



Brussels, **XXX**
[...](2014) **XXX**

COMMUNICATION FROM THE COMMISSION

Draft Commission Notice on the notion of State aid pursuant to Article 107(1) TFEU

COMMUNICATION FROM THE COMMISSION

Draft Commission Notice on the notion of State aid pursuant to Article 107(1) TFEU

Table of Contents

1.	Introduction	4
2.	Notion of undertaking and economic activity	4
2.1.	General principles	5
2.2.	Exercise of public powers	6
2.3.	Social security	7
2.4.	Health care	8
2.5.	Education and research activities	9
2.6.	Infrastructure	10
3.	State origin	12
3.1.	Imputability	12
3.1.1.	Indicators for imputability	13
3.1.2.	Imputability and obligations under Union law	13
3.2.	State resources	14
3.2.1.	General principles	14
3.2.2.	Controlling influence over the resources	16
3.2.3.	State involvement in redistribution between private entities	17
4.	Advantage	18
4.1.	The notion of advantage in general	18
4.1.1.	General principles	18
4.1.2.	Indirect advantage	20
4.2.	The market economy operator (MEO) test	21
4.2.1.	Introduction	21
4.2.2.	General principles	22
4.2.3.	Application of the MEO test	24
5.	Selectivity	32
5.1.	General principles	32
5.2.	Material selectivity	33
5.2.1.	De jure and de facto selectivity	33
5.2.2.	Selectivity stemming from discretionary administrative practices	34

5.2.3.	The assessment of material selectivity for measures mitigating the normal charges of undertakings	34
5.3.	Regional selectivity	38
5.3.1.	Institutional autonomy	39
5.3.2.	Procedural autonomy	39
5.3.3.	Economic and financial autonomy	40
5.4.	Specific fiscal aid issues.....	40
5.4.1.	Cooperative societies	41
5.4.2.	Undertakings for collective investment	42
5.4.3.	Tax amnesties.....	43
5.4.4.	Tax settlements and rulings.....	44
5.4.5.	Depreciation/amortisation rules	45
5.4.6.	Flat-rate tax regime for specific activities.....	46
5.4.7.	Anti-abuse rules	46
5.4.8.	Excise duties.....	47
6.	Effect on trade and competition	47
6.1.	General principles	47
6.2.	Distortion of competition	47
6.3.	Effect on trade	48
7.	Final Provisions.....	50

1. INTRODUCTION

1. In the context of the State aid modernisation exercise, the Commission wishes to provide further clarification on the key concepts relating to the notion of State aid provided for in Article 107(1) of the Treaty on the Functioning of the European Union (TFEU), with a view to contributing to an easier, more transparent and more consistent application of this notion across Europe.
2. The present communication only concerns the notion of State aid pursuant to Article 107(1) TFEU, which both the Commission and national authorities (including national courts) have to apply in conjunction with the notification and stand-still obligation provided for in Article 108(3) TFEU. On the contrary, the present communication does not concern the compatibility of State aid with the internal market pursuant to Article 107 (2) and (3) TFEU, which is for the Commission to assess.
3. Considering that the notion of State aid is an objective and legal concept defined directly by the Treaty, the Commission will simply clarify how it understands the Treaty provisions, in line with the EU case-law, without prejudice to the interpretation of the Court of Justice of the European Union.
4. It should be underlined that the Commission is bound by this objective notion, subject only to specific situations involving complex economic assessments¹. It is only within the framework of Article 107 (1) TFEU that the legality of a Decision of the Commission about the existence of State aid should be assessed. Whenever possible, the Commission will therefore refer in this notice to the case-law or, in the absence of judgments, to its decisional practice, even if it is not possible to address all issues on this basis. It should be underlined that the primary reference for interpreting the notion of aid is always the case-law of the Union courts.
5. Article 107(1) TFEU defines State aid as any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods in so far as it affects trade between Member States”. This present Communication will clarify the different elements which, according to the case-law, constitute a State aid pursuant to that provision: the existence of an undertaking, the imputability of the measure to the State, its financing through State resources, the grant of an advantage, the selectivity of the measure and its potential effect on competition and trade within the Union.

2. NOTION OF UNDERTAKING AND ECONOMIC ACTIVITY

6. Based on Article 107(1) TFEU, the State aid rules generally only apply where the recipient of an aid is an “undertaking”.

¹ See to that effect Case C-290/07 P *Commission v Scott* [2010] ECR I-7763, paragraph 66.

2.1. General principles

7. The Court of Justice has consistently defined undertakings as entities engaged in an economic activity, regardless of their legal status and the way in which they are financed². The classification of a particular entity as an undertaking thus depends entirely on the nature of its activities. This general principle has three important consequences:
8. First, the status of the entity under national law is not decisive. For example, an entity that is classified as an association or a sports club under national law may nevertheless have to be regarded as an undertaking within the meaning of Article 107(1) TFEU. The same applies to an entity that is formally part of the public administration. The only relevant criterion in this respect is whether it carries out an economic activity.
9. Second, the application of the State aid rules as such does not depend on whether the entity is set up to generate profits. Based on the case-law of the Court of Justice and the General Court, non-profit entities can offer goods and services on a market too³. Where this is not the case, non-profit providers remain outside of State aid control.
10. Third, the classification of an entity as an undertaking is always relative to a specific activity. An entity that carries out both economic and non-economic activities is to be regarded as an undertaking only with regard to the former.
11. Two separate legal entities may be considered to form one economic unit for the purposes of the application of State aid rules. That economic unit is then considered to be the relevant undertaking. In this respect, the Court of Justice considers the existence of a controlling share and other functional, economic and organic links⁴.
12. To clarify the distinction between economic and non-economic activities, the Court of Justice has consistently held that any activity consisting in offering goods and services on a market is an economic activity⁵.
13. The question whether a market exists for certain goods and services may depend on the way those services are organised in the Member State concerned⁶ and may thus vary from one Member State to another. Moreover, due to political choice or economic developments, the classification of a given activity can change over time. What is not an economic activity today may turn into one in the future, and vice versa.
14. The decision of a public authority not to allow third parties to provide a certain service (for example, because it wishes to provide the service in-house) does not rule out the existence of an economic activity. In spite of such market closure, an

² Joined Cases C-180/98 to C-184/98 *Pavlov and Others* [2000] ECR I-6451, paragraph 74.

³ Joined Cases 209/78 to 215/78 and 218/78 *Van Landewyck* [1980] ECR 3125 paragraph 88; Case C-244/94 *FFSA and Others* [1995] ECR I-4013, paragraph 21; Case C-49/07 *MOTOE* [2008] ECR I-4863, paragraphs 27 and 28.

⁴ Case C-480/09 P *AceaElectrabel Produzione SpA v Commission* [2010] ECR I-13355 paragraphs 47 to 55; Case C-222/04 *Cassa di Risparmio di Firenze SpA and Others* [2006] ECR I-289, paragraph 112.

⁵ Case 118/85 *Commission v Italy* [1987] ECR 2599, paragraph 7; Case C-35/96 *Commission v Italy* [1998] ECR I-3851, paragraph 36; Joined Cases C-180/98 to C-184/98 *Pavlov and Others* [2000] ECR I-6451, paragraph 75.

⁶ Joined Cases C-159/91 and C-160/91 *Poucet and Pistre* [1993] ECR I-637, paragraphs 16 to 20.

economic activity can exist where other operators would be willing and able to provide the service in the market concerned. More generally, the fact that a particular service is provided in-house has no relevance for the economic nature of the activity⁷.

15. Since the distinction between economic and non-economic activities depends on political choices and economic developments in a given Member State, it is not possible to draw up an exhaustive list of activities that a priori would never be economic. Such a list would not provide genuine legal certainty and would thus be of little use. The following paragraphs instead seek to clarify the distinction with respect to a number of important areas.
16. In the absence of a definition of economic activity in the Treaties, the case-law appears to follow different criteria for the application of internal market rules and for the application of competition law⁸.
17. The simple fact that an entity holds shares, even a majority shareholding, in an undertaking providing goods or services on a market does not mean that that entity should automatically be considered an undertaking for the purposes of Article 107 TFEU. Where that shareholding only gives rise to the exercise of rights attached to the status of shareholder as well as, if appropriate, the receipt of dividends, which are merely the fruits of the ownership of an asset, that entity will not be considered an undertaking if it does not itself provide goods or services on a market⁹.

2.2. Exercise of public powers

18. It follows from the case-law that Article 107 TFEU does not apply where the State acts “by exercising public power”¹⁰ or where public entities act “in their capacity as public authorities”¹¹. An entity may be deemed to act by exercising public powers where the activity in question is a task that forms part of the essential functions of the State or is connected with those functions by its nature, its aim and the rules to which it is subject¹². Generally speaking, unless the Member State concerned has decided to introduce market mechanisms, activities that intrinsically form part of the prerogatives of official authority and are performed by the State do not constitute economic activities. Examples are activities related to:

⁷ See Opinion of Advocate General Geelhoed in Case C-295/05 *Asociación Nacional de Empresas Forestales (Asemfo)* [2007] ECR I-2999, paragraphs 110 to 116; Regulation (EC) No 1370/2007 of the European Parliament and of the Council of 23 October 2007 on public passenger transport services by rail and by road and repealing Council Regulations (EEC) Nos 1191/69 and 1107/70, OJ L 315, 3.12.2007, p. 1, Articles 5(2) and 6(1); Commission Decision 2011/501/EU of 23 February 2011 on State aid C 58/06 (ex NN 98/05) implemented by Germany for Bahnen der Stadt Monheim (BSM) and Rheinische Bahngesellschaft (RBG) in the Verkehrsverbund Rhein-Ruhr, OJ L 210, 17.8.2011, p. 1, recitals 208 and 209.

⁸ Case C-519/04 P *David Meca-Medina and Igor Majcen v Commission* [2006] ECR I-6991, paragraphs 30 to 33; Case C-350/07 *Kattner Stahlbau* [2009] ECR I-1513, paragraphs 66, 72, 74 and 75; Opinion of Advocate General Poiares Maduro in Case C-205/03 P *FENIN* [2006] ECR I-6295, paragraphs 50 and 51.

⁹ Case C-222/04 *Cassa di Risparmio di Firenze SpA and Others* [2006] ECR I-289, paragraphs 107 to 118 and 125.

¹⁰ Case 118/85 *Commission v Italy* [1987] ECR 2599, paragraphs 7 and 8.

¹¹ Case C-30/87 *Bodson* [1988] ECR I-2479, paragraph 18.

¹² See, in particular, Case C-364/92 *SAT* [1994] ECR I-43, paragraph 30.

- (a) the army or the police¹³;
- (b) air navigation safety and control¹⁴;
- (c) maritime traffic control and safety¹⁵;
- (d) anti-pollution surveillance¹⁶;
- (e) the organisation, financing and enforcement of prison sentences¹⁷; and
- (f) the collection of data to be used for public purposes on the basis of a statutory obligation imposed on the undertakings concerned to disclose such data¹⁸.

19. In so far as a public entity exercises an economic activity which can be separated from the exercise of public powers, that entity, in relation to that activity, acts as an undertaking. On the contrary, if that economic activity cannot be separated from the exercise of public powers, the activities exercised by that entity as a whole remain connected with the exercise of those public powers and therefore fall outside the notion of undertaking¹⁹.

2.3. Social security

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

21. The Court of Justice and the General Court use a range of criteria to determine whether a social security scheme is solidarity-based and therefore does not involve an economic activity:

- (a) whether affiliation with the scheme is compulsory²⁰;
- (b) whether the scheme pursues an exclusively social purpose²¹;
- (c) whether the scheme is non-profit²²;
- (d) whether the benefits are independent of the contributions made²³;
- (e) whether the benefits paid are not necessarily proportionate to the earnings of the person insured²⁴; and

¹³ Commission Decision of 7 December 2011 on State aid SA.32820 (2011/NN) – United Kingdom – Aid to Forensic Science Services, OJ C 29, 2.2.2012, p. 4, paragraph 8.

¹⁴ Case C-364/92 *SAT/Eurocontrol* [1994] ECR I-43, paragraph 27; Case C-113/07 P *Selex Sistemi Integrati v Commission* [2009] ECR I-2207, paragraph 71.

¹⁵ Commission Decision of 16 October 2002 on State aid N 438/02 — Belgium — Aid to port authorities, OJ C 284, 21.11.2002, p. 2.

¹⁶ Case C-343/95 *Calì & Figli* [1997] ECR I-1547, paragraph 22.

¹⁷ Commission Decision of 19 July 2006 on State aid N 140/06 — Lithuania — Allotment of subsidies to the State Enterprises at the Correction Houses, OJ C 244, 11.10.2006, p. 12.

¹⁸ Case C-138/11 *Compass- Datenbank GmbH* [2012] ECR I-0000, paragraph 40.

¹⁹ Case C-138/11 *Compass- Datenbank GmbH* [2012] ECR I-0000, paragraph 38, and Case C-113/07 P *SELEX Sistemi Integrati v Commission* [2009] ECR I-2207, paragraphs 72 et seq.

²⁰ Joined Cases C-159/91 and C-160/91 *Poucet and Pistre* [1993] ECR I-637, paragraph 13.

²¹ Case C-218/00 *Cisal and INAIL* [2002] ECR I-691, paragraph 45.

²² Joined Cases C-264/01, C-306/01, C-354/01 and C-355/01 *AOK Bundesverband* [2004] ECR I-2493, paragraphs 47 to 55.

²³ Joined Cases C-159/91 and C-160/91 *Poucet and Pistre* [1993] ECR I-637, paragraphs 15 to 18.

- (f) whether the scheme is supervised by the State²⁵.
22. Such solidarity-based schemes must be distinguished from economic schemes²⁶. In contrast with solidarity-based schemes, economic schemes are regularly characterised by:
- (a) optional membership²⁷;
 - (b) the principle of capitalisation (dependency of entitlements on the contributions paid and the financial results of the scheme)²⁸;
 - (c) their profit-making nature²⁹; and
 - (d) the provision of entitlements which are supplementary to those under a basic scheme³⁰.
23. Some schemes combine features of both categories. In such cases, the classification of the scheme depends on an analysis of different elements and their respective importance³¹.
- 2.4. Health care**
24. In the Union, health care systems differ significantly between Member States. Whether and to which degree different health care providers compete with each other depends on these national specificities.
25. In some Member States, public hospitals are an integral part of a national health service and are almost entirely based on the principle of solidarity³². Such hospitals are directly funded from social security contributions and other State resources and provide their services free of charge on the basis of universal coverage³³. The Court of Justice and the General Court have confirmed that, where such a structure exists, the relevant organisations do not act as undertakings³⁴.
26. Where that structure exists, even activities that in themselves could be of an economic nature, but are carried out merely for the purpose of providing another

²⁴ Case C-218/00 *Cisal and INAIL* [2002] ECR I-691, paragraph 40.

²⁵ Joined Cases C-159/91 and C-160/91 *Poucet and Pistre* [1993] ECR I-637, paragraph 14; Case C-218/00 *Cisal and INAIL* [2002] ECR I-691, paragraphs 43 to 48; Joined Cases C-264/01, C-306/01, C-354/01 and C-355/01 *AOK Bundesverband* [2004] ECR I-2493, paragraphs 51 to 55.

²⁶ See, in particular, Case C-244/94 *FFSA and Others* [1995] ECR I-4013, paragraph 19.

²⁷ Case C-67/96 *Albany* [1999] ECR I-5751, paragraphs 80-87.

²⁸ Case C-244/94 *FFSA and Others* [1995] ECR I-4013, paragraphs 9 and 17 to 20; Case C-67/96 *Albany* [1999] ECR I-5751, paragraphs 81 to 85; see also Joined Cases C-115/97 to C-117/97 *Brentjens* [1999] ECR I-6025, paragraphs 81 to 85, Case C-219/97 *Drijvende Bokken* [1999] ECR I-6121, paragraphs 71 to 75, and Joined Cases C-180/98 to C-184/98 *Pavlov and Others* [2000] ECR I-6451, paragraphs 114 and 115.

²⁹ Joined Cases C-115/97 to C-117/97 *Brentjens* [1999] ECR I-6025, paragraphs 74 to 85.

³⁰ Joined Cases C-180/98 to C-184/98 *Pavlov and Others* [2000] ECR I-6451, paragraphs 67 to 70.

³¹ Case C-350/07 *Kattner Stahlbau* [2009] ECR I-1513, paragraphs 33 et seq.

³² Based on the case-law of the Union Courts, a prominent example is the Spanish National Health System (see Case T-319/99 *FENIN* [2003] ECR II-357 and Case C-205/03P [2006] ECR I-6295, paragraphs 25 to 28.)

³³ Depending on the overall characteristics of the system, charges which only cover a small fraction of the true cost of the service may not affect its classification as non-economic.

³⁴ Case T-319/99 *FENIN* [2003] ECR II-357, paragraph 39 and Case C-205/03P [2006] ECR I-6295, paragraphs 25 to 28.

non-economic service, are not of an economic nature. An organisation that purchases goods — even in large quantities — for the purpose of offering a non-economic service does not act as an undertaking simply because it is a purchaser in a given market³⁵.

