the granting of an advantage to an entity can be excluded, the contractual arrangements of the PPP have to take into account all the conditions set out in Section 2.3. In addition, the undertaking entrusted with the SGEI must be chosen as a result of a public procurement procedure which allows for selection of the tenderer capable of providing the SGEI at the least cost to the community.

However, if the undertaking in question is not selected pursuant to such a public procurement procedure, the level of compensation needs to be determined as follows:

1. on the basis of a generally accepted market remuneration for the given service, where it exists;[47] or
2. on the basis of an analysis of the costs[48] which a typical[49] undertaking, well run and adequately provided with the necessary means[50] so as to be able to meet the necessary PSOs, would have incurred in discharging those PSOs. In such a case, account must be taken of the relevant receipts and a reasonable profit.

[45] **C-280/00 Altmark Trans GmbH and Regierungspräsidium Magdeburg v. Nahverkehrsgesellschaft Altmark GmbH and Oberbundesanwalt beim BVerWG** [2003] ECR I-07747.

[46] *See the* **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**

[47] See, for example, Commission Decision in Case C 49/06 — *Italy —State aid scheme implemented by Italy to remunerate Poste Italiane for distributing postal savings certificates* (OJ L 189, 21.7.2009,p. 3).

[48] The costs to be taken into account are the direct costs necessary to discharge the SGEI and an appropriate contribution to the indirect costs common to both the SGEI and other activities.

[49] "*Typical undertaking*" means an undertaking in the sector under consideration, whether located in the same Member State or in other Member States, but not an undertaking that enjoys a monopoly position or receives public service compensation granted on conditions that do not comply with EU law.

[50] "*Undertaking adequately provided with material*" means an undertaking which has the resources necessary for it to discharge immediately the public service obligations incumbent on the undertaking to be entrusted with the operation of the SGEI.

2. Automatically approved State aid using the SGEI Decision

The SGEI Decision[51] is officially entitled *Commission Decision of 20 December 2011 on the application of Article 106(2) of the Treaty on the Functioning of the European Union to State aid in the form of public service compensation granted to certain undertakings entrusted with the operation of services of general economic interest (2012/21/EU).*[52]

The procuring authority of a PPP should apply the SGEI Decision in cases where the requirements of the Altmark judgment (and the related Communication) referred to above cannot be applied. For certain small projects, it may in practice be advisable in the first instance to consider whether the project complies with the more straightforward SGEI Decision rather than trying to apply the more difficult Altmark criteria.

To benefit from the SGEI Decision, the conditions set out in Section 2.3 must be satisfied. In addition, the following conditions also have to be met:

1. the remuneration paid by the procuring authority has to be below EUR 15 million per year, except in the hospitals and social services sectors, where there is no ceiling;[53]
2. in principle, the maximum duration for support benefiting from the SGEI Decision is ten years. However, the SGEI Decision allows for more than ten years if a significant investment is required from the private partner to fulfil its contractual obligations, which would almost certainly be the case with PPP projects;
3. a reference to the SGEI Decision must be included in the PPP contract; and
4. the parameters according to which the compensation is calculated must be included in the PPP contract.

If the criteria set out in the SGEI Decision are met, the compensation allocated to the private partner for the PSO will be exempted from notification even if it is regarded as State aid, because it will be deemed to be automatically approved as compatible aid.

Finally, it is important to note that the SGEI Decision does not apply to the land transport sector.

[51] Also called the **Commission Decision of 20 December 2011 on the application of Article 106(2) of the Treaty on the Functioning of the European Union to State aid in the form of public service compensation granted to certain undertakings entrusted with the operation of SGEIs** (2012/21/EU).

[52] Article 106(2) of the TFEU provides as follows: "*Undertakings entrusted with the operation of services of general economic interest or having the character of a revenue-producing monopoly shall be subject to the rules contained in the Treaties, in particular to the rules on competition, in so far as the application of such rules does not obstruct the performance, in law or in fact, of the particular tasks assigned to them. The development of trade must not be affected to such an extent as would be contrary to the interests of the Union.*"

[53] See Article 2 (1) of the **SGEI Decision**

3. State aid compatibility through the SGEI Framework

If neither the SGEI Decision nor the Altmark criteria are applicable, there is a further way for the compensation allocated to the private partner for the PSO to be declared compatible with the internal market on the basis of Article 106 of the TFEU. However, in this situation the relevant Member State will have to notify the measure to the Commission and obtain authorisation before the project is implemented.

