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Bruno Nascimbene
Alessia Di Pascale *Editors*

The Modernisation of State Aid for Economic and Social Development

Studies in European Economic Law and Regulation

Volume 14

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The Modernisation of State Aid for Economic and Social Development

Springer

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Introduction: The Modernization of State Aid Regulation

Bruno Nascimbene

1 The Complexities of EU State Aid Policies

In recent years, competition policy has seen State aid regulation take on an increasingly relevant role, while trying to occupy a middle ground between pushing toward the single market and protecting common interests.¹

- a) In the matter of State aid regulation, the European Union is unique in that we find various public authorities (Member States) abiding by rules set out by a single higher authority (the European Commission). Moreover, the legal framework underpinning this system was designed at a time when no precedent or previous experience were available.²

Even though the rules on State aid were established in 1957 (Article 87 of the Treaty of Rome)³ and scarcely changed since then, we have had to wait almost 40 years to see them in effect.⁴

In spite of this stagnation, however, the definition of State aid has undergone an evolution, influenced by the policies of the European Commission, the difficulties in their enforcement and the build-up of case law produced by the European Court of Justice during the integration process.⁵

¹See, inter alia, Tosato (2011), pp. 3 et seq.

²See Ehlermann (1994), pp. 1213 et seq.

³The only modification consisted of the substitution of “common market” with “internal market”.

⁴See Lyons and Kassim (2013), p. 4.

⁵For an analysis of the different interests involved in the evolution of the EU concept of State aid, see Piernas Lopez (2015), chapter 1.

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- b) According to many political scientists, one has to consider the economic and political context which accompanied this evolution of State aid policies, as it may be argued that the very definition of State aid has been subject to various interpretations according to the interests and political aims prevailing at a particular time—thus giving rise to a somewhat fluid concept of State aid.⁶

This matter—as well as being a unique phenomenon that is wholly European in creation—has numerous implications that go beyond mere economic or legal considerations. The political nature of decisions taken by the European Union regarding State aid means that the effect of such decisions on the internal balance of the EU has to be considered. Indeed, the Commission has exercised on-and-off control and its monitoring actions have been carried out with varying intensity, sometimes in sharply opposed directions. This happened not because of specific deficiencies in the Treaties, but as a result of the economic and political conditions of the European Union.

Furthermore, it should be stressed that the uniqueness of State aid rules depend also on the fact that State aid involves a multiplicity of public and private parties, which leads to many difficulties in the coordination and in the relationships between national authorities (central and regional) and the Commission.⁷

Finally, a genuine modernization process of State aid rules was sparked by the recent financial and economic crisis, which was followed by huge injections of liquidity in support of companies and banks.

2 The Modernization Process: Historical Background

As mentioned previously, although the main rules regarding State aid have been left well-nigh unaltered in substance, their application has seen remarkable changes over the years. Initially, this process was propelled mainly by the implementation of Articles 101 and 102 of the Treaty on the Functioning of the European Union (hereinafter the “TFEU”), while that of Articles 107 and 108 TFEU took over at a later stage.

Again, the context in which these changes took place has to be considered: the first important drive toward a revolution of the enforcement systems came from the EU enlargement. With the addition of new Member States in the 1990s, the centralized system began to be considered ineffective in protecting competition: in order to preserve the Commission’s resources for the most important cases, decentralization—that is, task distribution—was to be put in place.

⁶De Burca (2002), p. 181. The terminology of De Burca has already been borrowed by Piernas Lopez (2015).

⁷In this sense, see Tesaro (2011), p. XIII; Köhler (2014), P-165-174.

- a) The modernization process involved the entire area of EU antitrust law. In 2004, EC Regulation no. 1/2003⁸ replaced EEC Regulation no. 17/62.⁹ The acknowledgement of the direct effect of Article 101(3) TFEU, and the subsequent repeal of the mechanism for prior notification, brought about a “network” system, in which the application of Articles 101 and 102 is fully shared between the Commission, the national courts and the competition authorities of Member States, in contrast with the previous centralized system that hindered the Commission’s ability to tackle the most serious infringements of antitrust rules.
- b) Subsequently, efforts toward decentralization were also evident in the application of the rules for the control of State aid. In 2012 the adoption of a communication by the Commission on the modernization of State aid control launched this second phase.¹⁰ The objective was to cut down the number of *ex ante* notifications of aid measures and aid schemes to the Commission—under Article 108 TFEU—by making such notifications compulsory only for those measures likely to have far-reaching consequences on competition and the internal market. Projects raising lesser competition concerns would be exempt from the notification obligation, while certain requirements—set out by the Commission—would ensure the compatibility of non-notified aid measures with Article 107 TFEU. New responsibilities would fall to Member States in ensuring the compliance of aid measures with EU rules. New safeguards—in particular transparency obligations and *ex post* monitoring—would be necessary as well.¹¹

By contrast with Articles 101 and 102 TFEU, Article 107 has not become applicable directly and the Commission retains the exclusive competence to establish whether an aid measure is compatible with the Treaty. There are similarities between the two modernization processes, in particular in the attempt to reduce the administrative burden on the Commission. Nevertheless, certain peculiar features distinguish the modernization of State aid control from the modernization of antitrust rules. The subject matter of State aid control is the use of public resources by Member States. With the erosion of Member States’ financial capabilities and the increased pressure for more efficient public spending, the reform of State aid control actually aims to encourage a more effective use of public resources by national authorities. To this end, the latest regulations and guidelines are consistently designed to promote ‘better-targeted’ aid, needed

⁸Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty.