27. In many other Member States, hospitals and other health care providers offer their services for remuneration, be it directly from patients or from their insurance³⁶. In such systems, there is a certain degree of competition between hospitals concerning the provision of health care services. Where this is the case, the fact that a health service is provided by a public hospital is not sufficient for the activity to be classified as non-economic.
28. The Court of Justice and the General Court have also clarified that health care services which independent doctors and other private practitioners provide for remuneration at their own risk are to be regarded as an economic activity³⁷. The same principles would apply as regards independent pharmacies.

2.5. Education and research activities

29. According to the case-law public education organised within the national educational system funded and supervised by the State may be considered as a non-economic activity. The Court of Justice held that the State:
- “by establishing and maintaining such a system of public education and financed entirely or mainly by public funds and not by pupils or their parents ... does not intend to become involved in activities for remuneration, but carries out its task towards its population in the social, cultural and educational areas”³⁸.
30. According to the same case-law, the non-economic nature of public education is in principle not affected by the fact that pupils or their parents sometimes have to pay tuition or enrolment fees which contribute to the operating expenses of the system. Such financial contributions often only cover a fraction of the true costs of the service and can thus not be considered as remuneration for the service provided. They therefore do not alter the non-economic nature of a general education service predominantly funded by the public purse³⁹. These principles can cover public educational services such as vocational training⁴⁰, private and public primary schools⁴¹ and kindergartens⁴², secondary teaching activities in universities⁴³ and the

³⁵ Case T-319/99 *FENIN* [2003] ECR II-357, paragraph 40.

³⁶ See, for instance, Case C-157/99 *Geraets-Smits and Others* [2001] ECR I-5473, paragraphs 53 to 58.

³⁷ See Joined Cases C-180/98 to C-184/98 *Pavlov and Others* [2000] ECR I-6451, paragraphs 75 and 77.

³⁸ Case C-318/05 *Commission v Germany* [2007] ECR I-6957, paragraph 68. See also Commission Decision of 25 April 2001 on State aid N 118/00 Subvention publiques aux clubs sportifs professionnels, OJ C 333 28.11.2001, p.6.

³⁹ Judgment of the EFTA Court of 21 February 2008 in Case E-5/07 *Private Barnehagers Landsforbund v EFTA Surveillance Authority* EFTA Ct. Rep [2008] p. 62, paragraph 83.

⁴⁰ Case 263/86 *Humbel* [1988] ECR 5365, paragraph 18.

⁴¹ Case C-318/05 *Commission v Germany* [2007] ECR I-6957, paragraphs 65 to 71. Case C-76/05 *Schwartz* [2007] ECR I-6849, paragraphs 37 to 47.

⁴² Judgment of the EFTA Court of 21 February 2008 in Case E-5/07 *Private Barnehagers Landsforbund v EFTA Surveillance Authority*.

⁴³ Case C-281/06 *Jundt* [2007] ECR I-12231, paragraph 28 to 39.

provision of education in universities⁴⁴. The same principles can be applied to certain cultural services such as public libraries⁴⁵.

31. Such public education services must be distinguished from services financed predominantly by parents or pupils or commercial revenues. For example, higher education financed entirely by students clearly fall within the latter category. In certain Member States public entities can also offer educational services which, due to their nature, financing structure and the existence of competing private organisations, are to be regarded as economic.
32. In light of the above principles, the Commission considers that certain activities of universities and research organisations fall outside the ambit of the State aid rules. This concerns their primary activities, namely:
 - (a) education for more and better skilled human resources;
 - (b) the conduct of independent research and development for more knowledge and better understanding, including collaborative research and development; and
 - (c) the dissemination of research results.
33. The Commission considers that technology transfer activities (licensing, creation of spin-off, or other forms of management of knowledge created by the research organisation) are non-economic where those activities are of an internal nature⁴⁶ and all income is reinvested in the primary activities of the research organisations concerned⁴⁷.

2.6. Infrastructure

34. Until not long ago, the financing of infrastructure was often considered to fall outside the State aid rules on the assumption that the construction and operation of an infrastructure would constitute a general measure of public policy and not an economic activity. For instance, the Commission's 1994 Aviation guidelines reflected this view by stating that “[t]he construction [or] enlargement of infrastructure projects (such as airports, motorways, bridges, etc.) represents a general measure of economic policy which cannot be controlled by the Commission under the Treaty rules on State aids”⁴⁸.
35. However, the *Aéroports de Paris* judgment of 12 December 2000⁴⁹ invalidated this interpretation, clarifying that the operation of an airport constitutes an economic

⁴⁴ Case 109/92 *Wirth* [1993] ECR I-6447 paragraphs 14 to 22.

⁴⁵ See Commission Decision of 16 April 2013 on State aid case SA.35529 – Czech Republic – Digitisation of books in libraries.

⁴⁶ According to footnote 25 of the Community Framework for State aid for research and development and innovation, “internal nature“ means a situation in which the management of the knowledge of the research organisation is conducted either by a department or a subsidiary of the research organisation or jointly with other research organisations. Contracting the provision of specific services to third parties by way of open tenders does not jeopardise the internal nature of such activities.

⁴⁷ See paragraphs 3.1.1 and 3.1.2 of the Community Framework for State aid for research and development and innovation.

⁴⁸ “Application of Article 92 and 93 of the EC Treaty and Article 61 of the EEA Agreement to State aids in the aviation sector”, OJ C 350, 10.12.1994, p. 5, paragraph 12.

⁴⁹ Case T-128/98 *Aéroports de Paris v Commission* [2000] ECR II-3929, paragraph 125. See also Case T-196/04 *Ryanair v Commission* [2008] II-3643, paragraph 88.

activity. More recently, the 2010 *Leipzig/Halle* ruling⁵⁰ confirmed that the construction of any type of infrastructure that is meant to be exploited economically, such as a commercial airport runway, is an economic activity in itself, which means that State aid rules apply to the way in which it is funded. While the above cases relate to a specific sector, the principles developed by the Court appear to be of general interpretation and thus applicable to any infrastructure operated for an economic activity.

36. Nevertheless, due to the uncertainty that existed prior to the *Aéroports de Paris* judgment, public authorities could legitimately consider that the financing of infrastructure granted prior to that judgment did not constitute State aid and that, accordingly, such measures did not need to be notified to the Commission. It follows that the Commission cannot put such financing measures definitely adopted before the *Aéroports de Paris* judgment into question on the basis of State aid rules⁵¹. Of course, this does not imply any presumption on the presence of State aid after the *Aéroports de Paris* judgment, which will have to be verified on a case by case basis⁵².
37. Public funding of infrastructure that is not meant to be commercially exploited is in principle excluded from the application of the State aid rules. This concerns, for instance, general infrastructures, such as public roads, bridges or canals, which are made available for public use without any consideration. The same applies to infrastructure that is intended for activities that the State normally performs in the exercise of its public powers (for instance air traffic control-related infrastructure in airports, lighthouses and other equipment for the needs of general navigation, police- and customs-related infrastructure).
38. Where an originally non-economic infrastructure is later re-assigned to economic use (e.g. where a military airport is converted to civilian use), only the costs incurred for the conversion of the infrastructure to economic use will be taken into account for the assessment under the State aid rules⁵³.
39. If an infrastructure is used for both economic and non-economic activities, public funding will fall under the State aid rules only insofar as it covers the costs linked to the economic activities. When it is possible to separate the costs and revenues corresponding to the economic and non-economic activities, the State aid rules shall only apply with regard to the State support granted in excess of the amount covering the costs of the non-economic activities.
40. If, in cases of mixed use, the infrastructure is used almost exclusively for a non-economic activity, its funding may fall outside the State aid rules in its entirety, provided the economic use remains purely ancillary, i.e. an activity which is directly related to and necessary for the operation of the infrastructure, or intrinsically linked

⁵⁰ Joined Cases T-443/08 and T-455/08 *Freistaat Sachsen, Flughafen Leipzig/Halle et al v Commission* [2011] ECR II-1311, in particular paragraphs 93 and 94, upheld on appeal, see Case C-288/11 P *Mitteldeutsche Flughafen AG and Flughafen Leipzig-Halle GmbH v Commission* [2012] ECR I-0000.

⁵¹ Commission Decision of 3 October 2012 on State aid case SA.23600, Financing Arrangements for Munich Airport Terminal 2, OJ L 319, 29.11.2013, p. 8, recitals 74 to 81.

⁵² The above clarifications are without prejudice to the application of Cohesion Policy rules in these circumstances, on which guidance has been provided in other instances.

⁵³ See Commission Decision on State aid SA.23324, – Tampere-Pirkkala Airport, OJ L 309, 13.11.2013, p. 27.

to its main non-economic use. In general, such ancillary activities consume the same inputs as the primary non-economic activities; e.g. material, equipment, labour, fixed capital. Ancillary economic activities must remain limited in scope, as regards the capacity of the infrastructure⁵⁴. Examples of such ancillary economic activities may include certain research organisations that occasionally rent out their equipment and laboratories to industrial partners. .

3. STATE ORIGIN

41. The granting of an advantage directly or indirectly through State resources and the imputability of such a measure to the State are two separate and cumulative conditions for State aid to exist⁵⁵. However, they are often considered together when assessing a measure under Article 107(1) TFEU, as they both relate to the public origin of the measure in question.

3.1. Imputability

42. In cases where a public authority grants aid to a beneficiary or designates a private or public body to administer the measure, this transfer is imputable to the State, even if the public authority enjoys autonomy⁵⁶. Imputability is less evident, however, if the advantage is granted through one or more intermediate bodies, be they public or private, and in particular through public undertakings⁵⁷.

43. In such cases, it is necessary to determine whether the public authorities can be regarded as having been involved, in one way or another, in adopting the measure⁵⁸.

44. The mere fact that a measure is taken by a public undertaking is not *per se* sufficient to consider it imputable to the State⁵⁹. However, it does not need to be demonstrated that, in a particular case, the public authorities specifically incited the public undertaking to the aid measures in question. In fact, since relations between the State and public undertakings are necessarily close, there is a real risk that State aid may be granted through the intermediary of those undertakings in a non-transparent manner and in breach of the rules on State aid laid down by the Treaty⁶⁰. Moreover, precisely because of the privileged relations that exist between the State and public undertakings, it will, as a general rule, be very difficult for a third party to

⁵⁴ In this respect, the economic use of the infrastructure may be considered ancillary when the capacity allocated each year to such activity does not exceed 15 per cent of the infrastructure's overall annual capacity.

⁵⁵ See, for instance, Case C-482/99 *France v Commission (Stardust)* [2002] ECR I-4397, paragraph 24; Case T-351/02 *Deutsche Bahn AG v Commission* [2006] ECR II-1047, paragraph 103.

⁵⁶ Case T-358/94 *Air France v Commission* [1996] ECR II-2109, paragraph 62 and Case 248/84 *Germany v Commission* [1987] ECR 4013, paragraphs 62 to 68.

⁵⁷ The concept of public undertakings can be defined by reference to Commission Directive 2006/111/EC, of 16 November 2006, on the transparency of financial relations between Member States and public undertakings as well as on financial transparency within certain undertakings (OJ L 318, 17.11.2006, p. 17). Article 2(b) of this Directive states that "‘public undertakings’ means any undertaking over which the public authorities may exercise directly or indirectly a dominant influence by virtue of their ownership of it, their financial participation therein, or the rules which govern it".

⁵⁸ Case C-482/99 *France v Commission (Stardust)* [2002] ECR I-4397, paragraph 52.

⁵⁹ Case C-482/99 *France v Commission (Stardust)* [2002] ECR I-4397. See also Case T-442/03 *SIC v Commission* [2008] ECR II-1161, paragraphs 93 to 100.

⁶⁰ Case C-482/99 *France v Commission (Stardust)* [2002] ECR I-4397, paragraph 53.

demonstrate that aid measures taken by such an undertaking were in fact adopted on the instructions of the public authorities in a particular case⁶¹.

45. For these reasons, the imputability to the State of an aid measure taken by a public undertaking may be inferred from a set of indicators arising from the circumstances of the case and the context in which the measure was taken⁶².

3.1.1. *Indicators for imputability*

46. A non-exhaustive list of possible indicators to establish imputability includes the following⁶³:

(i) The body in question could not take the contested decision without taking account of the requirements of the public authorities.

(ii) The fact that, besides factors of an organic nature which link the public undertaking to the State, the undertaking, through which aid was granted, had to take account of directives issued by governmental bodies.

(iii) The integration of the public undertaking into the structures of the public administration.

(iv) The nature of the undertaking's activities⁶⁴ and their exercise on the market in normal conditions of competition with private operators.

(v) The legal status of the undertaking (whether it is subject to public law or ordinary company law). However, the mere fact that a public undertaking has been constituted in the form of a capital company under ordinary law cannot be regarded as sufficient to exclude imputability⁶⁵, having regard to the autonomy which that legal form confers on it.

(vi) The degree of the supervision that the public authorities exercise over the management of the undertaking.

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

3.1.2. *Imputability and obligations under Union law*

47. A measure is not imputable if the Member State is under an obligation to implement it under Union law without any discretion. In that case, the measure stems from an act of the Union legislature and is not imputable to the State⁶⁶.

⁶¹ Case C-482/99 *France v Commission (Stardust)* [2002] ECR I-4397, paragraph 54.

⁶² Case C-482/99 *France v Commission (Stardust)* [2002] ECR I-4397, paragraph 55.

⁶³ Case C-482/99 *France v Commission (Stardust)* [2002] ECR I-4397, paragraphs 55 and 56. See also the Opinion of Advocate General Jacobs, Case C-482/99 *France v Commission (Stardust)* [2002] ECR I-4397, paragraphs 65 to 68.

⁶⁴ For instance, when measures are taken by public development banks (Case T-358/94 *Air France v Commission* [1996] ECR II-2109, paragraphs 57 to 62. and Case T-387/11 *Nitrogenmuvek Vegyipari, Zrt. v. Commission*, [2013] ECR II-0000, paragraph 63.

⁶⁵ Case C-482/99 *France v Commission (Stardust)* [2002] ECR I-4397, paragraph 57.

⁶⁶ See Case C-460/07 *Sandra Puffer* [2009] ECR I-3251, paragraph 70, on the right to tax deductions under the VAT system set up by the Union, and Case T-351/02 *Deutsche Bahn AG v Commission* [2006] ECR II-1047, paragraph 102, on tax exemptions required by Union law.

48. This rule does not, however, apply in situations where Union law simply allows for certain national measures and the Member State enjoys discretion (i) on whether to adopt the measures in question or (ii) in establishing the characteristics of the concrete measure which are relevant from a State aid perspective. Measures that are adopted jointly by several Member States are imputable to all the Member States concerned pursuant to Article 107(1) TFEU⁶⁷.

3.2. State resources

3.2.1. General principles

49. Only advantages granted directly or indirectly through State resources can constitute State aid within the meaning of Article 107(1) TFEU⁶⁸.

50. State resources include all resources of the public sector⁶⁹, including resources of intra-State entities (decentralised, federated, regional or other)⁷⁰ and, under certain circumstances, resources of private bodies (see paragraphs 56 and 57 below). It is irrelevant whether an institution within the public sector is autonomous⁷¹. Funds provided by the central bank of a Member State to specific credit institutions generally fall within the scope of State aid rules⁷².

51. Resources of public undertakings also constitute State resources within the meaning of Article 107(1) TFEU because the State is capable of directing the use of these resources⁷³. For the purpose of State aid law, transfers within a public group may also be relevant, for example, if resources are transferred from the mother company to its subsidiary (even if it constitutes a single undertaking from an economic point of view). The question of whether the transfer of such resources is imputable to the State is addressed in section 3.1 above. The fact that a public undertaking is a beneficiary of an aid measure does not exclude it from granting aid to another beneficiary by way of a different aid measure⁷⁴.

52. The fact that a measure granting an advantage is not financed directly by the State, but by a public or private body established or appointed by the State to administer the

⁶⁷ Commission Decision 2010/606/EU of 26 February 2010 on State aid C 9/2009 (ex NN 49/2008, NN 50/2008 and NN45/2008) implemented by the Kingdom of Belgium, the French Republic and the Grand Duchy of Luxembourg for Dexia SA, OJ L 274, 19.10.2010, p. 54

⁶⁸ Case 82/77 *Van Tiggele* [1978] ECR 25, paragraphs 25 and 26; Case T-358/94 *Air France v Commission* [1996] ECR II-2109, paragraph 63.

⁶⁹ Case T-358/94 *Air France v Commission* [1996] ECR II-2109, paragraph 56.

⁷⁰ Case 248/84 *Germany v Commission* [1987] ECR 4013, paragraph 17; Joined Cases T-92/00 and 103/00, *Territorio Histórico de Álava and Others v Commission* [2002] ECR II-1385, paragraph 57.

⁷¹ Case T-358/94 *Air France v Commission* [1996] ECR II-2109, paragraphs 58 to 62.

⁷² See Communication from the Commission on the application, from 1 August 2013, of State aid rules to support measures in favour of banks in the context of the financial crisis ("Banking Communication") OJ C 216, 30.7.2013, p. 1. However, the Commission clarified that where a central bank reacts to a banking crisis not with selective measures in favour of individual banks, but with general measures open to all comparable market players in the market (e.g. lending to the whole market on equal terms), such general measures often fall outside the scope of State aid control.