The Commission will assess the compatibility of State aid with the internal market on the basis of the Commission's Communication on the *European Union framework for State aid in the form of public service compensation (2011) (2012/C 8/03)*, which is commonly referred to as the SGEI Framework.[54] The conditions of compatibility in the SGEI Framework are in substance the same as the common features set out in Section 2.3, the requirement to notify under the SGEI Framework being the key difference.

The SGEI Framework does not apply to land, air and maritime transport or public broadcasting (to which sector-specific rules apply instead).

The SGEI Framework distinguishes between three different situations:

a. Standard assessment

The "*standard assessment"* applies to aid that has to be notified and that does not qualify for either the "*simplified assessment"* or the "*in-depth assessment"*. On the basis of the "*standard assessment"*, in order to consider aid for an SGEI to be compatible with State aid provisions, the following conditions have to be satisfied:

- the PPP project would have to be defined as contributing to an SGEI following a public consultation or other similarly appropriate instruments that take the interests of users and providers into account. However, this does not apply where it is clear that a new consultation will not bring any significant added value to a recent consultation (i.e. the process cannot be continually repeated until the desired answer is obtained);
- the duration of the PPP contract should be justified by objective criteria such as the need to amortise non-transferable fixed assets. In principle, the duration of a PPP contract should not exceed the period required for the depreciation of the most significant assets used to provide the SGEI;
- there should be compliance with public procurement provisions;
- the amount of compensation must not exceed what is necessary to cover the net cost of the PSO, in addition to a "*reasonable"* profit for the private partner:
  - in principle, the net cost of the PSO should be calculated as the difference between (i) the net cost borne by the private partner to deliver its obligations with the PSO and (ii) the net cost borne by the

[54] Also called the **Communication from the Commission — European Union framework for State aid in the form of public service compensation (2011)**

same private partner delivering its obligations without the PSO (also called the "*net avoided cost"* methodology). For situations where the latter methodology is not feasible or appropriate, the Commission can accept other methods such as the methodology based on *"cost allocation",* for which the cost of the PSO is calculated as the difference between the PSO costs and revenues as determined in the PPP contract;

  - in addition, the procuring authority should include incentives for the private partner to ensure efficiency, for instance by providing different compensation depending on the extent to which predetermined targets are met;

- there should be transparency, notably via the publication of a number of items of information, including the amounts of aid granted to the undertaking on a yearly basis; and
- if the procuring authority assigns the same SGEI to several private partners, the compensation allocated to the private partners should be calculated on the basis of the same method in respect of each private partner.

b. Simplified assessment

Cases that satisfy the SGEI Decision's condition related to the amount of the compensation (below EUR 15 million per year, except for the hospitals and social services sectors, where there is no ceiling)[55] involve a "*simplified assessment"* method. This means there is no obligation to:

- carry out a public consultation on public needs to define the SGEI;
- calculate the PSO compensation on the same basis for different private partners carrying out the same SGEI;
- use the "*net avoided cost"* methodology to calculate the PSO costs charged by the private partner; or
- introduce efficiency incentives.

Aside from the above points, all the other conditions from the "*standard assessment"* method have to be satisfied to gain the Commission's authorisation based on the "*simplified assessment"* method.

c. In-depth assessment

In some exceptional situations (notably where the "*standard assessment"* method conditions are not satisfied), compensation for an SGEI may have the potential to create serious distortions of competition. Some examples of cases where an "*in-depth assessment"* is necessary are provided by the SGEI Framework.[56]

> *"The Commission will restrict its attention to those distortions where the aid has significant adverse effects on other Member States and the functioning*