⁹Council Regulation (EEC) No 17/62: First Regulation implementing Articles 85 and 86 of the Treaty.

¹⁰Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, EU State Aid Modernisation (SAM), COM (2012) 209 of 8 May 2012.

¹¹See, inter alia: Walter (2013), pp. 757–772; von Wendland (2015), pp. 25–50; Lever (2013), pp. 5–10.

either to correct actual market failures in connection with the objectives of the ‘Europe 2020’¹² agenda or to encourage social cohesion.

- c) Thus, the modernization of State aid control aims at economic and social reform. Under the *modernized* approach, the conditions under which a State aid measure or regime is deemed compatible with the internal market follow a set of common principles aimed at ensuring that State aid pursues clearly defined objectives of general interest, is an appropriate instrument, does not go beyond what is strictly necessary to pursue such objectives and that negative consequences of State aid for competition are kept to a minimum. In other words, decentralization is the key through which a more flexible and efficient control of State aid may be achieved, following a similar pattern to that of the European antitrust modernization. In particular, a widespread shift from *ex ante* to *ex post* State aid control was set in motion by the mentioned Regulation 651/2014—extending the exemption from notification obligation (pursuant to Article 108(3) TFEU) to a wide number of aid measures. As a result of this provision, Member States are required to verify the conditions for the exemption and in some cases they themselves must evaluate the effect of the adopted aid measures. This substantial shift from the traditional *ex ante* to *ex post* control could make it easier for Member States to grant aids that are assumed to be compatible with the internal market, and some fear that effective control has been weakened.¹³
- d) It should be recalled that the so-called Almunia Package¹⁴ on the assessment under State aid rules of the compensation of public service obligations for services of general economic interest (SGEI), adopted in 2011, already enshrined some of the main features of the new approach: only measures potentially entailing major distortions of competition remain subject to the notification obligation; the Commission, moreover, sets forth detailed requirements that aim to ensure that service providers are not overcompensated and that the use of public resources is limited to what is strictly necessary in the public interest. Moreover, in the Almunia Package the Commission tried to simplify procedures, in particular with reference to social services of general economic interest.
- e) Between 2012 and 2015 the reform announced by the Commission in the communication on the modernization of State aid control has been almost entirely completed. Procedural rules have been revised (they were recently consolidated in Council Regulation No. 1589/2015¹⁵); a new broad general

¹²Communication from the Commission, Europe 2020: A strategy for smart, sustainable and inclusive growth, COM (2010) 2020 of 3 March 2010.

¹³See Boccaccio (2016).

¹⁴The Commission, on 8 September 2015, published the Member States’ reports on compliance with the rules on State aid for the provision of services of general economic interest (“Almunia package”) in 2012–2014.

¹⁵Council Regulation (EU) 2015/1589 of 13 July 2015 laying down detailed rules for the application of Article 108 of the Treaty on the Functioning of the European Union (codification).

block exemption regulation¹⁶ together with a new *de minimis* regulation¹⁷ have been adopted. Several acts of soft law have been either revised or adopted *ex novo*, aiming to provide a complete and consistent set of guidelines to the public administration of the Member States for the use of public resources in a way which is consistent with the Treaty. The topics covered by the various communications and guidelines include the rescue and restructuring of companies, regional aid, research and development, energy and environment, agriculture, investment and risk financing, broadband, air transport and airports, and projects of European interest. Moreover, the Directorate-General for Competition (DG COMP) has published some complementary documents on how to conduct the *ex post* evaluation of the impact of major aid schemes and how to assess the compatibility of State aid in the field of infrastructure.

3 The Modernization Process: A First Assessment

- a) It is still too early to make an assessment of the overall effectiveness of the reform of State aid control. Whether it will respond to the expectations of the Commission strongly depends on how Member States play their role in the new decentralized application system. Nonetheless, at this stage of the process it appears relevant to put forward an in-depth analysis and discussion of the main features of the State aid modernization framework, considering both its strengths and the challenges that will have to be met in the coming years.
- b) Furthermore, the factors mentioned in Sect. 1 above are still in the balance. One should also consider that the evolution of the Commission's policy related to State aid reveals how dynamic the development of State aid regulation has been.¹⁸ This is of course a consequence of the subject matter's interconnection with the main economic and political events that have affected the European Union (and, before, the European Community). Indeed, the literature often distinguishes a number of periods of EU integration and shows how the objectives and priorities of State aid policy have been influenced by the general political and economic developments taking place at EU level.¹⁹ The Commission had to cope with a "dilemma of discretion" at the heart of its State aid mandate. Even as the Commission had considerable freedom to exercise its

¹⁶Commission Regulation (EU) No 651/2014 of 17 June 2014 declaring certain categories of aid compatible with the internal market in application of Articles 107 and 108 of the Treaty Text with EEA relevance.