⁷³ Case C-482/99 *France v Commission (Stardust)* [2002] ECR I-4397, paragraph 38. See also C-278/00 *Greece v Commission* [2004] ECR I-3997, paragraphs 53 and 54, and Joined Cases C-328/99 and C-399/00 *Italy and SIM 2 Multimedia SpA v Commission* [2003] ECR I-4035, paragraphs 33 and 34.

⁷⁴ Joined Cases T-443/08 and T-455/08, *Freistaat Sachsen and Land Sachsen-Anhalt and Others v Commission* [2011] ECR II-1311, paragraph 143.

aid does not exclude that that measure is financed through State resources⁷⁵. A measure adopted by a public authority and favouring certain undertakings or products does not lose the character of a gratuitous advantage by the fact that it is wholly or partially financed by contributions imposed by the public authority and levied on the undertakings concerned⁷⁶.

53. The transfer of State resources may take many forms, such as direct grants, loans, guarantees, direct investment in the capital of enterprises and benefits in kind. A firm and concrete commitment to make State resources available at a later point in time is also considered a transfer of State resources. A positive transfer of funds is not necessary, as a foregoing State revenues is sufficient. Waiving revenue which would otherwise have been paid to the State constitutes a transfer of State resources⁷⁷. For example, a “shortfall” in tax and social security revenue due to exemptions or reductions in taxes or social security contributions granted by the Member State, or exemptions from the obligation to pay fines or other pecuniary penalties, fulfils the State resources requirement of Article 107(1) TFEU⁷⁸. The creation of a sufficiently concrete risk of imposing an additional burden on the State in the future, by a guarantee or by a contractual offer, is sufficient for the purposes of Article 107(1)⁷⁹.
54. If public authorities or public undertakings provide goods or services at a price below market rates, this implies a waiver of State resources (as well as the granting of an advantage).
55. Granting access to public domain or natural resources or granting special or exclusive rights⁸⁰ without adequate remuneration in line with market rates can constitute foregoing State revenues (again, as well as the granting of an advantage).⁸¹
56. In these cases it needs to be established whether the State, in addition to its role of manager of public assets, acts as a regulator that pursues policy objectives by making the selection process of the undertakings concerned subject to qualitative criteria (established *ex ante* in a transparent and non-discriminatory manner)⁸². When the

⁷⁵ Case 78/76, *Steinike & Weinlig* [1977] ECR 595, paragraph 21.

⁷⁶ Case 78/76, *Steinike & Weinlig* [1977] ECR 595, paragraph 22.

⁷⁷ Case C-83/98 P *France v Ladbroke Racing Ltd and Commission* [2000] ECR I-3271, paragraphs 48 to 51.

⁷⁸ Case C-387/92 *Banco Exterior de España* [1994] ECR I-877, paragraph 14 on tax exemptions. Furthermore, derogations from the normal insolvency rules, which allow undertakings to continue trading in circumstances under which they would not be allowed if the ordinary insolvency rules were applied, may involve an additional burden for the State if public bodies are among the principal creditors of those undertaking or where such action amounts to a de facto waiver of public debts, see Case C-295/97 *Piaggio* [1999] ECR I-3761, paragraphs 40 to 43 and Case C-200/97 *Ecotrade* [1998] ECR I-7907, paragraph 45.

⁷⁹ Case C-200/97 *Ecotrade* [1998] ECR I-7907, paragraph 41 and Joined Cases C-399/10 P and C-401/10 P, paragraphs 137-139.

⁸⁰ As defined in Article 2 (f) and (g) of Commission Directive 2006/111/EC of 16 November 2006 on the transparency of financial relations between Member States and public undertakings as well as on financial transparency within certain undertakings, OJ L 318, 17.11.2006, p. 17.

⁸¹ See also Communication from the Commission on the application of the European Union State aid rules to compensation granted for the provision of services of general economic interest, OJ C 8, 11.1.2012, p. 4, paragraph 33.

⁸² See Case T-475/04 *Bouygues SA v Commission* [2007] ECR II-2097, where the General Court noted that, in granting access to a scarce public resource such as the radio spectrum, national authorities

State acts as a regulator, it can decide legitimately not to maximise the revenues which could otherwise have been achieved, without falling under the scope of State aid rules, provided that all the operators concerned are treated equally, and that there is an inherent link between achieving the regulatory purpose and the foregoing of revenue⁸³.

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

58. A negative indirect effect on State revenues stemming from regulatory measures does not constitute a transfer of State resources, where it is an inherent feature of the measure⁸⁴. For example, a derogation from employment law provisions altering the framework for contractual relations between undertakings and employees does not constitute a transfer of State resources, despite the fact that it may reduce social security contributions or taxes payable to the State⁸⁵.

3.2.2. *Controlling influence over the resources*

59. The origin of the resources is not relevant provided that, before being directly or indirectly transferred to the beneficiaries, they enter under public control and are therefore available to the national authorities⁸⁶, even if the resources do not become the property of the public authority⁸⁷.

simultaneously performed the roles of telecommunications regulator and manager of such public resources (paragraph 104).

⁸³ See to that effect Commission Decision of 20 July 2004 on State aid NN 42/2004 – France - Modification of payments due from Orange and SFR for UMTS licences, OJ C/275, 8.11.2005, p. 3, recitals 28-30, upheld by the Union Courts (Case T-475/04 *Bouygues SA v Commission* [2007] ECR II-2097, paragraphs 108-111 and 123, and Case C-431/07 P *Bouygues and Bouygues Télécom v Commission* [2009] ECR I-2665, paragraphs 94-98 and 125). In this case, concerning the grant of UMTS radio spectrum licences, the State simultaneously performed the roles of telecommunications regulator and manager of such public resources and pursued the regulatory objectives set by Directive 97/13/EC of the European Parliament and of the Council of 10 April 1997 on a common framework for general authorisations and individual licences in the field of telecommunication services (OJ L 117, 7.5.1997, p. 15). In such a situation, the EU Courts confirmed that the award of licences without maximising the revenues which could have been achieved did not involve the grant of State aid, considering that the measures in question were justified by the regulatory objectives set out in Directive 97/13/EC and complied with the principle of non-discrimination. On the contrary, in Case C-279/08 P *Commission v Netherlands* [2011] ECR I-7671, paragraphs 88 et seq. the Court did not identify regulatory reasons that would have justified the grant without consideration of freely tradable emission rights.

⁸⁴ Case C-379/98 *PreussenElektra* [2001] ECR I-2099, paragraph 62.

⁸⁵ Joined Cases C-72/91 and C-73/91 *Sloman Neptun Schiffahrts* [1993] ECR I-887, paragraph 20 and 21. See also Joined Cases C-52/97, C-53/97 and C-54/97 *Viscido et al.* [1998] ECR I-2629, paragraphs 13 and 14 and Case C-189/91 *Kirsammer-Hack* [1993] ECR I-6185, paragraphs 17 and 18, on the fact that the non-application of certain provisions of employment law does not constitute a transfer of State resources.

⁸⁶ See, for instance Case C-206/06 *Essent Netwerk Noord* [2008] ECR I-5497, paragraph 70; Case C-83/98 P *France v Ladbroke Racing and Commission* [2000] ECR I-3271, paragraph 50.

⁸⁷ See Case T-358/94 *Air France v Commission* [1996] ECR II-2109, paragraphs 65 to 67, concerning an aid granted by the Caisse des Dépôts et Consignations which was financed with voluntary deposits of private citizens which could be withdrawn at any time. That did not affect the conclusion that those funds were State resources because the Caisse was able to use them from the balance produced by

60. Thus, subsidies financed through parafiscal charges or compulsory contributions imposed by the State and managed and apportioned in accordance with the provisions of public rules imply a transfer of State resources, even if not administered by the public authorities⁸⁸. Moreover, the mere fact that the subsidies are financed in part by voluntary private contributions is not sufficient to rule out the presence of State resources, since the relevant factor is not the origin of the resources but the degree of intervention of the public authority within the definition of the measure and its method of financing⁸⁹. The transfer of State resources can only be ruled out in very specific circumstances, notably if resources from the members of a trade association are earmarked for a specific purpose in the interest of the members, decided on by a private organization and with a purely commercial purpose, so long as the Member State is simply acting as a vehicle in order to make the contribution introduced by the inter-trade organisations compulsory⁹⁰.
61. A transfer of State resources is also present if the resources are at the joint disposal of several Member States who decide jointly on the use of those resources⁹¹. This would be the case, for example, for funds from the European Stability Mechanism (ESM).
62. Resources coming from the Union (e.g. from structural funds) or international financial institutions, such as the IMF or the EBRD, should also be considered as State resources if national authorities have discretion as to the use of those resources (in particular the selection of beneficiaries)⁹². By contrast, if such resources are awarded directly by the Union or the international financial institutions, with no discretion on the part of the national authorities, they do not constitute State resources (e.g. funding awarded in direct management under the Horizon 2020 framework program or the COSME program)⁹³.
- 3.2.3. *State involvement in redistribution between private entities*
63. Regulation that leads to financial redistribution from one private entity to another without any further involvement of the State does not entail a transfer of State resources, if the money flows directly from one private entity to another, without

deposits and withdrawals as if they were permanently at its disposal. See also Case C-83/98 P *France v Ladbroke Racing and Commission* [2000] ECR I-3271, paragraph 50.

⁸⁸ Case 173/73 *Italy v Commission* [1974] ECR 709, paragraph 16; Joined Cases C-78/90 to C-83/90 *Compagnie Commerciale de l'Ouest* [1992] ECR I-1847, paragraph 35. Case C-206/06 *Essent Netwerk Noord* [2008] ECR I-5497, paragraphs 58-74.

⁸⁹ Joined Cases T-139/09, T-243/09 and T-328/09 *France et al. v Commission*, [2012] ECR II-0000, paragraphs 63 and 64.

⁹⁰ See Case C-345/02 *Pearle* [2004] ECR I-7139, paragraph 41 and Case C-677/11 *Doux élevages SNC et al* [2013] ECR I-0000.

⁹¹ Commission Decision 2010/606/EU of 26 February 2010 on State aid C 9/2009 (ex NN 49/2008, NN 50/2008 and NN45/2008) implemented by the Kingdom of Belgium, the French Republic and the Grand Duchy of Luxembourg for Dexia SA, OJ L 274, 19.10.2010, p. 54.

⁹² See, for instance, concerning structural funds, Commission Decision of 22 November 2006 on State aid N 157/06, United Kingdom South Yorkshire Digital Region Broadband Project, recitals 21 and 29 on a measure partly financed by the European Regional Development Fund (ERDF), OJ C 80, 13.4.2007, p 2.

⁹³ However, in this case also principles similar to the substantive provisions of State aid law are often applicable by virtue of secondary Union legislation as they often impose consistency requirements.

passing through a public or private body designated by the State to administer the transfer.

64. For example, an obligation imposed by a Member State on private electricity suppliers to purchase electricity produced from renewable energy sources at fixed minimum prices does not entail the direct or indirect transfer of State resources to undertakings which produce that type of electricity⁹⁴. In this case, the undertakings concerned (i.e. the private electricity suppliers) are not appointed by the State to manage an aid scheme, but are only bound by an obligation to purchase a specific type of electricity with their own financial resources.
65. However, State resources are present where the charges paid by private persons transit through a public or private entity designated to channel them to the beneficiaries.
66. For example, surcharges imposed by law on private persons can be qualified as State resources. This is the case even where a private company is appointed by law to collect such charges on behalf of the State and to channel them to the beneficiaries, without allowing the collecting company to use the proceeds from the charges for purposes other than those provided for by the law. In this case, the sums in question remain under public control and are therefore available to the national authorities, which is sufficient reason for them to be considered State resources⁹⁵. Since this principle applies both to public bodies and private undertakings appointed to collect the charges and process the payments, changing the status of the intermediary from a public to a private entity has no relevance for the State resources criterion if the State continues to strictly monitor that entity⁹⁶.

4. ADVANTAGE

4.1. The notion of advantage in general

4.1.1. General principles

67. An advantage, within the meaning of Article 107(1) TFEU, is any economic benefit which an undertaking would not have obtained under normal market conditions, i.e. in the absence of State intervention⁹⁷. Section 4.2 of this Communication provides detailed guidance on the question of whether a benefit can be considered to be obtained under normal market conditions.

⁹⁴ Case C-379/98 *PreussenElektra* [2001] ECR I-2099, paragraphs 59 to 62. The Court held that the imposition of a purchase obligation on private undertakings does not constitute a direct or indirect transfer of State resources and that this qualification does not change because of the lower revenues of the undertakings subject to that obligation which is likely to cause a diminution of tax revenues because this constitutes an inherent feature of the measure. In this case, the private undertaking was not allowed to pass on its additional costs to its customers. See also Case C-222/07 *UTECA* [2009] ECR I-1407, paragraphs 43 to 47, on compulsory contributions imposed on broadcasters in favour of film production not involving a transfer of State resources.

⁹⁵ Case C-206/06 *Essent Netwerk Noord* [2008] ECR I-5497, paragraphs 69 to 75.

⁹⁶ Commission Decision 2011/528/EU on State aid C 24/09 (ex NN 446/08) – Austria – Green Electricity Act, OJ L 235, 10.9.2011, p. 42, recital 76.

⁹⁷ Case C-39/94 *SFEI and Others* [1996] ECR I-3547, paragraph 60; Case C-342/96 *Spain v Commission* [1999] ECR I-2459, paragraph 41.

68. Only the effect of the measure on the undertaking is relevant, neither the cause nor the objective of the State intervention⁹⁸. Whenever the financial situation of an undertaking is improved as a result of State intervention, an advantage is present. To assess this, the financial situation of the undertaking following the measure should be compared with its financial situation if the measure had not been introduced⁹⁹. Since only the effect of the measure on the undertaking matters, it is irrelevant whether the advantage is compulsory for the undertaking in that it could not avoid or refuse it¹⁰⁰.
69. The precise form of the measure is also irrelevant in establishing whether it confers an economic advantage on the undertaking¹⁰¹. Not only is the granting of positive economic advantages relevant for the notion of State aid, but relief from economic burdens can also constitute an advantage. The latter is a broad category which comprises any mitigation of charges normally included in the budget of an undertaking¹⁰². This covers all situations in which economic operators are relieved of the inherent costs of their economic activities¹⁰³, even if there is no legal obligation to assume those costs¹⁰⁴.
70. The existence of an advantage is not ruled out by the mere fact that competing undertakings in other Member States are in a more favourable position¹⁰⁵, because the notion of advantage is based on an analysis of the financial situation of an undertaking in its own legal and factual context with and without the particular measure.
71. Costs arising from regulatory obligations imposed by the State can in principle be considered to relate to the inherent costs of the economic activity, so that any compensation for these costs confers an advantage on the undertaking. This means that the existence of an advantage is in principle not excluded by the fact that the benefit does not go beyond compensation for a cost stemming from the imposition of a regulatory obligation. The same applies to relief for costs that the undertaking would not have incurred had there been no incentive stemming from the State measure because without this incentive it would have structured its activities

⁹⁸ Case 173/73 *Italy v Commission* [1974] ECR 709, paragraph 13.

⁹⁹ Case 173/73, *Italy v Commission* [1974] ECR 709, paragraph 13. .

¹⁰⁰ Commission Decision 2004/339/EC of 15.10.2003 on the measures implemented by Italy for RAI SpA, OJ 2004 L 119, 23.4.2004, p. 1, recital 69; Opinion of Advocate General Fennelly, Case C-251/97 *France v Commission* [1999] ECR I-6639, paragraph 26.

¹⁰¹ Case C-280/00 *Altmark Trans* [2003] ECR I-7747, paragraph 84.

¹⁰² Case C-387/92 *Banco Exterior de España* [1994] ECR I-877, paragraph 13; Case C-156/98 *Germany v Commission* [2000] ECR I-6857, paragraph 25; Case C-6/97 *Italy v Commission* [1999] ECR I-2981, paragraph 15; Case C-172/03 *Heiser* [2005] ECR I-1627, paragraph 36.

¹⁰³ Case C-126/01 *GEMO SA* [2003] ECR I-13769, paragraphs 28 to 31 on the free collection and disposal of waste.

¹⁰⁴ Case C-241/94 *France v Commission* [1996] ECR I-4551, paragraph 40; Case C-5/01 *Belgium v Commission*, [2002] ECR I-11991, paragraphs 38 and 39; Case T-565/08 *Corsica Ferries France SAS v Commission*, [2012] ECR II-0000, paragraphs 137 and 138.

¹⁰⁵ Case 173/73 *Italy v Commission* [1974] ECR 709, paragraph 17. See also Case T-55/99 *Confederación Espanola de Transporte de Mercancías v Commission* [2000] ECR II-3207, paragraph 85.

differently¹⁰⁶. The existence of an advantage is also not excluded if a measure compensates charges of a different nature that are unconnected with that measure¹⁰⁷.