[55] See Article 2(1) of the **SGEI Decision**

[56] See paragraphs 54-55 of the **SGEI Framework**

> *of the internal market, for example, because they deny undertakings in important sectors of the economy the possibility to achieve the scale of operations necessary to operate efficiently.*
>
> *Such distortions may arise, for instance, where the entrustment [the contract] either has a duration which cannot be justified by reference to objective criteria (such as the need to amortise non-transferable fixed assets) or bundles a series of tasks (typically subject to separate entrustments [contracts] with no loss of social benefit and no additional costs in terms of efficiency and effectiveness in the provision of the services)."*

In these situations, the Commission has to carry out an "*in-depth assessment"* of the compensation allocated to the private partner. The "*in-depth assessment"* includes the examination of the following options:

- whether the same public service could equally well be provided in a less distortive manner (for instance, by way of a more limited duration or scope, or through separate contracts); or
- whether there were alternatives to the granting of the aid to the private partner (for instance, to give compensation directly to users).

A further step is for the Commission to apply a balancing test, based on Article 106(2) of the TFEU, which states that the SGEI must not affect the development of trade to an extent that would be contrary to the interests of the EU as a whole.

Annex III: Specific General Block Exemption Regulations with potential PPP relevance

Regional aid[57]

The object of regional aid is to promote the development of the less-prosperous regions[58] of the EU, mainly by supporting initial investment but occasionally by providing operating aid.[59] The Regional Aid Guidelines provide guidance to the Member States on how they can grant investment aid to companies in order to support the development of such regions. The current version of the Regional Aid Guidelines covers the period of 2014 to 2020. Pursuant to the Regional Aid Guidelines, the Commission has approved regional aid maps for the Member States for the period 2014 to 2020. This maps set out the territories (or parts thereof) which will be eligible for regional aid under Article 107(3)(a) and (c) of the TFEU.

The amount of regional aid which would be designated compatible under the Regional Aid Guidelines depends firstly on the status of the region in which the aid is being given, more disadvantaged regions being allowed to have relatively greater aid intensities and higher thresholds for notification. On an individual project basis in the most disadvantaged regions of the EU this could allow anything up to EUR 37.5m of aid to be given using an aid intensity of 50% without the need of notifying the aid to the Commission. This would prove a useful tool in the case of managing the State aid impact of PPP projects.[60]

The GBER rules allow some initial investment to be used by both SMEs and non-SMEs (in some regions) without a further need for notification. This initial investment can cover capital spending which may have some relevance to PPPs such as: setting up a new establishment, extending an existing establishment or starting an activity involving the production of products not previously produced in the establishment (though the latter two are not applicable to non-SMEs operating in relatively prosperous areas eligible for regional aid). This aid is itself subject to a maximum percentage of the eligible costs. This operates on a sliding scale depending on the size of the enterprise benefiting from the aid and the relative prosperity of the region.

Among other rules, in all cases the investment and jobs created by the aid must be maintained for 5 years (3 years for SMEs) after the delivery of the investment and 25% of the financial contribution must come from sources free of public subsidy. Of interest to PPP projects in sparsely populated areas is that operating aid can also be granted under certain conditions.

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57 See **European Commission Guidelines on regional State aid for 2014-2020**

58 These regions are defined in Article 107 (3)(a) and(c) of the TFEU).

59 "*Operating aid*" means aid to cover costs which a company could expect to pay in the normal course of business, such as rent, rates, utility bills, salary costs and other overhead costs. Operating aid is usually not allowed, except under specific EU regulations and notices or in exceptional circumstances. This is to be contrasted with "*investment aid*", which is considered beneficial in certain circumstances and is more readily approved by the Commission as long as it satisfies the relevant criteria. Investment aid means aid granted to companies to support investments, particularly in new production or the modernisation of existing facilities and, in the case of the regional aid, to incentivise investment in the less advantaged regions of the EU.

60 See para. 20 (n) of the **European Commission Guidelines on regional State aid for 2014-2020**

Environmental protection

In the area of aid for environmental protection policy, the GBER provides several distinct exemption regimes, three of which are relevant to PPP projects: (1) investment aid for energy efficiency measures, (2) investment aid for energy efficient projects in buildings, and (3) investment aid for energy-efficient district heating and cooling. Whilst the first of these regimes may be seen as an over-arching regime for all eligible energy efficiency measures, the latter two exemption regimes deal with more specific types of projects, to which additional criteria apply (as outlined below).