72. As regards compensation for costs incurred to provide a service of general economic interest, the Court made clear in the *Altmark* judgement that the granting of an advantage can be excluded if four cumulative conditions are met¹⁰⁸. First, the recipient undertaking must actually have public service obligations to discharge, and the obligations must be clearly defined. Second, the parameters on the basis of which the compensation is calculated must be established in advance in an objective and transparent manner. Third, the compensation cannot exceed what is necessary to cover all or part of the costs incurred in the discharge of public service obligations, taking into account the relevant receipts and a reasonable profit. Fourth, where the undertaking which is to discharge public service obligations is not chosen following a public procurement procedure to select a tenderer capable of providing those services at the least cost to the community, the level of compensation needed must be determined on the basis of an analysis of the costs which a typical undertaking, well-run and adequately provided with means to meet the public service requirements, would have incurred in discharging those obligations, taking into account the relevant receipts and a reasonable profit for discharging the obligations. The Commission spelt out these conditions in its Communication on the application of the EU State aid rules to compensation granted for the provision of services of general economic interest¹⁰⁹.
73. Moreover, the existence of an advantage should be ruled out in the case of a reimbursement of illegally assessed taxes¹¹⁰, an obligation condemnation on the national authorities to compensate for damage they have caused to certain undertakings¹¹¹ or the payment of compensation for an expropriation¹¹².

4.1.2. *Indirect advantage*

74. An advantage can be conferred on undertakings other than those to which State resources are directly transferred (indirect advantage)¹¹³. A measure can also

¹⁰⁶ For instance, if a company receives a subsidy to carry out an investment in an assisted region, it cannot be argued that this does not mitigate costs normally included in the budget of the undertaking considering that, in the absence of the subsidy, the company would not have carried out the investment.

¹⁰⁷ Case C-81/10 P *France Télécom SA v Commission* [2011], paragraphs 43 to 50. That logically applies to the relief of costs incurred by an undertaking to replace the status of officials with the status of employees comparable to that of its competitors, which confers an advantage on the undertaking concerned (on which there was some previous uncertainty following the judgment of the General Court in Case T-157/01 *Danske Busvognmoend v Commission* [2004] ECR II-917, paragraph 57). See also on compensation for stranded costs Case T-25/07 *Iride SpA and Iride Energia SpA v Commission* [2009] ECR II-245, paragraphs 46 to 56.

¹⁰⁸ Case C-280/00 *Altmark Trans* [2003] ECR I-7747, paragraph 87 to 95.

¹⁰⁹ OJ C 8, 11.01.2012, p. 4.

¹¹⁰ Case 61/79 *Amministrazione delle finanze dello Stato* [1980] ECR 1205, paragraphs 29 to 32.

¹¹¹ Joined Cases 106 to 120/87 *Asteris AE and Others v Greece* [1988] ECR 5515, paragraphs 23 and 24.

¹¹² Case T-64/08 *Nuova Terni Industrie Chimiche SpA v Commission* [2010] ECR II-125, paragraphs 59 to 63 and 140 to 141, clarifying that while the payment of a compensation for an expropriation does not grant an advantage, an extension ex post of such compensation can constitute State aid.

¹¹³ Case C-156/98 *Germany v Commission* [2000] ECR I-6857, paragraphs 26 and 27; Case C-403/10 *Mediaset SpA v Commission* [2011] ECR I-117, paragraphs 73 to 77; Case C-382/99 *Netherlands v Commission* [2002] ECR I-5163, paragraphs 60 to 66; Case T-424/05 *Italy v Commission* [2009] ECR II-23, paragraphs 136 to 147. See also Article 107(2)(a) TFEU.

constitute both a direct advantage to the recipient undertaking and an indirect advantage to other undertakings, for instance, undertakings operating on subsequent levels of activity¹¹⁴. The direct recipient of the measure can be either an undertaking or an entity (natural or legal person) not engaged in any economic activity¹¹⁵.

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

4.2. The market economy operator (MEO) test

4.2.1. Introduction

76. The Union legal order is neutral with regard to the system of property ownership¹¹⁷ and does not in any way prejudice the right of Member States to act as economic operators. However, when public authorities directly or indirectly carry out economic transactions in any form¹¹⁸, they are subject to the Union State aid rules.
77. Economic transactions carried out by a public body or a public undertaking do not confer an advantage on its counterpart, and therefore do not constitute aid, if they are carried out in line with normal market conditions¹¹⁹. This principle has been developed with regard to different economic transactions. The Union Courts have developed the '*market economy investor principle*' to identify the presence of State aid in cases of public investment (in particular, capital injections): to determine whether a public body's investment constitutes State aid, it is necessary to assess whether, in similar circumstances, a private investor of a comparable size operating in normal conditions of a market economy could have been prompted to make the investment in question¹²⁰. Similarly, the Union Courts have developed the '*private creditor test*' to examine whether debt renegotiations by public creditors involve State aid, comparing the behaviour of a public creditor to that of hypothetical private

¹¹⁴ In case an intermediary undertaking is a mere vehicle for transferring the advantage to the beneficiary and it does not retain any advantage, it should not normally be considered as a recipient of State aid.

¹¹⁵ Case C-403/10 P *Mediaset SpA v Commission* [2011] ECR I-117, paragraph 81.

¹¹⁶ By contrast, a mere secondary economic effect in the form of increased output (which does not amount to indirect aid) can be found where the aid is simply channelled through an undertaking (e.g. a financial intermediary) which fully passes it on to the aid beneficiary.

¹¹⁷ Article 345 TFEU stipulates that "*The Treaties shall in no way prejudice the rules in Member States governing the system of property ownership*".

¹¹⁸ See, for instance Case C-40/85 *Belgium v Commission* [1986] ECR 2321, paragraph 12.

¹¹⁹ Case C-39/94 *SFEI and Others* [1996] ECR I-3547, paragraphs 60-61.

¹²⁰ See, for instance, Case C-142/87 *Belgium v Commission* ("*Tubemeuse*") [1990] ECR I-959, paragraph 29, and Case C-305/89 *Italy v Commission* ("*Alfa Romeo*") [1991] ECR I-1603, paragraphs 18 and 19; Case T-16/96 *Cityflyer Express v Commission* [1998] ECR II-757, paragraph 51, Joined Cases T-129/95, T-2/96 and T-97/96 *Neue Maxhütte Stahlwerke and Lech-Stahlwerke v Commission* [1999] ECR II-17, paragraph 104; Joined Cases T-228/99 and T-233/99 *Westdeutsche Landesbank Girozentrale and Land Nordrhein-Westfalen v Commission* [2003] ECR II-435..

creditors that find themselves in a similar situation¹²¹. Finally, the Union Courts have developed the '*private vendor test*' to assess whether a sale carried out by a public body involves State aid, considering whether a private vendor, under normal market conditions, could have obtained the same or a better price¹²².

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

4.2.2. *General principles*

79. The purpose of the MEO test is to assess whether the State has granted an advantage to an undertaking by not acting like a market economy operator with regard to a certain transaction. In that respect, it is not relevant whether the intervention constitutes a rational means for the public authorities in order to pursue public policy (e.g. employment) considerations. Similarly, the profitability or unprofitability of the beneficiary is not in itself a decisive indicator for establishing whether or not the economic transaction in question is in line with market conditions. The decisive element is whether the public authorities acted as a market economy operator would have done in a similar situation. If this is not the case, the beneficiary undertaking has received an economic advantage which it would not have obtained under normal market conditions¹²³, placing it in a more favourable position to that of its competitors¹²⁴.
80. For the purpose of the MEO test, only the benefits and obligations linked to the situation of the State as an economic operator – to the exclusion of those linked to its situation as a public authority – are to be taken into account¹²⁵. Indeed, the MEO test is not applicable if the State acts as a public authority rather than as an economic operator. If a State intervention is initiated for public policy reasons (for instance, for reasons of social or regional development), the State's behaviour may be rational

¹²¹ Case C-525/04 P *Spain v. Commission* [2007] ECR I-9947, Case C-73/11 P *Frucona v Commission* [2013] ECR I-0000; Case C-256/97 *DMTransport* [1999] ECR I-3913.

¹²² Joined Cases T-268/08 and T-281/08 *Land Burgenland and Austria v Commission* [2012] ECR II-0000.

¹²³ Joined Cases T-228/99 and T-233/99 *Westdeutsche Landesbank Girozentrale and Land Nordrhein-Westfalen v Commission* [2003] ECR II-435, paragraph 208.

¹²⁴ See, to that effect, Case C-124/10 P *Commission v EDF* [2012], paragraph 90; Case C-387/92 *Banco Exterior de España* [1994] ECR I-877, paragraph 14, and Case C-6/97 *Italy v Commission*, paragraph 16.

¹²⁵ Case C-124/10 P *Commission v EDF* [2012] ECR I-0000, paragraphs 79 to 81; Case 234/84 *Belgium v Commission* [1986] ECR 2263, paragraph 14; Case 40/85 *Belgium v Commission* [1986] ECR 2321, paragraph 13; Joined Cases C-278/92 to C-280/92 *Spain v Commission* [1994] ECR I 4103, paragraph 22; and Case C-334/99 *Germany v Commission* [2003] ECR I-1139, paragraph 134).

from a public policy perspective, but at the same time not in line with market conditions, because market economy operators would not normally be guided by such considerations. Accordingly, the MEO test should be applied leaving aside all social, regional policy and sectoral considerations which relate to a Member State's role as a public authority¹²⁶.

81. The assessment of whether a State intervention is in line with market conditions must be examined on an *ex-ante* basis, having regard to the information available at the time the intervention was decided upon¹²⁷. Any prudent market economy operator would normally carry out its own *ex-ante* assessment of the strategy and financial prospects of a project¹²⁸, for instance, by means of a business plan.
82. Therefore, if a Member State argues that an economic transaction is in line with the MEO test, where there is doubt, it must provide evidence showing that the decision to carry out the transaction was taken, at the time, on the basis of economic evaluations comparable to those which, in similar circumstances, a rational private operator (with characteristic similar to those of the public body concerned) would have had carried out to determine the transaction's profitability or economic advantages¹²⁹. For this purpose, evaluations made after the transaction was carried out, based on a retrospective finding that it was actually profitable or not, or on subsequent justifications of the course of action actually chosen, are not relevant¹³⁰.
83. The assessment of whether a transaction is in line with market conditions must be carried out taking into account the effects of the transaction on the undertaking concerned without considering whether the specific means used to carry out that transaction would be available to market operators. For instance, the applicability of the MEO test cannot be ruled out simply because the means employed by the State are fiscal¹³¹.
84. In certain cases, several consecutive measures of State intervention must, for the purposes of Article 107(1) TFEU, be regarded as a single intervention. That could be the case, in particular, where consecutive interventions are so closely linked to each other, especially having regard to their chronology, their purpose and the circumstances of the undertaking at the time of those interventions, that they are

¹²⁶ Case C-124/10 P *Commission v EDF* [2012] ECR I-0000, paragraphs 79 to 81; Case 234/84 *Belgium v Commission* [1986] ECR 2263, paragraph 14; Case 40/85 *Belgium v Commission* [1986] ECR 2321, paragraph 13; Joined Cases C-278/92 to C-280/92 *Spain v Commission* [1994] ECR I 4103, paragraph 22; and Case C-334/99 *Germany v Commission* [2003] ECR I-1139, paragraph 134; Joined Cases T-228/99 and T-233/99 *Westdeutsche Landesbank Girozentrale and Land Nordrhein-Westfalen v Commission* [2003] ECR II-435; T-20/03 *Kahla Thüringen Porzellan v Commission* [2008] ECR II-2305, Case T-98/00 *Linde v Commission* [2002] ECR II-3961.

¹²⁷ Case C-124/10 P *Commission v EDF* [2012] ECR I-0000, paragraphs 83-85 and 105, Case C-482/99 *France v Commission* [2002] ECR I-4397, paragraphs 71 and 72 and Case T-16/96 *Cityflyer Express v Commission* [1998] ECR II-757, paragraph 76.

¹²⁸ Case C-124/10 *Commission v EDF* [2012] ECR I-0000, paragraph 84, 85 and 105.

¹²⁹ The level of sophistication of such an *ex ante* assessment may vary depending on the complexity of the transaction concerned and the value of the assets, goods or services involved. Normally, such *ex ante* evaluations should be carried out with the support of experts with appropriate skills and experience. Such evaluations should always be based on objective criteria and should not be affected by policy considerations. Evaluations conducted by independent experts may provide an additional corroboration for the credibility of the assessment.

¹³⁰ Case C-124/10 P *Commission v EDF* [2012] ECR I-0000, paragraph 85.

¹³¹ Case C-124/10 P *Commission v EDF* [2012] ECR I-0000, paragraph 88.

inseparable from one another¹³². For instance, subsequent State interventions which take place in relation to the same undertaking in a relatively short period of time, are linked with each other, or were all planned or foreseeable at the time of the first intervention, should normally be assessed together. On the other hand, when the later intervention was a result of unforeseen events at the time of the earlier intervention¹³³ the two measures should normally be assessed separately.

85. In order to assess whether certain transactions are in line with market conditions all the relevant circumstances should be considered. For instance, there can be exceptional circumstances in which the purchase of goods or services by a public authority, even if carried out at market prices, may not be considered in line with market conditions¹³⁴.

4.2.3. Application of the MEO test

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

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

87. A transaction's compliance with market conditions can be empirically established through specific market data (i) when the transaction is carried out "*pari passu*" by public entities and private operators or (ii) when it concerns the sale and purchase of assets, goods and services (or other comparable transactions) carried out through an open, transparent non-discriminatory and unconditional tender procedure. In such cases, if the specific market data concerning the transaction show that it is not in line with market conditions, it would not normally be appropriate to use other assessment methodologies to reach a different conclusion¹³⁵.

(i) *Pari passu* transactions

¹³² Joined Cases C-399/10 P and C-401/10 P *Bouygues SA, Bouygues Télécom SA v Commission* [2013] ECR I-0000, paragraph 104; Joined Cases T-415/05, T-416/05 and T-423/05 *Greece and Others v Commission* [2010] ECR II-4749, paragraph 177 and Case T-11/95 *BP Chemicals v Commission* [1998] ECR II-3235, paragraphs 170 and 171.

¹³³ Commission Decision of 19 December 2012 in Case SA.35378 Financing of Berlin Brandenburg Airport, Germany OJ C 36, 8.2.2013, p. 10, recitals 14 to 33.

¹³⁴ In Case T-14/96 *BAI v Commission* [1999] ECR II-139, the General Court held that, in the light of specific circumstances of the case, it could be concluded that the purchase of travel vouchers by national authorities from P&O Ferries did not meet an actual need, thus the national authorities did not act in a manner similar to a private operator acting under normal market economy conditions. Accordingly, that purchase conferred an advantage on P&O Ferries which it would not have obtained under normal market conditions and all the sums paid in performance of the purchase agreement constituted State aid.

¹³⁵ See to that effect, Joined Cases T-268/08 and T-281/08 *Land Burgenland and Austria v Commission* (privatisation of Bank Burgenland) [2012] ECR II-0000, paragraph 72, where the General Court concluded that market prices established by valuation studies are not relevant if a proper tender has been carried out. In the latter case, the market price results from the offers actually and properly submitted in the tender procedure.

88. When a transaction is carried out under the same terms and conditions (and therefore with the same level of risk and rewards) by public bodies and private operators who are in a comparable situation (a '*pari passu*' transaction)¹³⁶, it can normally be inferred that such a transaction is in line with market conditions¹³⁷. On the contrary, if public bodies and private operators who are in a comparable situation take part in the same transaction at the same time but under different terms or conditions, this normally indicates that the intervention of the public body is not in line with market conditions¹³⁸.
89. In particular, to consider a transaction '*pari passu*', the following criteria should be assessed:
- (1) whether the intervention of the public bodies and private operators is decided and carried out at the same time (i.e. the interventions are “concomitant”) or whether there is a time lapse and a change of economic circumstances has taken place between those interventions,
 - (2) whether the terms and conditions of the transaction are the same for the public entities and all private operators involved, also taking into account the possibility of increasing or decreasing the level of risk over time,
 - (3) whether the intervention of the private operators has real economic significance and is not merely symbolic or marginal¹³⁹, and
 - (4) whether the starting position of the public entities and the private operators involved is comparable with regard to the transaction, taking into account, for instance, their previous exposure vis-à-vis the undertakings concerned (see section 4.2.3.3), the possible synergies which can be achieved¹⁴⁰, the extent to which the different investors bear similar transaction costs¹⁴¹, or any other circumstance specific to the

¹³⁶ The terms and conditions cannot be considered to be the same if public bodies and private operators intervene on the same terms but at different moments, following a change in the economic situation.

¹³⁷ See, in that regard, Case T-296/97 *Alitalia v Commission* [2000] ECR II-3871, paragraph 81.

¹³⁸ However, if the transactions are different and are not carried out at the same time, the mere fact that the terms and conditions are different does not provide any decisive indication (positive or negative) as to whether the transaction carried out by the public body is in line with market conditions.

¹³⁹ For instance, in the Citynet Amsterdam case, the Commission considered that two private operators taking up one-third of the total equity investments in a company (considering also the overall shareholding structure and that their shares are sufficient to form a blocking minority regarding any strategic decision of the company) could be considered economically significant (see Commission Decision 2008/729/EC of 11 December 2007 on State aid C53/2006 Citynet Amsterdam, the Netherlands. OJ L 247, 16.9.2008, p. 27 recitals 96-100). By contrast, in case N429/2010 Agricultural Bank of Greece (ATE), OJ C 317, 29.10.2011, p. 5, the private participation reached only 10% of the investment, as opposed to 90% by the State, so that the Commission concluded that '*pari passu*' conditions were not met, since the capital injected by the State was neither accompanied by a comparable participation of a private shareholder nor proportionate to the number of shares held by the State. See also Case T-296/97 *Alitalia v Commission* [2000] ECR II-3871, paragraph 81.

¹⁴⁰ They must also have the same industrial rationale, Commission Decision 2005/137/EC on State aid C25/2002 Participation financière de la Région wallonne dans l'entreprise CARSID - Acier *CECA*, OJ L 47, 18.2.2005, p. 28 recitals 67 to 70.

¹⁴¹ Transaction costs may relate to the costs that the respective investors incur for the purpose of screening and selecting the investment project, arranging the terms of the contract or monitoring the performance over the lifetime of the contract. For instance, where publicly owned banks consistently bear the costs

private or the public operator which could distort the comparison. Naturally, the decision taken by the private operator should not have been influenced by public authorities.

90. The '*pari passu*' condition may not be applicable where public involvement is a strict requirement for the participation of the private operators to participate in the transaction, since this might indicate that the public entity concerned is able to provide a unique contribution to the transaction which no market operator can replicate.
- (ii) The sale and purchase of assets, goods and services (or other comparable transactions) through open, transparent, non-discriminatory and unconditional tenders
91. If the sale and purchase of assets, goods and services (or other comparable transactions¹⁴²) are carried out following an open, transparent, sufficiently well-publicised, non-discriminatory and unconditional tender procedure, in compliance with the principles of the Public procurement Directives¹⁴³ (even in cases where those Public procurement Directives are not as such applicable), it can be presumed that those transactions are in line with market conditions.
92. A tender procedure complying with these principles must meet the following criteria:
93. A tender has to be open to allow all interested and qualified bidders to participate in the process. As regards the characteristics of the tender, an 'open procedure'¹⁴⁴ in line with the requirement of the public procurement rules is certainly acceptable, but a 'restricted procedure'¹⁴⁵ can also be considered sufficient to establish the market price, unless interested operators are prevented from tendering without valid reasons¹⁴⁶.
94. The procedure has to be transparent, in order to allow all interested tenderers to be equally and reasonably informed at each stage of the tender procedure. Accessibility of information, sufficient time for interested tenderers, and the clarity of the selection and award criteria are all crucial elements for a transparent selection procedure. A tender has to be sufficiently well-publicised, so that it can come to the notice of all potential buyers. The degree of publicity needed to ensure sufficient publication in a

of screening investment projects for loan financing, the mere fact that private investors co-invest at the same interest rate is not sufficient to exclude aid.

¹⁴² For instance, the lease of certain goods or the grant of concessions for the commercial exploitation of natural resources.

¹⁴³ Directive 2004/17/EC of the European Parliament and of the Council of 31 March 2004 coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors (OJ L 134, 30.4.2004, p. 1) and Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts (OJ L 134, 30.4.2004, p. 114).

¹⁴⁴ Article 1(11)(a) of Directive 2004/18/EC, Article 1(9)(a) of Directive 2004/17/EC.

¹⁴⁵ Article 1(11)(b) of Directive 2004/18/EC, Article 1(9)(b) of Directive 2004/17/EC

¹⁴⁶ On the other hand, a competitive dialogue or a negotiated procedure without prior publication confer a wide discretion upon the adjudicating authority and may restrict the participation of interested operators. Therefore, these procedures can only be deemed sufficient to establish market prices in exceptional cases. The negotiated procedure without publication of a contract notice cannot ensure that the procedure leads to the selection of the tenderer capable of providing those services at the market price. See paragraph 66 of the SGEI Communication, OJ C 8, 11.1.2012, p. 4.

given case depends on the characteristics of the assets, goods and services to be sold. Assets, goods and services which, in view of their high value or other features may attract investors operating on a Europe-wide or international scale, should be publicised in such a manner so as to attract potential buyers operating on a Europe-wide or international scale.

95. Equal and non-discriminatory treatment of all bidders, objective selection and award criteria specified in advance of the process are indispensable conditions for ensuring the resulting transaction is in line with market conditions. To guarantee equal treatment, the criteria for the award of the contract should enable tenders to be compared and assessed objectively.
96. A tender for the sale of assets, goods or services is unconditional when any potential buyer, irrespective of whether or not he runs certain businesses, is generally free to acquire the assets, goods and services to be sold and to use them for his own purposes. If there is a condition that the purchaser is to assume special obligations - other than those arising from general domestic law or decision of the planning authorities - for the benefit of the public authorities or in the general public interest, the tender cannot be considered unconditional.
97. When public bodies sell assets, goods and services, the only relevant criterion for selecting the buyer should be the highest price¹⁴⁷, also taking into account the requested contractual arrangements (e.g. the vendor's sales guarantee or other post sale commitments). Only credible¹⁴⁸ and binding offers should be considered¹⁴⁹.
98. When public bodies buy assets, goods and services, any specific conditions attached to the tender should be closely and objectively related to the subject matter of the contract and should allow for the most economically advantageous offer to match the value of the market¹⁵⁰.
99. To establish a market price, the tender must give rise to a sufficient level of competition to be qualified as a competitive tender process. In the case of procedures where it is apparent that only one operator is realistically able to submit a credible bid, the tender cannot be deemed competitive and thus cannot be considered to adequately establish the market price for the transaction.

¹⁴⁷ Joined Cases T-268/08 and T-281/08 *Land Burgenland and Austria v Commission* [2012], paragraph 87.

¹⁴⁸ An unsolicited bid can also be credible, depending on the circumstances of the case, and in particular if the bid is binding (see Case T-244/08 *Konsum Nord v Commission* [2011], paragraphs 73 to 75).

¹⁴⁹ For instance, mere announcements without binding requirements would not be considered in the tender procedure: see Joined Cases T-268/08 and T-281/08 *Land Burgenland and Austria v Commission* [2012], paragraph 87 and Case T-244/08 *Konsum Nord v Commission* [2011], paragraphs 67 and 75.

¹⁵⁰ The criteria should be defined in such a way so as to allow for an effective competition that leaves the successful bidder with a normal return, not more. In practice, this implies the use of tenders which put significant weight on the "price" component of the bid or which are otherwise likely to achieve a competitive outcome (e.g. certain reverse tenders with sufficiently clear-cut award criteria).

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

100. If it cannot be empirically established that a transaction is in line with market conditions through specific market data as indicated above, this can be assessed through (i) benchmarking or (ii) other assessment methods¹⁵¹.

(i) Benchmarking

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

102. To identify an appropriate benchmark, it is necessary to pay particular attention to the kind of operator concerned (e.g. a group holding, an operative company, a speculative fund, or a long-term investor seeking to secure profits in the longer run), the type of transaction at stake (e.g. equity participation or debt transaction) and the market(s) concerned (e.g. financial markets, fast-growing technology markets, utility or infrastructure markets). The timing of the transactions is also particularly relevant when significant economic developments have taken place. Where appropriate, the available market benchmarks may need to be adjusted according to the specific features of the State transaction (for instance, the situation of the beneficiary undertaking and of the relevant market)¹⁵². Benchmarking may not be an appropriate method to establish market prices if the available benchmarks have not been defined with regard to market considerations or the existing prices are significantly distorted by public interventions.

103. Benchmarking often does not establish one “precise” reference value, but rather it establishes a range of possible values by assessing a set of comparable transactions. Where the aim of the assessment is to consider whether or not the State intervention is in line with market conditions or not, it is normally appropriate to consider measures of central tendency such as the average or the median of the set of comparable transactions. In certain cases, where there is a considerable variation surrounding the measure of central tendency, it may be more appropriate to focus on the median than on the average.

(ii) Other assessment methods

104. If none of the above assessment criteria apply, the fact that a transaction is in line with market conditions can be established on the basis of a generally-accepted, standard assessment methodology¹⁵³. Such a methodology must be based on the available objective, verifiable and reliable data¹⁵⁴, which should be sufficiently detailed and should reflect the economic situation at the time at which the transaction was decided, taking into account the level of risk and future expectations¹⁵⁵.

¹⁵¹ When the market price is set through 'pari passu' or tender transactions, these results cannot be disputed by other assessment methodologies – such as by independent studies (see Joined Cases T-268/08 and T-281/08 *Land Burgenland and Austria v Commission* [2012], paragraph 72.

¹⁵² See Joined Cases T-228/99 and T-233/99 *Westdeutsche Landesbank Girozentrale and Land Nordrhein-Westfalen v Commission* [2003] ECR II-435, paragraph 251.

¹⁵³ See Case T-366/00 *Scott v Commission* [2007] ECR II-797, paragraph 134.

¹⁵⁴ See Case T-274/01 *Valmont Nederland BV v Commission* [2004] ECR II-3145, paragraph 71.

¹⁵⁵ See Case T-366/00 *Scott v Commission* [2007] ECR II-797, paragraph 158.

Depending on the value of the transaction, the robustness of the evaluation should normally be corroborated by performing a sensitivity analysis, assessing different business scenarios, preparing contingency plans and comparing the results with alternative evaluation methodologies. A new (ex-ante) valuation may need to be carried out if the transaction is delayed and it is necessary to take into account recent changes in market conditions.

105. As an example, a widely accepted standard methodology to determine the (annual) return on investments is to calculate the internal rate of return (IRR)¹⁵⁶. One can also evaluate the investment decision in terms of the Net Present Value (NPV)¹⁵⁷, which produces results equivalent to the IRR in most cases¹⁵⁸. To assess whether the investment is carried out on market terms, the return on the investment must be compared to the normal expected market return. A normal expected return (or cost of capital of the investment) can be defined as the average expected return that the market requires from the investment on the basis of generally accepted criteria, notably, the risk of the investment, taking into account the financial position of the company and the specific features of the sector, the region or the country. If this normal return cannot be reasonably expected, then the investment would most likely not be pursued on market terms. In general, the riskier the project, the higher the rate of return that fund providers will demand, i.e. the higher the cost of capital.
106. Choosing an adequate assessment methodology could depend on the market situation¹⁵⁹, data availability or the type of transaction¹⁶⁰. For instance, whereas an

¹⁵⁶ The IRR is not based on accounting earnings in a given year, but takes into account the stream of future cash flows that the investor expects to receive over the entire lifetime of the investment. It is defined as the discount rate for which the NPV of a stream of cash flows equals zero.

¹⁵⁷ The NPV is the difference between the positive and negative cash flows over the lifetime of the investment, discounted at the appropriate return (the cost of capital).

¹⁵⁸ There is a perfect correlation between NPV and IRR in cases where the IRR is equal to the opportunity cost of the investor. Where the NPV of an investment is positive, this implies that the project has an IRR that exceeds the required rate of return (opportunity cost of the investor). In that case, the investment is worth carrying out. If the project has an NPV that is equal to zero, the IRR of the project equals the required rate of return. In that case, the investor is indifferent between carrying out the investment and investing elsewhere. Where the NPV is negative, the IRR is below the cost of capital and the investment is not profitable enough as there are better opportunities elsewhere. Where the IRR and the NPV lead to different investment decisions (such a difference in result could arise, in particular, in mutually exclusive projects), the NPV method should in principle be preferred in line with market practice.

¹⁵⁹ For instance, in the case of a liquidation of a company, a valuation based on liquidation value or based on asset value could be the most adequate assessment methods.

¹⁶⁰ For instance, in the case of land sales, when the comparative method (benchmarking) may not be appropriate and other generally accepted methods appear to fail to accurately establish the land value, an alternative method could be employed, such as the Vergleichspreissystem valuation method proposed by Germany (endorsed for agricultural and forestry land in Commission Decision on State aid SA.33167 Proposed alternative method to evaluate agriculture and forestry land in Germany when sold by public authorities, OJ C 43, 15.2.2013, p. 7). However, "[...] it cannot be ruled out that, in certain instances, the method laid down in that provision of national law may lead to a result far removed from market value. In such circumstances, pursuant to the obligation on all the organs of the State, including the national courts and administrative authorities, to set aside a rule of national law which is contrary to EU law, those courts or administrative authorities which are responsible for the application of that rule are required to disapply the provision of national law in question". Case C-239/09 Seydaland Vereinigte Agrarbetriebe GmbH & Co. KG v. BVVG Bodenverwertungs- und -verwaltungs GmbH [2010] ECR I-13083, paragraph 52.

investor seeks to generate a profit by investing in undertakings (in which case IRR or NPV are likely to be the most adequate method), a creditor seeks to obtain payment of sums owed to it (the principal sum and any interest) by a debtor within the contractually and legally determined period¹⁶¹ (in which case the evaluation of collateral, e.g. the asset value, could be more relevant).

107. Methods to establish the IRR or NPV of an investment do not typically result in one precise value that could be accepted as the only possible market price, but rather in a range of possible market prices (depending on the economic, legal and other specific circumstances of the transaction inherent in to the assessment method). Where the aim of the assessment is to consider whether the State intervention is in line with market conditions, it is normally appropriate to consider measures of central tendency, such as the average or the median of the set of comparable transactions.
108. Prudent MEOs typically assess their interventions by using several different methodologies (for instance, NPV calculations are validated by benchmarking methods) to corroborate the estimates. The different methodologies converging at the same value will provide a further indication for establishing a genuine market price. Thus, the presence of complementary valuation methodologies corroborating each other's findings will be considered a positive indication when assessing whether a transaction is in line with market conditions.

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

109. The fact that the public entity concerned has prior economic exposure to an undertaking (for instance, if it is an equity holder or if it has provided loans or guarantees) should be taken into consideration when examining whether a transaction is in line with market conditions. However, such prior exposure should not in itself be the result of previous State aid¹⁶² or of an intervention that was not carried out on market terms¹⁶³.
110. Prior exposure due to interventions carried out on market terms must be considered in the framework of counterfactual scenarios for the purpose of the MEO test. For instance, in the case of an equity or debt intervention in a public company in difficulty, the expected return on such an investment should be compared with the expected return in the counterfactual scenario of the liquidation of the company. In the event that liquidation provides higher gains or lower losses, a prudent market operator would choose that option¹⁶⁴. For this purpose, the liquidation costs to be considered should not include costs linked to the responsibilities of the public authorities, but only costs that a rational market economy operator would incur¹⁶⁵,

¹⁶¹ See, for instance, Case C-342/96 *Spain v Commission* [1999] ECR I-2459, paragraph 46, and Case C-256/97 *DMTransport* [1999] ECR I-3913, paragraph 24.

¹⁶² See Case C-334/99 *Germany v Commission* [2003] ECR I-1139, paragraphs 133 to 141; Joined Cases T-268/08 and T-281/08 [2012] *Land Burgenland and Austria v Commission* ECR II-0000, paragraphs 155 to 159, and Joined Cases T-228/99 and T-233/99 *Westdeutsche Landesbank Girozentrale and Land Nordrhein-Westfalen v Commission* [2003] ECR II-435, paragraphs 313 to 315.

¹⁶³ Case C-334/99 *Germany v Commission* [2003] ECR I-1139, paragraphs 137 to 142.

¹⁶⁴ See, to that effect, Case T-296/97 *Alitalia v Commission* [2000] ECR II-3871 or Case C-73/11 P *Frucona v Commission* [2013] ECR I-0000, paragraphs 79 and 80.

¹⁶⁵ Case C-334/99 *Germany v Commission* [2003] ECR I-1139, paragraphs 140.

also taking into account the evolution of the social, economic and environmental context in which it operates¹⁶⁶.

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

111. As for any other transaction, loans and guarantees granted by public entities (including public undertakings) may entail State aid if they are not in line with market terms.

112. As for guarantees, a triangular situation involving a public entity as a guarantor, the borrower and the lender normally has to be analysed¹⁶⁷. In most cases, aid could only be present at the level of the borrower, as the public guarantee may grant him an advantage, by enabling him to borrow at a rate that he would not have been able to obtain on the market without the guarantee¹⁶⁸ (or to borrow in a situation where, exceptionally, no loan could have been obtained on the market at whichever rate). However, under certain specific circumstances, the grant of a public guarantee might also entail aid to the lender, in particular where the guarantee is given ex post on an existing obligation between lender and borrower, or where a guaranteed loan is used to pay back a non-guaranteed one¹⁶⁹.

113. Any guarantee granted on more favourable terms than market conditions, taking into account the economic situation of the borrower, confers an advantage on the latter (who pays a fee that does not appropriately reflect the risk that the guarantor assumes)¹⁷⁰. In general, unlimited guarantees are not in line with normal market conditions. This also applies to implicit guarantees stemming from the State liability for debts of insolvent public undertakings sheltered from ordinary bankruptcy rules¹⁷¹.

114. In the absence of empirical market information on a specific debt transaction, the debt instrument's compliance with market conditions may be established on the basis of a comparison with comparable market transactions (i.e. through benchmarking). In the case of loans and guarantees, information on the financing costs of the company may, for example, be obtained from other (recent) loans taken by the company in question, from yields on bonds issued by the company or from credit default swap (CDS) spreads on that company. Comparable market transactions may be also similar loan/guarantee transactions undertaken by a sample of comparator companies, bonds issued by a sample of comparator companies or CDS spreads on a

¹⁶⁶ Case T-565/08 *Corsica Ferries France v Commission* [2012] ECR II-0000, paragraphs 79 to 84. The General Court confirmed in this case that, in principle, it might be economically rational in the long term for private investors, in particular larger groups of companies, to pay complementary indemnities (for instance, to protect the brand image of a group). However, the necessity of paying such complementary indemnities should be demonstrated thoroughly in the concrete case for which activities the protection of the image is needed and that such payments are an established practice amongst private companies in similar circumstances (mere examples are not sufficient).