1. **Investment aid for energy efficiency measures.** This exemption category does not apply to aid exceeding EUR 15 million per undertaking per project, and is only available for investment aid that enables undertakings to achieve energy efficiency.

   However, it is important to note that this exemption category does not apply to improvements which are carried out to ensure that undertakings comply with EU standards, even if these standards are not yet in force (but have already been adopted).

   To calculate the exempted amount of aid, first the costs that can be taken into consideration for this exemption ("*the eligible costs*") have to be identified. Second, the percentage that can be exempted from State aid notification has to be calculated as the extra investment costs that are needed to achieve the higher level of energy efficiency and that can be identified in the total investment cost as a separate investment dedicated to energy efficiency.

   If the proportion of the investment related to energy efficiency cannot be identified, the eligible costs will need to be identified by reference to a similar, less energy-efficient investment that would have been credibly carried out without the aid. The difference between the costs of both investments determines the energy efficiency-related cost and constitutes the eligible costs.

   In principle, the amount of aid should not exceed 30% of the eligible costs. However, the aid intensity may be increased for:

   – aid granted to small undertakings[61] (by 20 percentage points);

   – aid granted to medium-sized undertakings[62] (by 10 percentage points);

   – investments located in assisted areas[63] fulfilling the conditions of Article 107(3)(a) of the TFEU[64] (by 15 percentage points); and

[61] A "*small enterprise*" is defined as an enterprise that employs fewer than 50 persons and whose annual turnover and/or annual balance sheet total does not exceed EUR 10 million.

[62] The category of medium-sized enterprises is made up of enterprises that employ fewer than 250 persons and have an annual turnover not exceeding EUR 50 million, and/or an annual balance sheet total not exceeding EUR 43 million.

[63] "*Assisted areas*" means areas designated in an approved regional aid map for the period 1.7.2014 - 31.12.2020 pursuant to Articles 107(3)(a) and (c) of the TFEU.

[64] Article 107(3)(a) of the TFEU provides that "*aid to promote the economic development of areas where the standard of living is abnormally low or where there is serious underemployment, and of the regions referred to in*

- investments located in assisted areas fulfilling the conditions of Article 107(3)(c) of the TFEU[65] (by 5 percentage points).

2. **Investment aid for energy efficiency projects in buildings.** This exemption category applies to aid not exceeding EUR 10 million in the form of loans or guarantees provided directly to beneficiaries (or via a specially set up fund) in support of energy efficiency projects in buildings. Energy efficiency improvements undertaken to ensure that the beneficiary complies with existing EU standards are not exempted from the notification requirement under this section (as is the case for the previous exemption category concerning investment aid for energy efficiency measures).

   The conditions for the use of this exemption depend on the form of the aid, as follows:

   - if the aid is in the form of a loan, the nominal value of the loan shall not exceed EUR 10 million per project. The repayment by the building's owners to the energy efficiency fund or other financial intermediary should also not be less than the nominal value of the loan; and
   - if the aid is in the form of a guarantee, the guarantee should comply with the requirements of the State Guarantee Notice (see Chapter 3 of this report). The guarantee should also not exceed 80% of the underlying loan, and in all cases the nominal value of the amount guaranteed shall not exceed EUR 10 million per project at the level of the final beneficiaries.

   Where energy efficiency aid is granted via an energy efficiency fund or other financial intermediary, such a fund or financial intermediary needs to fully pass the benefits on to the final beneficiaries (i.e. the building's owners or tenants).

   In addition, for aid granted via energy efficiency funds and/or financial intermediaries, the Commission has laid down further rules, which are set out in Box 8.

3. **Investment aid for energy-efficient district heating and cooling**. This exemption from notification can be applied to the installation of one or more energy efficient heating and cooling production plants and any extra costs needed for the construction, expansion and refurbishment of the generation units to operate an energy-efficient installation compared to a conventional

Article 349, in view of their structural, economic and social situation" may be considered to be compatible with the internal market. Areas eligible for regional aid under Article 107(3)(a) of the TFEU, commonly referred to as "*a*" areas, tend to be the more disadvantaged within the EU in terms of economic development. Under the Regional Aid Guidelines, Member States may designate as "a" areas those areas which constitute outermost regions or those areas whose GDP per capita in purchasing power standards is below or equal to 75% of the EU average.

[65] Article 107(3)(c) of the TFEU provides that "*aid to facilitate the development of certain economic activities or of certain economic areas, where such aid does not adversely affect trading conditions to an extent contrary to the common interest"* may be considered to be compatible with the internal market. Areas eligible under Article 107(3)(c) of the TFEU, commonly referred to as "*c*" areas, also tend to be disadvantaged but to a lesser extent than "*a*" areas under Article 107(3)(a) of the TFEU. The Regional Aid Guidelines set out the rules for the designation of 'c' areas by Member States (paras.155-161).

production plant. It should be noted that the amount of aid should not exceed 45% of the eligible investment costs.

Box 8: Energy efficiency funds and/or financial intermediaries

For aid granted via energy efficiency funds and/or financial intermediaries, the Commission has laid down a number of criteria that should be taken into account to determine eligibility for this exemption:

- financial intermediary managers and energy efficiency fund managers shall be selected via an open, transparent and non-discriminatory call for tenders in accordance with the relevant EU and national laws. In particular, there shall be no discrimination on the basis of the place of establishment or incorporation in any Member State;
- financial intermediaries and energy efficiency fund managers may be required to fulfil pre-defined criteria, objectively justified by the nature of the investments;
- the private partner has to be selected through a procurement process that tries to establish an appropriate risk/reward-sharing arrangement whereby, for support other than guarantees, asymmetric profit-sharing shall be given preference over downside protection. If the private investors are not selected in this way, the fair rate of return to the private investors shall be established by an independent expert selected via an open, transparent and non-discriminatory call for tenders;
- in the case of asymmetric loss-sharing between public and private investors, the first loss assumed by the public investor shall be capped at 25% of the total investment;
- investors shall be allowed to be represented on the governance bodies of the energy efficiency fund or financial intermediary;
- the energy efficiency fund or financial intermediary shall be established according to the applicable laws and the Member State shall provide for a due diligence process in order to ensure a commercially sound investment strategy for the purpose of implementing the energy efficiency aid measure;
- financial intermediaries, including energy efficiency funds, shall be managed on a commercial basis and shall ensure profit-driven financing decisions. This is considered to be the case when the financial intermediary and, as the case may be, the managers of the energy efficiency fund satisfy the following conditions:
  - (a) they are obliged by law or contract to act with the diligence of a professional manager in good faith and avoid conflicts of interest; best practices and regulatory supervision shall apply;
  - (b) their remuneration shall conform with market practice. This requirement is considered to be met where the manager is selected through an open, transparent and non-discriminatory call for tenders, based on objective criteria linked to experience, expertise and operational and financial capacity;
  - (c) they shall receive remuneration linked to performance or share part of the investment risks by co-investing own resources so as to ensure that their interests are permanently aligned with the interests of the public investor;
  - (d) they shall set out an investment strategy, criteria and the proposed timing of investments in energy efficiency projects, establishing the ex-ante financial viability and their expected impact on energy efficiency;
  - (e) a clear and realistic exit strategy shall exist for the public funds invested in the energy efficiency fund or granted to the financial intermediary, allowing the market to finance energy efficiency projects when the market is ready to do so.

Feasibility studies

In the GBER, "*feasibility study*" means the evaluation and analysis of the potential of a project. Such a study should aim to support the process of decision-making by objectively and rationally uncovering the project's strengths and weaknesses, opportunities and threats, as well as identifying the resources required to see it through to completion and ultimately its prospects of success.

The aid intensity[66] for the beneficiary shall not exceed 50% of the eligible costs for feasibility studies and in all cases the aid amount shall not exceed EUR 7.5 million per study. However, the aid intensities may be increased by 10 percentage points for medium-sized enterprises and by 20 percentage points for small enterprises.

Broadband infrastructure

For this exemption from notification, the eligible broadband costs are the following investment costs:

- deployment of a passive broadband infrastructure;[67]
- broadband-related civil engineering works;
- deployment of basic broadband networks; and
- deployment of next generation access (NGA) networks.