¹⁶⁷ On the assessment to be carried out concerning the possible grant of State aid in the form of a guarantee, see also the Commission Notice on the application of Articles 87 and 88 of the EC Treaty to State aid in the form of guarantees (2008/C 155/02), which is integrated but not replaced by the present notice.

¹⁶⁸ See Case C-275/10, *Residex Capital v Gemeente Rotterdam*, not yet published, paragraph 39.

¹⁶⁹ See Case C-275/10, *Residex Capital v Gemeente Rotterdam*, not yet published, paragraph 42.

¹⁷⁰ See Case T-154/10, *France v European Commission*, not yet published, paragraph 106.

¹⁷¹ See Case T-154/10, *France v European Commission*, not yet published, paragraphs 82-88 and 91-94.

sample of comparator companies. In the case of guarantees, if no corresponding price benchmark can be found on the financial markets, the total financing cost of the guaranteed loan, including the interest rate of the loan and the guarantee premium, should be compared to the market price of a similar non-guaranteed loan. Benchmarking methods may be complemented with assessment methods based on the return on capital¹⁷².

115. To further facilitate the assessment whether a measure complies with the MEO test for public authorities, the Commission has developed proxies to determine the aid character of loans and guarantees.
116. For loans, the methodology to calculate a reference rate, which should act as a proxy for the market price in situations where comparable market transactions are not straightforward to identify (which is more likely to apply to transactions involving limited amounts and/or transactions involving SMEs) is entailed in the Reference Rate Communication¹⁷³. It should be recalled that this reference rate is only a proxy¹⁷⁴. If comparable transactions have typically taken place at a lower price than that indicated as a proxy by the reference rate, the Member State can consider that this lower price is the market price. If, on the other hand, the same company has carried out recent similar transactions at a higher price than the reference rate and its financial situation and the market environment have remained substantially unchanged, the reference rate may not constitute a valid proxy of market rates for that specific case.
117. For guarantees the Commission has developed detailed guidance on proxies (and safe harbours for SMEs) in the Notice on Guarantees¹⁷⁵. According to this Notice, to rule out the presence of aid it is normally sufficient that the borrower is not in financial difficulty, that the guarantee is linked to a specific transaction, that the lender bears part of the risk and that the borrower pays a market oriented price for the guarantee.

5. SELECTIVITY

5.1. General principles

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

¹⁷² For instance, through RAROC (Risk Adjusted Return on Capital), which is what lenders and investors require for providing finance of similar benchmark risk and maturity to an undertaking active in the same sector.

¹⁷³ See the Communication from the Commission on the revision of the method for setting the reference and discount rates, OJ C 14, 19.1.2008, p. 6. For subordinated loans, which are not covered in the Reference Rate Communication, the methodology set out in Commission Decision of 11 December 2008 on State aid N55/2008, GA/EFRE Nachrangdarlehen, OJ C 9/2009, 14.1.2009, can be used.

¹⁷⁴ However, where Commission regulations or Commission decisions on aid schemes refer to the reference rate for the identification of the aid amount, the Commission will consider it as a fixed no-aid benchmark (safe-harbour).

¹⁷⁵ Commission Notice on the application of Articles 87 and 88 of the EC Treaty to State aid in the form of guarantees, OJ C 155, 20.6.2008, p.10.

119. General measures, which are effectively open to all undertakings operating within a Member State on an equal basis are not selective. However, for the measures to be genuinely general in character, they shall not be de facto reduced in scope by factors that restrict their practical effect. Neither a large number of eligible undertakings (which can even include all undertakings of a certain sector), nor the diversity and size of the sectors to which they belong, provide grounds for concluding that a State initiative constitutes a general measure of economic policy, if not all economic sectors can benefit from it¹⁷⁶. The fact that the scope of application of a measure is determined in an objective manner is not in itself sufficient to establish the general character of the measure and does not exclude selectivity¹⁷⁷.
120. To clarify the notion of selectivity under State aid law, it is useful to distinguish between material and geographical selectivity. Moreover, it is useful to provide further guidance on certain issues specific to tax (or similar) measures.

5.2. Material selectivity

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

5.2.1. De jure and de facto selectivity

122. De jure selectivity results directly from the legal criteria for granting a measure that is formally reserved for certain undertakings only (for instance, those having a certain size, located in a certain area, active in certain sectors, having a certain legal form, companies incorporated during a particular period, or companies belonging to a group having certain characteristics or companies entrusted with certain functions within a group). De facto selectivity can be established in cases where, although the formal criteria for the application of the measure are formulated in general and objective terms, the structure of the measure is such that its effects significantly favour a particular group of undertakings (as in the examples indicated above).¹⁷⁸
123. De facto selectivity may be the result of conditions or barriers imposed by Member States preventing certain undertakings from benefiting from the measure. For example, applying a tax measure (e.g. a tax credit) only to investments exceeding a certain threshold may mean that the measure is de facto reserved for undertakings with significant financial resources¹⁷⁹.

¹⁷⁶ See, for instance, Case C-143/99 *Adria-Wien Pipeline* [2001] ECR I-8365, paragraph 48.

¹⁷⁷ See, for instance, Case T-379/09 *Italy v Commission* [2012] ECR I-0000, paragraph 47. The measure in question in this case was a partial exemption from excise duty on the diesel used for the heating of greenhouses. The General Court indicated that the fact that the exemption could benefit all undertakings choosing greenhouse production was not sufficient to establish a general character of the measure.

¹⁷⁸ Such was the case in Joined Cases C-106/09 P and C-107/09 P *Commission and Spain v Government of Gibraltar and United Kingdom* [2011], concerning the Gibraltar tax reform, which de facto favoured offshore companies. See paragraphs 101 et seq. of that judgment. The reform introduced a system consisting of three taxes applicable to all Gibraltar companies, namely a payroll tax, a business property occupation tax (BPOT) and a registration fee. Liability for payroll tax and BPOT would have been capped at 15% of profits. The Court found that such a combination of taxes excluded from the outset any taxation of offshore companies as they had no taxable basis due to the lack of employees and lack of business property in Gibraltar.

¹⁷⁹ See, for instance, Joined Cases T-92/00 and T-103/00 *Ramondín SA and Ramondín Cápsulas SA v Commission* [2002] ECR II-1385, paragraph 39.

5.2.2. *Selectivity stemming from discretionary administrative practices*

124. Measures which *prima facie* apply to all undertakings, but are (or may be) limited by the discretionary power of administration, are selective¹⁸⁰. This is the case where meeting the given criteria does not automatically result in an entitlement to the measure.
125. Authorities have discretionary power in applying a measure, in particular, where the criteria for granting the aid are formulated in a very general or vague manner that necessarily involves a margin of discretion in the assessment. For example, the tax administration can vary the conditions for granting a tax concession according to the characteristics of the investment project submitted to it for assessment. Similarly, if the competent authorities have a broad discretion to determine the beneficiaries or the conditions under which the tax advantage is granted on the basis of criteria unrelated to the tax system, such as maintaining employment, the exercise of that discretion must then be regarded as favouring ‘certain undertakings or the production of certain goods’¹⁸¹.

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

126. When Member States adopt ad hoc positive measures benefitting one or more well identified undertaking (for instance, granting money or assets to certain undertakings), it is normally easy to conclude that such measures have a selective character, as they reserve favourable treatment for one or a few undertakings¹⁸².
127. The situation is usually less clear when Member States adopt broader measures, applicable to all undertakings fulfilling certain criteria, which mitigate the charges that those undertakings would normally have to bear (for instance, tax or social security exemptions for undertakings fulfilling certain criteria).
128. In such cases, the selectivity of the measures should normally be assessed by means of a three-step analysis. First, the system of reference must be identified. Second, it should be determined whether a given measure constitutes a derogation from that system insofar as it differentiates between economic operators who, in light of the objectives intrinsic to the system, are in a comparable factual and legal situation. Assessing whether a derogation exists is the key element of this part of the test and allows a conclusion to be drawn as to whether the measure is *prima facie* selective. If the measure in question does not constitute a derogation from the reference system, it is not selective. However, if it does (and therefore is *prima facie* selective), it needs to be established, in the third step of the test, whether the derogatory measure is justified by the nature or the general scheme of the (reference) system¹⁸³. If a *prima facie* selective measure is justified by the nature or the general scheme of the system,

¹⁸⁰ See Case C-256/97 *Déménagements-Manutention Transport SA (DMT)* [1999] ECR I-3913, paragraph 27.

¹⁸¹ See Case C-6/12 *P Oy* [2013] ECR I-0000, paragraph 27.

¹⁸² See Opinion of Advocate General Mengozzi of 27 June 2013 in case C-284/12 *Deutsche Lufthansa*, paragraph 52.

¹⁸³ See, for instance, Case C-279/08 *P Commission v Netherlands (NOx)* [2011] ECR I-7671, paragraph 62, Case C-143/99 *Adria-Wien Pipeline* [2001] ECR I-8365.

it will not be considered selective and will thus fall outside the scope of Article 107(1) TFEU¹⁸⁴.

129. However, the three-step analysis cannot be applied in certain particular cases, taking into account the practical effects of the measures concerned. In fact, it must be emphasised that Article 107(1) TFEU does not distinguish between measures of State intervention in terms of their causes or aims, but defines them in relation to their effects, independently of the techniques used¹⁸⁵. This means that in certain exceptional cases it is not sufficient to examine whether a given measure derogates from the rules of the reference system as defined by the Member State concerned, but it is also necessary to evaluate whether the boundaries of the system of reference have been designed in a consistent manner or, on the contrary, in a clearly arbitrary or biased way, so as to favour certain undertakings which are in a comparable situation with regard to the underlying logic of the system in question.
130. Thus, in joined cases C-106/09 P and C-107/09 P¹⁸⁶ concerning the Gibraltar tax reform, the Court of Justice found that the reference system as defined by the Member State concerned, although founded on criteria that were of a general nature, discriminated in practice between companies which were in a comparable situation with regard to the objective of the tax reform, resulting in a selective advantage being conferred on offshore companies¹⁸⁷. In this respect, the Court found that the fact that offshore companies were not taxed was not a random consequence of the regime, but the inevitable consequence of the fact that the bases of assessment were specifically designed so that offshore companies had no tax base¹⁸⁸.
131. Similar verification may also be necessary in certain cases concerning special-purpose levies, where there are elements indicating that the boundaries of the levy have been designed in a clearly arbitrary or biased way, so as to favour certain products or certain activities which are in a comparable situation with regard to the underlying logic of the levies in question. For instance, in *Ferring*¹⁸⁹, the Court of Justice considered a levy imposed on the direct sale of medicinal products by pharmaceutical laboratories but not on the sale by wholesalers to be selective. In light of the particular factual circumstances brought to the attention of the Court – such as the clear objective of the measure and its effects – it did not simply examine whether the measure in question would lead to a derogation from the reference system constituted by the levy. It also compared the situations of the pharmaceutical laboratories (subject to the levy) and of the wholesalers (excluded), concluding that

¹⁸⁴ See, for instance, Joined Cases C-78/08 to C-80/08, *Paint Graphos and others* [2011] ECR I-7611, paragraph 49 et seq.; Case C-308/01 *GIL Insurance* [2004] ECR I-4777.

¹⁸⁵ See Case C-487/06 P *British Aggregates v Commission* [2008] ECR I-10515, paragraphs 85 and 89 and the case-law cited; Case C-279/08 P *Commission v Netherlands* [2011] ECR I-7671, paragraphs 51; Joined Cases C-106/09 P and C-107/09 P *Commission and Spain v Government of Gibraltar and United Kingdom* [2011] ECR I-0000, paragraph 87.

¹⁸⁶ Joined Cases C-106/09 P and C-107/09 P *Commission and Spain v Government of Gibraltar and United Kingdom* [2011] ECR I-0000.

¹⁸⁷ Joined Cases C-106/09 P and C-107/09 P *Commission and Spain v Government of Gibraltar and United Kingdom* [2011] ECR I-0000, paragraphs 101 et seq.

¹⁸⁸ I Joined Cases C-106/09 P and C-107/09 P *Commission and Spain v Government of Gibraltar and United Kingdom* [2011] ECR I-0000, paragraph 106.

¹⁸⁹ Case C-53/00 *Ferring*, [2001] ECR I-9067, paragraph 20.

the non-imposition of the tax on the direct sales by the wholesalers equated to granting them a *prima facie* selective tax exemption¹⁹⁰.

5.2.3.1. Identification of the reference system

132. The reference system constitutes the framework against which the selectivity of a measure is assessed. It defines the boundaries for examining whether certain undertakings benefit from a derogation from the normal rules which together form that reference system and are therefore treated in an advantageous way compared to other undertakings subject to the general rules of the system.
133. The reference system is composed of a consistent set of rules that generally apply – on the basis of objective criteria – to all undertakings falling within its scope as defined by its objective. Typically, these rules define not only the scope of that system, but also the conditions under which the system applies, the rights and obligations of undertakings subject to it and the technicalities of the functioning of the system.
134. In the case of taxes, the construction of the reference system is based on such elements as the tax base, the taxable persons, the taxable event and the tax rates. For example, a reference system could be identified with regard to the corporate income tax system¹⁹¹, the VAT system¹⁹², or the general system of taxation of insurance¹⁹³. The same applies to special-purpose (stand-alone) levies, such as levies on certain products or activities with a negative impact on the environment or health, which do not really form part of a wider taxation system. As a result, and subject to special cases illustrated in paragraphs 124 to 126 above, the reference system is, in principle, the levy itself¹⁹⁴.

5.2.3.2. Derogation from the system of reference

135. Once the reference system has been established, the next step of the analysis consists of examining whether a given measure differentiates between undertakings in derogation from that system. To do this, it is necessary to determine whether the measure is liable to favour certain undertakings or the production of certain goods as compared with other undertakings which are in a similar factual and legal situation, in light of the intrinsic objective of the system of reference¹⁹⁵. However, for this

¹⁹⁰ Case C-53/00 *Ferring*, [2001] ECR I-9067, paragraphs 19 and 20.

¹⁹¹ See Joined Cases C-78/08 to C-80/08, *Paint Graphos and others* [2011],] ECR I-7611, paragraph 50. The Court sometimes applies in this context the term of "the ordinary tax system" (see Joined Cases C-182/03 and C-217/03, *Belgium and Forum 187 v Commission*, [2006] ECR I-5479, paragraph 95) or "the general tax scheme" (see Case C-66/02, *Italy v Commission*, [2005] ECR I-10901, paragraph 100).

¹⁹² See the Court's reasoning concerning selectivity in Case C-172/03, *Heiser*, [2005] ECR I-1627, paragraphs 40 et seq.

¹⁹³ See Case C-308/01 *GIL Insurance* [2004] ECR I-4777, paragraphs 75 and 78.

¹⁹⁴ See Case T-210/02 *RENV British Aggregates Association v Commission* [2012] ECR II-0000, paragraphs 49 and 50. Even if a levy is introduced in the national legal system to transpose an EU directive, that levy remains the system of reference.

¹⁹⁵ In general, all undertakings having an income are considered to be in a similar legal and factual situation from the perspective of direct company taxation. In its *Paint Graphos* judgment the Court has, however, indicated that, in light of the peculiarities of cooperative societies which have to conform to particular operating principles, those undertakings cannot be regarded as being in a comparable factual and legal situation to that of commercial companies, provided that they act in the economic interest of their members and their relations with their members are not purely commercial but personal and

purpose, external policy objectives – such as regional, environmental or industrial policy objectives – cannot be relied upon by the Member States to justify the differentiated treatment of undertakings under a certain regime.

136. In this regard, the structure of certain special-purpose levies (and in particular their tax basis), such as environmental and health taxes imposed to discourage certain activities or products that have an adverse effect on the environment or human health, will normally integrate the policy objectives pursued. In such cases, a differentiated treatment for activities/products whose situation is different from the intrinsic objective pursued, as reflected in the structure of the tax, does not give rise to a derogatory treatment.¹⁹⁶
137. If a measure favours certain undertakings or the production of certain goods which are in a comparable legal and factual situation, the measure will be considered to be *prima facie* selective.

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

138. A measure which derogates from the reference system (*prima facie* selectivity) may still be found to be non-selective if it is justified by the nature or general scheme of that system. This is the case where a measure derives directly from the intrinsic basic or guiding principles of the reference system or where it is the result of inherent mechanisms necessary for the functioning and effectiveness of the system¹⁹⁷. On the contrary, external policy objectives which are not inherent to the system cannot be relied upon for that purpose¹⁹⁸.
139. The basis for a possible justification could, for instance, be the need to fight fraud or tax evasion, the need to take into account specific accounting requirements, administrative manageability, the principle of tax neutrality, the progressive nature of income tax and its redistributive purpose, the need to avoid double taxation¹⁹⁹, and the objective of optimising the recovery of fiscal debts.
140. Member States should, however, introduce and apply appropriate control and monitoring procedures to ensure that derogatory measures are consistent with the logic and general scheme of the tax system²⁰⁰. For derogatory measures to be justified by the nature or general scheme of the system, it is also necessary to ensure

individual, the members being actively involved in the running of the business and entitled to equitable distribution of the results of economic performance (See Joined Cases C-78/08 to C-80/08, *Paint Graphos and others* [2011] ECR I-7611, paragraph 61).

¹⁹⁶ In this respect, a levy introduced in the national legal system transposing an EU directive which provides within its scope for differentiated treatment for certain activities/products, can indicate that such activities/products are in a different situation to the intrinsic objective pursued.

¹⁹⁷ See for example Joined Cases C-78/08 to C-80/08 *Paint Graphos and others* [2011] ECR I-7611, paragraph 69.

¹⁹⁸ See Joined Cases C-78/08 to C-80/08 *Paint Graphos and others* [2011] ECR I-7611, paragraphs 69 and 70; Case C-88/03 *Portugal v Commission* [2006] ECR I-7115, paragraph 81; Case C-279/08 P *Commission v Netherlands (NOx)* [2011] ECR I-7671; Case C-487/06 P *British Aggregates v Commission* [2008] ECR I-10515.

¹⁹⁹ In Joined Cases C-78/08 to C-80/08, *Paint Graphos and others* [2011], the Court referred to the possibility of relying on the nature or general scheme of the national tax system as a justification for the fact that cooperative societies which distribute all their profits to their members are not taxed themselves as cooperatives, provided that tax is levied on the individual members (paragraph 71).

²⁰⁰ Joined Cases C-78/08 to C-80/08 *Paint Graphos and others* [2011] ECR I-7611, paragraph 74.

that those measures are consistent with the principle of proportionality and do not go beyond what is necessary to achieve the legitimate objective being pursued, in that the objective could not be attained by less far-reaching measures²⁰¹.

141. The Member State which introduced a differentiation between undertakings needs to be able to show that this differentiation is actually justified by the nature and general scheme of the system in question²⁰².

5.3. Regional selectivity

142. In principle, only those measures whose scope encompasses the entire territory of the State escape the selectivity criterion laid down in Article 107(1) TFUE. However, as outlined below, the reference system need not necessarily be defined within the limits of the Member State concerned²⁰³. A measure favouring undertakings active in a part of the national territory should therefore not automatically be considered selective.

143. As established by the case-law²⁰⁴, measures with a regional or local scope of application may not be selective if certain requirements are fulfilled.

144. In this regard, three scenarios concerning tax measures must be distinguished²⁰⁵:

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

- (2) The second scenario corresponds to symmetrical devolution of tax powers²⁰⁶ - a model of distribution of tax competences in which all infra-State authorities at a particular level (regions, districts or others) of a Member State have the same autonomous power in law or in fact to decide the applicable tax rate within their territory of competence, independently of the central government. In this case, the measures decided by the infra-State authorities are not selective as it is impossible to determine a normal tax rate capable of constituting the reference framework.

- (3) In the third scenario – the one of asymmetrical devolution of tax powers²⁰⁷ - only certain regional or local authorities can adopt tax measures applicable within their territory. In this case, the assessment of the selective nature of the measure at stake depends on whether the authority concerned is sufficiently autonomous from the central government of the Member State²⁰⁸. The regional or local authority shall be

²⁰¹ Joined Cases C-78/08 to C-80/08 *Paint Graphos and others* [2011] ECR I-7611, paragraph 75.

²⁰² See Joined Cases C-106/09 P and C-107/09 P *Commission and Spain v Government of Gibraltar and United Kingdom* [2011] ECR I-0000, paragraph 146; Case C-159/01 *Netherlands v Commission* [2004] ECR I-4461, paragraph 43; Case C-88/03 *Portugal v Commission* [2006] ECR I-7115.

²⁰³ Case C-88/03 *Portugal v Commission* [2006] ECR I-7115, paragraph 57, Joined Cases C-428/06 to C-434/06 *Unión General de Trabajadores de La Rioja*, [2008] ECR I-6747, paragraph 47.

²⁰⁴ Case C-88/03 *Portugal v Commission* [2006] ECR I-7115 [2006] ECR I-7115, paragraphs 57 et seq.; Joined Cases C-428/06 to C-434/06 *UGT-Rioja and Others* [2008] ECR I-6747, paragraphs 47 et seq.

²⁰⁵ Case C-88/03 *Portugal v Commission* [2006] ECR I-7115, paragraphs 63 to 66.

²⁰⁶ See Opinion of Advocate General Geelhoed of 20 October 2005 in Case C-88/03 *Portuguese republic v Commission*, paragraph 60.

²⁰⁷ *Idem*.

²⁰⁸ Case C-88/03 *Portugal v Commission* [2006] ECR I-7115, paragraph 58: “it is possible that an infra-state enjoys legal and factual status which makes it sufficiently autonomous in relation to the central government of a Member State, with the result that, by the measures it adopts, it is that body and not the

considered sufficiently autonomous from the central government of the Member State if it plays a fundamental role in the definition of the political and economic environment in which the undertakings operate²⁰⁹. This is the case when three cumulative criteria of autonomy are fulfilled: institutional, procedural and economic autonomy²¹⁰. If all of these criteria of autonomy are present when a regional or local authority decides to adopt a tax measure applicable only within its territory, then the region in question, not the Member State, constitutes the geographical reference framework.

5.3.1. *Institutional autonomy*

145. The existence of institutional autonomy can be established where the tax measure decision has been taken by a regional or local authority within its own constitutional, political and administrative status that is separate from that of the central government. In the *Azores* case, the Court observed that the Portuguese Constitution recognised the Azores as an autonomous region with its own political and administrative status and self-governing institutions, which also have their own fiscal competence, and the power to adapt national fiscal provisions to regional particularities²¹¹.
146. The assessment of whether this criterion has been fulfilled in each individual case should include, in particular, examination of the constitution and other relevant laws of a given Member State so as to verify whether a given region indeed has its own separate political and administrative status and whether it has its own self-governing institutions which have the power to exercise their own fiscal competence.

5.3.2. *Procedural autonomy*

147. The existence of procedural autonomy can be established where a tax measure decision has been adopted without the central government being able to directly intervene in determining its content.
148. The essential criterion for determining whether procedural autonomy exists is not the extent of the competence that the infra-State body is recognised as having, but the capability of that body, in view of its competence, to adopt a decision on a tax measure independently, i.e. without the central government being able to intervene directly as regards its content.
149. The fact that a consultation or conciliation procedure exists between the central and regional authorities to avoid conflicts does not preclude establishing the procedural autonomy of an infra-State body, provided that this body, and not the central government, has the final word on the adoption of the measure at stake²¹².

central government which plays a fundamental role in the definition of the political and economic environment in which undertakings operate.”

²⁰⁹ Joined Cases C-428/06 to C-434/06 *UGT-Rioja and Others* [2008] ECR I-6747, paragraph 55.

²¹⁰ Case C-88/03 *Portugal v Commission* [2006] ECR I-7115, paragraph 67.

²¹¹ See Case C-88/03 *Portugal v Commission* [2006] ECR I-7115, paragraph 70.

²¹² Joined Cases C-428/06 to C-434/06 *UGT-Rioja and Others* [2008] ECR I-6747, paragraphs 96 to 100.

150. The mere fact that the acts which the infra-State body adopts are subject to judicial review does not in itself mean that this body lacks procedural autonomy, since the existence of the latter is an inherent feature of the rule of law²¹³.

5.3.3. *Economic and financial autonomy*

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

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

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

154. If the three autonomy criteria above are met, the geographical reference framework in determining the selectivity of a measure is the territory for which the regional or local authority has competence.

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

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

5.4. **Specific fiscal aid issues**

157. Member States are free to decide on the economic policy which they consider most appropriate and, in particular, to spread the tax burden as they see fit across the

²¹³ Joined Cases C-428/06 to C-434/06 *UGT-Rioja and Others* [2008] ECR I-6747, paragraphs 80 to 83.

various factors of production. Nonetheless, Member States must exercise this competence consistently with Union law²¹⁴.

5.4.1. *Cooperative societies*

158. In principle, cooperative societies conform to operating principles which distinguish them from other economic operators²¹⁵. In particular, they are subject to specific membership requirements and their activities are conducted for the mutual benefit of their members²¹⁶, not in the interest of outside investors. In addition, reserves and assets are non-distributable and must be dedicated to the common interest of the members. Finally, cooperatives generally have limited access to equity markets and generate low profit margins.
159. In light of these peculiarities, cooperatives can be regarded as not being in a comparable factual and legal situation to that of commercial companies, so that preferential tax treatment for cooperatives may fall outside the scope of the State aid rules provided that²¹⁷:
- they act in the economic interest of their members;
 - their relations with members are not purely commercial, but personal and individual;
 - the members are actively involved in the running of the business; and
 - they are entitled to equitable distribution of the results of economic performance.
160. If, however, the cooperative society under examination is found to be comparable to commercial companies, a second stage is needed to establish whether the tax regime in question is justified by the logic of the tax system²¹⁸.
161. For this purpose, it should be noted that the measure needs to be in line with the basic or guiding principles of the Member State's tax system (by reference to the mechanisms inherent to this system). The logic of the tax system may be relied upon if it can be established that cooperative societies which distribute all their profits to their members are not taxed themselves as cooperatives, provided that tax is levied on the individual members. However, no valid justification can be found for a national measure that allows for profits from trade with third parties who are not members of the cooperative to be exempt from tax or sums paid to such parties by way of remuneration to be deducted. In any event, the reduced taxation must be consistent with the principle of proportionality and not go beyond what is necessary. Moreover, appropriate control and monitoring procedures must be applied by the Member State concerned.

²¹⁴ In particular, Member States must not introduce or maintain legislation which entails State aid or discrimination that is contrary to the fundamental freedoms. See, inter alia, Case C-182/08 *Glaxo Wellcome* [2009] ECR I-8591, paragraph 34 and the case-law cited.

²¹⁵ See preamble of Council Regulation (EC) No 1435/2003 of 22 July 2003 on the Statute for a European Cooperative Society.

²¹⁶ Control of cooperatives is vested equally in its members, as reflected in the "one person, one vote" rule.
²¹⁷ See Joined Cases C-78/08 to C-80/08 *Paint Graphos and others* [2011] ECR I-7611, Tax advantages to Italian Cooperatives, paragraph 55 and 61.

²¹⁸ See Joined Cases C-78/08 to C-80/08 *Paint Graphos and others* [2011] ECR I-7611, paragraphs 69 to 75.

5.4.2. Undertakings for collective investment²¹⁹

162. It is generally accepted that investment vehicles, such as undertakings for collective investment²²⁰, should be subject to an appropriate level of taxation since they basically operate as intermediary bodies between (third party) investors and the target companies being invested into. The absence of special tax rules governing investment funds/companies could result in an investment fund being treated as a separate taxpayer – with an additional layer of tax being imposed on any income or gains by the intermediary vehicle²²¹. In this context, Member States generally seek to reduce adverse taxation effects on investments through investment funds/companies compared to direct investments by individual investors and, as far as possible, to ensure that the overall final tax burden on the basket of various types of investments is about the same, irrespective of the vehicle used for the investment.
163. Tax measures aimed at ensuring tax neutrality for investments in collective investment funds/companies should not be viewed as selective where those measures do not have the effect of favouring certain collective investment undertakings or certain types of investments²²², but rather of reducing or eliminating double economic taxation in accordance with the overall principles inherent to the tax system in question. For the purpose of this section, tax neutrality means that taxpayers are treated the same whether they invest directly in assets, such as government securities and the shares of joint-stock companies, or indirectly in such assets through investment funds. Accordingly, a tax regime for collective investment undertakings following the purpose of fiscal transparency at the level of the intermediary vehicle may constitute a possible justification under the logic of the tax system in question. This would be the case if the prevention of double economic taxation constitutes a principle inherent to the tax system in question. By contrast, preferential tax treatment limited to well-defined investment vehicles which fulfil specific conditions²²³ to the detriment of other investment vehicles that are in a comparable legal and factual situation should be viewed as selective²²⁴.

²¹⁹ This section is not limited to undertakings for collective investment subject to Council Directive 65/611/EEC on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (UCITS). It also covers other types of collective investment undertakings not covered by that Directive.

²²⁰ Such undertakings may be constituted under the law of contract (as common funds managed by management companies) or trust law (as unit trusts) or under statute (as investment companies). See Article 1(3) of the UCITS Directive.

²²¹ International Monetary Fund, 1998, *Tax Law Design and Drafting*, volume 2; Chapter 22, *Taxation of Investment Funds*. According to the IMF publication, general agreement exists that, at a minimum, tax rules should not unduly hamper or prevent development of investment funds.

²²² See Case T-445/05 *Associazione italiana del risparmio gestito and Fineco Asset Management v Commission* [2009] ECR II-289, paragraph 78 et seq. where the General Court upheld Commission Decision 2006/638/EC of 6 September 2005, OJ L 268, 27.9.2006, p. 1, declaring as incompatible with the common market an aid scheme that provides certain undertakings with tax incentives for collective investment in transferable securities specialising in shares of small or medium-sized capitalisation companies which may be traded on the regulated European market.

²²³ For example, preferential tax treatment at the investment vehicle level being conditional upon the investment of three-quarters of the fund's assets in SMEs.

²²⁴ See Case T-445/05 *Associazione italiana del risparmio gestito and Fineco Asset Management v Commission* [2009] ECR II-289, paragraph 150.

164. However, tax neutrality does not mean that such investment vehicles should be entirely exempt from any tax or that the fund managers should be exempt from tax on the fees charged by them for managing the underlying assets being invested into by the funds²²⁵. Nor it justifies a more beneficial tax treatment of a collective investment than of an individual investment for the tax regimes in question²²⁶. In such cases, the tax regime would be disproportionate and would go beyond what is necessary to achieve the objective of preventing double taxation and would therefore constitute a selective measure.

5.4.3. Tax amnesties

165. Tax amnesties commonly involve immunity from criminal penalties, fines and (some or all) interest payments. While certain amnesties require payment in full of tax amounts due²²⁷, others entail a partial waiver of the amount of tax due²²⁸.

166. In general, a tax amnesty measure that applies to undertakings can be considered a general measure if the conditions below are met²²⁹.

167. First, the measure should be of an exceptional nature, provide a strong incentive for undertakings to voluntarily comply with the tax obligations, and enhance tax debt collection. Second, it should effectively be open to any undertaking of any sector or size that has outstanding tax liabilities due at the date set by the measure, without favouring any pre-defined group of undertakings. Third, it should not entail any *de facto* selectivity in favour of certain undertakings or sectors. Fourth, the tax administration's action should be limited to administering the implementation of the tax amnesty without any discretionary power to intervene in the granting or intensity of the measure. Finally, the measure should not entail a waiver from verification.

168. The limited temporal application of tax amnesties, which apply only for a short period²³⁰ to tax liabilities which were due before a pre-defined date and which are still due at the time of the introduction of the tax amnesty, is inherent to the concept of a tax amnesty that aims to improve both the collection of taxes and the taxpayers' compliance.

169. Tax amnesty measures may also be considered as general measures if they follow the national legislature's objective of ensuring compliance with a general principle of law, such as the principle that a judgment must be given within a reasonable period of time²³¹.

²²⁵ The logic of neutrality behind the special taxation of investment undertakings applies to the fund capital, but not to the management companies' own revenues and capital. See State aid Decision of the EFTA Surveillance Authority of 18 March 2009 with regard to the taxation of investment undertakings in Lichtenstein.

²²⁶ See Commission Decision of 12 May 2012, N131/2009, Finland, Residential Real Estate Investment Trust (REIT) scheme, OJ L 131, 22.5.2012, p. 7, recital 33.

²²⁷ Tax amnesty may also provide the possibility to report undeclared assets or incomes.

²²⁸ See Case C-417/10, *Ministero dell'Economia e delle Finanze* [2012] ECR I-0000, paragraph 12.

²²⁹ See Commission Decision of 11 July 2012 on the tax amnesty measure notified by Latvia, SA.33183, OJ C 1, 4.1.2013, p. 6.

²³⁰ The period of application should be sufficient to allow all taxpayers to whom the measure applies to seek to benefit from it.

²³¹ See Case C-417/10 *Ministero dell'Economia e delle Finanze* [2012] ECR I-0000, paragraphs 40 to 42.

5.4.4. Tax settlements and rulings

170. Treating taxpayers on a discretionary basis may mean that the individual application of a general measure takes on the features of a selective measure, particularly, where the exercise of the discretionary power goes beyond the simple management of tax revenue by reference to objective criteria²³².
171. If in daily practice tax rules need to be interpreted, they should not leave room for the discretionary treatment of undertakings. Every decision by the administration that departs from the general tax rules and benefits individual undertakings leads in principle to a presumption of State aid and must be analysed in detail.