The amount of aid granted to the project should not exceed EUR 10 million. In addition, the exemption from notification is only for projects not exceeding EUR 70 million in total costs.

The investment should be located in areas where there is no infrastructure of the same category (either basic broadband or NGA network) and where no such infrastructure is likely to be developed on commercial terms within three years of the moment of publication of the planned aid measure.

The aid needs to be allocated on the basis of an open, transparent and non-discriminatory competitive selection process respecting the principle of technology neutrality (see Chapter 1).

In addition, the network operator needs to offer the widest possible active and passive wholesale access[68] under fair and non-discriminatory conditions, including physical unbundling in the case of NGA networks. Such wholesale access needs to be granted for at least seven years and the right of access to ducts or poles cannot be limited in time. In the case of aid for the construction of ducts, the ducts need to

[66] "*Aid intensity*" means the gross aid amount expressed as a percentage of the eligible costs, before any deduction of tax or other charges.

[67] A "*passive broadband infrastructure*" means a broadband network without any active component. It typically comprises civil engineering infrastructure, ducts and dark fibre and street cabinets.

[68] See Article 2, point 139, of Commission Regulation (EU) No 651/2014 of 17 June 2014 declaring certain categories of aid compatible with the internal market in application of Articles 107 and 108 of the TFEU.

be large enough to cater for several cable networks and different network arrangements.

The wholesale access price also needs to be based on the pricing principles set by the national regulatory authority and on benchmarks that prevail in other comparable, more competitive areas of the EU, taking into account the aid received by the network operator.

Sports and multifunctional recreational infrastructure

To be classified as eligible costs for this exemption from notification, sports infrastructure cannot be used exclusively by a single professional sports user. Recreational infrastructure therefore consists of facilities with a multi-functional character, in particular cultural and recreational services, with the exception of leisure parks and hotel facilities.

Access to the sports or multifunctional recreational infrastructure needs to be available to several users and be granted on a transparent and non-discriminatory basis. Undertakings that have financed at least 30% of the investment costs of the infrastructure may be granted preferential access under more favourable conditions, provided those conditions are made publicly available. If sports infrastructure is used by professional sports clubs, Member States shall ensure that the pricing conditions for using it are made publicly available.

Any concession or other contract with a third party to construct, upgrade and/or operate the sports or multifunctional recreational infrastructure needs to be assigned on an open, transparent and non-discriminatory basis (see Chapter 1).

The aid may take the form of:

- investment aid, which covers all expenses related to the design and construction of the project, including aid to upgrade the infrastructure; and/or
- operating aid for sports infrastructure.[69]

Aid cannot exceed EUR 15 million and the exemption from notification does not apply if the total infrastructure cost is above EUR 50 million. Eligible operating aid for sports infrastructure is restricted to EUR 2 million per item of infrastructure per year.

Local infrastructure

This exemption from notification applies to investment aid for the financing of construction or upgrade of local infrastructure that contributes, at a local level, to improving the business and consumer environment and modernising and developing the industrial bases. This exemption from notification does not apply to airport and

[69] For operating aid for sports infrastructure, the eligible costs shall be the operating costs of providing services for the infrastructure. Those operating costs include costs such as personnel costs, materials, contracted services, communications, energy, maintenance, rent and administration but exclude depreciation charges and the costs of financing if these have been covered by investment aid.

port infrastructure or to aid for infrastructure that is covered by other categories of exemption under the GBER. Dedicated infrastructure[70] (e.g. for a single user), is also not exempted under the relevant article.

Therefore the infrastructure to comply with this exemption from notification needs to be made available to interested users on an open, transparent and non-discriminatory basis. Also, the price charged for the use or sale of the infrastructure needs to correspond to a market price. Furthermore, any concession or other contract with a third party to operate the infrastructure needs to be assigned on an open, transparent and non-discriminatory basis (see Chapter 1).

The qualifying aid amount cannot exceed EUR 10 million or apply to infrastructure with a total cost in excess of EUR 20 million.

[70] "*Dedicated infrastructure*" means specific infrastructure built solely for the benefit of an ex-ante identifiable undertaking and tailored to its needs.

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