5.4.4.1. Tax settlements

172. Tax settlements generally occur in the context of disputes between the taxpayer and the tax authorities concerning the amount of tax owed. They constitute a common practice in many Member States. The conclusion of such tax settlements allows tax authorities to avoid long-standing legal disputes before national jurisdictions and ensure quick recovery of the tax due. While the competence of Member States in this field is not disputable, State aid may be involved, in particular, where it appears that the amount of taxes due has been significantly reduced without clear justification (such as optimising the recovery of debt) or in a disproportionate manner to the benefit of the taxpayer.
173. In this context, a transaction between the tax administration and a taxpayer may in particular entail a selective advantage²³³:
- where, in making disproportionate concessions to a taxpayer, the administration appears to apply a more “favourable” discretionary tax treatment compared to other taxpayers in a similar factual and legal situation;
 - where it appears that the settlement is contrary to the applicable tax provisions and has resulted in a lower amount of tax. This might be the case, for example, where established facts should have led to a different assessment of the tax on the basis of the applicable provisions (but the amount of tax due has been unlawfully reduced).

5.4.4.2. Administrative tax rulings

174. For reasons of legal certainty, many national tax authorities provide prior administrative rulings on how specific transactions will be treated fiscally²³⁴. This may be the case in determining arm’s-length profits for related party transactions where the uncertainty may justify an advance ruling practice designed to ascertain whether certain controlled transactions are conducted at arm’s length²³⁵.

²³² Case C-241/94 *France v Commission (Kimberly Clark Sopalin)* [1996] ECR I-4551, paragraphs 23 and 24.

²³³ See Commission Decision 2011/276/EU of 26 May 2010 on State aid C 76/03, Umicore SA, OJ L 122, 11.5.2011, p. 76, recital 155.

²³⁴ Some Member States have adopted circulars regulating the scope and extent of their ruling practices. Some of them also publish their rulings.

²³⁵ Commission Decision of 24 June 2003 on the tax ruling system for US foreign sales corporations, OJ L 23, 28.1.2004, p. 14, recital 61.

175. Administrative rulings that merely contain an interpretation of the relevant tax provisions without deviating from the case law and administrative practice do not give rise to a presumption of aid. However, the absence of publication of tax rulings and the room for manoeuvre which tax authorities sometimes enjoy support the presumption of aid. This does not make Member States any less able to provide their taxpayers with legal certainty and predictability on the application of general tax rules.
176. As a result, tax rulings should only aim to provide legal certainty to the fiscal treatment of certain transactions and should not have the effect of granting the undertakings concerned lower taxation than other undertakings in a similar legal and factual situation (but which were not granted such rulings). As demonstrated by the Commission's decisional practice, rulings allowing taxpayers to use alternative methods for calculating taxable profits, e.g. the use of fixed margins for a cost-plus or resale-minus method for determining an appropriate transfer pricing, may involve State aid²³⁶.
177. Advance administrative rulings involve selectivity in particular where:
- the tax authorities have discretion in granting administrative rulings;
 - the rulings are not available to undertakings in a similar legal and factual situation²³⁷;
 - the administration appears to apply a more “favourable” discretionary tax treatment compared with other taxpayers in a similar factual and legal situation;
 - the ruling has been issued in contradiction to the applicable tax provisions and has resulted in a lower amount of tax.

5.4.5. *Depreciation/amortisation rules*

178. In general, tax measures of a purely technical nature such as depreciation/amortisation rules do not constitute State aid (general measures). The method of calculating asset depreciation varies from one Member State to another, but such methods may be inherent to the tax systems to which they belong.
179. The difficulty in assessing possible selectivity with regard to the depreciation rate of certain assets lies in the requirement to establish a benchmark (from which a specific rate or depreciation method would possibly derogate). While in accounting terms, the purpose of this exercise is generally to reflect the economic depreciation of the assets

²³⁶ See Commission Decision 2003/438/EC of 16 October 2002 on State aid C 50/2001, Luxembourg Finance Companies, OJ L 153, 20.6.2003, p. 40, recitals 43 and 44; Commission Decision 2003/501/EC of 16 October 2002 on State aid C 49/2001, Luxembourg Coordination centres, OJ L 170, 9.7.2003, p. 20, recitals 46-47 and 50; Commission Decision 2003/755/EC of 17 February 2003, Belgian Coordination centres, OJ L 282, 30.10.2003, p. 55, recitals 89 to 95 and the related Joined Cases C-182/03 and C-217/03 *Belgium and Forum 187 v. Commission* [2006] ECR I-5479, paragraphs 96 and 97; Commission Decision 2004/76/EC of 13 May 2003, French Headquarters and Logistic Centres, OJ L 23, 28.1.2004, p. 1, recitals 50 and 53.

²³⁷ For example, this would be the case if some undertakings involved in transactions with controlled entities are not allowed to request such rulings, contrary to a pre-defined category of undertakings. See in this respect Commission Decision of 24 June 2003 on the tax ruling system for US foreign sales corporations, OJ L 23, 28.01.2004, p. 14, recitals 56 to 62.

with the aim of presenting a fair view of the financial situation of the company, the fiscal process follows different purposes such as allowing companies to spread deductible expenses over time.

180. Depreciation incentives (such as a shorter term of depreciation, a more favourable depreciation method²³⁸, early depreciation, etc.) for certain types of assets or undertakings, which are not based on the guiding principles of the depreciation rules in question, may give rise to the existence of State aid. By contrast, accelerated and early depreciation rules for leased assets may be seen as general measures if the lease contracts in question are really accessible to companies of all sectors and sizes²³⁹.

181. Obviously, if the tax authority has discretionary freedom to set different depreciation periods or different valuation methods, firm by firm or sector by sector, there is a presumption of selectivity. Likewise, prior authorisation from a tax administration as a condition for applying a depreciation scheme involves selectivity if the authorisation is not limited to the prior verification of the legal requirements²⁴⁰.

5.4.6. *Flat-rate tax regime for specific activities*

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

183. Such provisions are therefore not selective, if

- the flat-rate regime is justified by the concern to avoid disproportionate administrative burden on certain types of undertakings because of their small size and/or sector of activity (e.g., in the agriculture or fisheries sectors); and
- on average, the flat-rate regime does not have the effect of implying a lower tax burden for them as compared to other undertakings excluded from its scope of application and does not entail advantages for a sub-category of beneficiaries of this regime.

5.4.7. *Anti-abuse rules*

184. The provision of anti-abuse rules may be justified by the logic of preventing tax avoidance by taxpayers²⁴¹. However, such rules might be selective if they provide for a derogation (non-application of the anti-abuse rules) to specific undertakings or transactions, which would not be consistent with the logic underlying the anti-abuse rules in question²⁴².

²³⁸ Declining-balance method or the sum-of-the-years'-digits method as opposed to the most common straight-line method.

²³⁹ See Commission Decision of 20 November 2012 on SA.34736 on the early depreciation of certain assets acquired through a financial leasing, OJ C 384, 13.12.2012, p. 1.

²⁴⁰ See Commission Decision of 20 December 2006 on the depreciation of assets leased out by economic interest groupings (EIG's), OJ L 112, 30.4.2007, p. 41, recital 122.

²⁴¹ Case C-308/01 *GIL Insurance Ltd and others* [2004] ECR I-4777, paragraphs 65 *et seq.*

²⁴² See Commission Decision 2007/256/EC of 20 December 2006 on the aid scheme implemented by France under Article 39CA of the General Tax Code, OJ L112, 30.04.2007, p. 41, recital 81 and *seq.*

5.4.8. *Excise duties*

185. Although excise duties are largely harmonised at Union level (which may affect the imputability criterion – see Section 3), this does not automatically imply that any duty relief in these areas would fall outside the scope of the State aid rules. In fact, a reduced excise duty can grant a selective advantage for the undertakings which use the product in question as an input or sell it on the market²⁴³.

6. EFFECT ON TRADE AND COMPETITION

6.1. General principles

186. Public support to undertakings is only prohibited under Article 107(1) TFEU if it “distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods” and only insofar as it “affects trade between Member States”.

187. These are two distinct and necessary elements of the notion of aid. In practice, however, these criteria are often treated jointly in the assessment of State aid as they are, as a rule, considered inextricably linked²⁴⁴.

6.2. Distortion of competition

188. A measure granted by the State is considered to distort or threaten to distort competition when it is liable to improve the competitive position of the recipient compared to other undertakings with which it competes²⁴⁵. For all practical purposes, a distortion of competition within the meaning of Article 107 TFEU is thus assumed as soon as the State grants a financial advantage to an undertaking in a liberalised sector where there is, or could be, competition²⁴⁶.

189. The fact that the local authorities assign a public service to an in-house provider (even if they were free to entrust that service to third parties) does not as such exclude a possible distortion of competition. However, a possible distortion of competition is excluded if (i) a given service is subject to a legal monopoly (established in compliance with EU law)²⁴⁷ and is not in competition with similar

²⁴³ See for instance Commission Decision 1999/779/EC of 3 February 1999 on an Austrian aid granted in the form of an exemption from beverage tax of wine and other fermented beverages sold directly on the place of production to the consumer, OJ L 305, 30. 11. 1999, p. 27.

²⁴⁴ Joined Cases T-298/07, T-312/97 etc. *Alzetta* [2000] ECR II-2325, paragraph 81.

²⁴⁵ Case 730/79 *Phillip Morris* [1980] ECR 267, paragraph 11. Joined Cases T-298/07, T-312/97 etc. *Alzetta* [2000] ECR II-2325, paragraph 80.

²⁴⁶ This excludes markets that, under both Union and national law, are closed to competition. Joined Cases T-298/07, T-312/97 etc. *Alzetta* [2000] ECR II-2325, paragraphs 141 to 147; Case C-280/00 *Altmark Trans* [2003] ECR I-7747.

²⁴⁷ A legal monopoly can be found where a given service is reserved by law or regulatory measures to an exclusive provider, with a clear prohibition for any other operator to provide such service (not even to satisfy a possible residual demand from certain customer groups). On the contrary, the mere fact that the provision of a public service is entrusted to a specific undertaking does not mean that such undertaking enjoys a legal monopoly. A legal monopoly should not only exclude competition in the market, but also for the market, in that it should exclude any possible competition to become the exclusive provider of the service in question (see in that respect Commission Decision of 7 July 2002 on State aid No N 356/2002 - United Kingdom - Network Rail, OJ C C 232, 28.9.2002, p. 2, recitals 75-77).

(liberalised) services and (ii) the service provider cannot be active (due to regulatory or statutory constraints) in any other liberalised (geographical or product) market.

190. Public support is liable to distort competition even if does not help the recipient undertaking to expand and gain market shares. It is enough that the aid allows it to maintain a stronger competitive position than it would have had if the aid had not been provided. In this context, for aid to be presumed to distort competition, it is normally considered sufficient that the aid gives the beneficiary an advantage by relieving it of expenses it would otherwise have had to bear in the course of its day-to-day business operations²⁴⁸. The definition of State aid does not require that the distortion of competition or effect on trade is significant or material. The fact that the amount of aid is low or the recipient undertaking is small will not in itself rule out a distortion of competition or the threat thereof²⁴⁹, provided however that the likelihood of such a distortion is not merely hypothetical²⁵⁰.

6.3. Effect on trade

191. An advantage granted to an undertaking operating in a market which is open to competition will normally be assumed to distort competition and also be liable to affect trade between Member States. Indeed, “*where State financial aid strengthens the position of an undertaking as compared with other undertakings competing in intra-Community trade, the latter must be regarded as affected by the aid*”²⁵¹.
192. Public support can be considered capable to affect intra-EU trade even if the recipient is not directly involved in cross-border trade. For instance, the subsidy may make it more difficult for operators in other Member States to enter the market by maintaining or increasing local supply²⁵².
193. Even a public subsidy granted to an undertaking which provides only local or regional services and does not provide any services outside its State of origin may nonetheless have an effect on trade between Member States where undertakings from other Member States might provide such services (also through the right of establishment) and this possibility is not merely hypothetical. For example, where a Member State grants a public subsidy to an undertaking for supplying transport services, the supply of these services may, by virtue of the subsidy, be maintained or increased with the result that undertakings established in other Member States have less of a chance of providing their transport services in the market in that Member State²⁵³. Such an effect may however be less likely where the scope of the economic activity is very small, as may be evidenced by a very low turnover.
194. In principle, trade can also be affected even if the recipient exports all or most of its production outside the Union, but in such situations the effect is less immediate and cannot be assumed from the mere fact that the market is open to competition²⁵⁴.

²⁴⁸ Case C-172/03 *Heiser* [2005] ECR I-1627, paragraph 55.

²⁴⁹ Case T-55/99 *CETL* [2000] ECR II-3207, paragraph 89. Case C-280/00 *Altmark Trans* [2003] ECR I-7747, paragraph 81.

²⁵⁰ Case C-280/00 *Altmark Trans* [2003] ECR I-7747, paragraph 79.

²⁵¹ Case T-288/07 *Friulia Venezia Giulia*, [2001] ECR II-1619, paragraph 41.

²⁵² Case C-280/00 *Altmark Trans* [2003] ECR I-7747, paragraph 78.

²⁵³ Case C-280/00 *Altmark Trans* [2003] ECR I-7747, paragraphs 77 and 78.

²⁵⁴ Case C-494/06 P *Commission v Italian Republic and Wam SpA* [2009] ECR I-3639, paragraph 62.

195. In establishing a distortion of competition or an effect on trade, it is not necessary to define the market or to investigate in detail the impact of the measure on the competitive position of the beneficiary and its competitors²⁵⁵. All that must be shown is that the aid is such as to be liable to affect trade between Member States and to distort competition.
196. However, the Commission has in several cases considered that, due to their specific circumstances, certain activities had a purely local impact and consequently did not affect trade between Member States. Common features²⁵⁶ of such decisions are that:
- (a) the aid does not lead to demand or investments being attracted to the region concerned and does not create obstacles to the establishment of undertakings from other Member States;
 - (b) the goods or services produced by the beneficiary are purely local or have a geographically limited attraction zone;
 - (c) there is at most a marginal effect on the markets and on consumers in neighbouring Member States;
197. Some examples are:
- swimming pools and other leisure facilities intended predominantly for a local catchment area²⁵⁷.
 - museums or other cultural infrastructure unlikely to attract visitors from other Member States²⁵⁸;
 - hospitals and other health care facilities aimed at a local population²⁵⁹;
 - news media and/or cultural products which, for linguistic and geographical reasons, have a locally restricted audience²⁶⁰;
 - a conference centre, where the location and the potential effect of the aid on prices is unlikely to divert users from other centres in other Member States²⁶¹;
 - concerning the financing of cable ways (and in particular ski lifts), the Commission practice clarified that the following factors should typically be

²⁵⁵ Case 730/79 *Phillip Morris* [1980] ECR 2671; Case T-211/2005 *Italy v Commission* [2009] ECR II-2777, paragraphs 157 to 160, Joined Cases T-298/07, T-312/97 etc. *Alzetta* [2000] ECR II-2325, paragraph 95.

²⁵⁶ See also, for local infrastructure, the guidance in the Notice from the Commission on a simplified procedure for treatment of certain types of aid, point 5(b)(viii), OJ C 136, 16.6.2009, p. 7.

²⁵⁷ See, for instance, the Commission Decision on State aid N 258/2000 *Leisure Pool Dorsten*, OJ C 172, 16.6.2001, p. 16.

²⁵⁸ See, for instance, the Commission decisions in State aid cases N 630/2003 *Local Museums Sardinia*, OJ C 275, 8.11.2005, p. 3 and SA.34466 *Cyprus – Center for Visual Arts and Research*, OJ C 1, 4.1.2013, p. 10.

²⁵⁹ See, for instance, the Commission decisions in State aid cases N 543/2001 *Ireland – Capital allowances for hospitals*, OJ C 154, 28.6.2002, p. 4 or SA.34576 *Portugal – Jean Piaget North-east Continuing Care Unit*, OJ C 73, 13.03.2013, p. 1.

²⁶⁰ See, for instance, the Commission's decisions in State aid cases N 257/2007 *Subsidies for theatre productions in the Basque country*, OJ C 173, 26.07.2007, p. 1; N 458/2004 *Editorial Andaluza Holding*; SA.33243 *Jornal de Madeira*, OJ C 131, 28.05.2005, p. 12.

²⁶¹ See, for instance, the Commission's decision in State aid case N 486/2002 *Sweden – Congress hall in Visby*, OJ C 75, 27.03.2003, p. 2.

taken into account to draw a distinction between installations liable to have a local catchment area and others²⁶²: a) the location of the installation (e.g. within cities or linking villages); b) operating time; c) predominantly local users (proportion of daily as opposed to weekly passes); d) the total number and capacity of installations relative to the number of resident users; e) other tourism-related facilities in the area. Similar factors could, with the necessary adjustments, also be relevant for other types of facilities.

7. FINAL PROVISIONS

198. The following Commission communications and notices are repealed : Commission Communication of the Commission to the Member States 93/C 307/03 on the application of Articles 92 and 93 of the EEC Treaty and of Article 5 of Commission Directive 80/723/EEC to public undertakings in the manufacturing sector, Commission communication on State aids elements in sales of land and buildings by public authorities, Commission Notice on the application of the State aid rules to measures relating to direct business taxation.
199. The present Communication shall replace any contrary statements relating to the notion of State aid included in all existing Commission communications and frameworks.

²⁶² Commission communication to the Member States and other interested parties concerning State aid N 376/01- Aid scheme for cableways, OJ C 17, 18.7.2002, p. 2.