¹⁷Commission Regulation (EU) No 1407/2013 of 18 December 2013 on the application of Articles 107 and 108 of the Treaty on the Functioning of the European Union to *de minimis* aid.

¹⁸For an in-depth analysis of the evolution of the Commission's policy on State aid divided into four main periods, see Piernas Lopez (2015), chapter 3.

¹⁹For different periodizations of the evolution of EU competition law, see: Weiler (1991), p. 2403; Wesseling (2000), p. 9; Doleys (2009).

delegated autonomy, it was also subject to embedded institutional control mechanisms and political pressures that served to condition that autonomy. Some would argue that the history of EU State aid policy is written in the Commission's efforts to navigate that dilemma.²⁰

- c) Another relevant factor to be considered is the evolution in the European Court of Justice's case law. Over the years, the Court of Justice has shown a more balanced approach between deregulation and other values, with an evolving recognition, for example, of the importance of social policy and public service.²¹ In other words, the case law on State aid has been influenced by economic interests fixed by the Treaty, such as the competition rules or the free movement of goods. The influence of the Court of Justice's case law is for example evident in the broad definition of State aid, which comprehends several State measures and forms of public intervention, not considering its form as essential.

Furthermore, as has already been stressed,²² the role of national courts in the matter of State aid is marginal despite the Commission's efforts to improve this, as evidenced by the 2009 Communication.²³

- d) It is also relevant that the State Aid Action Plan (SAAP) implemented by the Commission²⁴ was primarily designed to significantly reduce the number of aids and to redistribute them according to horizontal objectives, such as relating to research or innovation.²⁵ As a consequence of the SAAP, the State aid definition has also been frequently interpreted from an economic perspective, while before almost only legal scholars debated this field.²⁶ Two main theories on the objectives and the nature of State aid rules have been developed in literature, as a consequence of the SAAP.²⁷ The first school of thought considers State aid rules to be deeply linked to the internal market; therefore economics has a very limited role in the State aid field.²⁸ By contrast, another part of the literature considers that State aid measures are by definition connected to the competition rules; therefore an economic approach is needed in order to carry out an analysis

²⁰See Doleys (2009).

²¹See Jacobs (2005).

²²See Tesaro (2011).

²³Commission notice on the enforcement of State aid law by national courts (2009/C 85/01); with regard to the Italian context, see the Casebook edited by F. Capotorti and G. Greco, *Aiuti di Stato*, available at Eurojus.it (<http://libreria.eurojus.it/prodotto/raccolta-aiuti-di-stato>).

²⁴The State Aid Action Plan presented by the Commission launched a comprehensive reform of State aid policy that will cover a 5-year period (2005–2009). The objective was to guarantee the Member States a clear and predictable framework in order to enable them to grant State aid, targeted towards achieving the Lisbon Strategy objectives.

²⁵See Schepisi (2011), pp. 17 et seq.

²⁶See, Crocioni (2006), p. 89; Neven and Verouden (2008), p. 99; Garcia and Neven (2004); Nitsche and Heidhues (2005).

²⁷For an analysis of these two approaches, see Piernas Lopez (2015).

²⁸See, inter alia: Buendia Sierra (2006), p. 59.

of distortions of competition produced by those measures and to complete the trend toward an effects-based approach.²⁹

4 The Central Idea of the Volume

The contributions collected in this book are linked together by a common thread. The different features of the reform—from the institutional framework to the substantive criteria of evaluation of State aid in the different policy areas—are analysed in light of three main objectives of the reform: clarity of rules; effectiveness of procedures; ability to promote additional investment and a more dynamic, sustainable and inclusive economy in the European Union.

Some of the chapters are revised versions of papers presented at a conference on “The modernization of State aid”, held at the University of Milan on 26 November 2014. The conference was organized by the Jean Monnet Centre of Excellence at the University of Milan and Assonime (the association between the Italian joint stock companies),³⁰ as part of the cultural initiatives on European issues held during the Italian Presidency of the EU Council.

The volume is divided in two parts—one focused on the new institutional framework and the other one on its impact on the different policy areas—that will be briefly introduced in the next two sections.

4.1 *A New Institutional Framework for State Aid Control*

Part I of the volume is devoted to the analysis of the general features of the new framework for State aid control, from both an institutional and an economic perspective.

- a) In the second chapter,³¹ Nicola Pesaresi (Head of Unit State aid at the European Commission, DG COMP) highlights that the State aid modernization reform cannot be understood in isolation from the overall Europe 2020 strategy aimed at making Europe a smart, sustainable and inclusive economy. He explains that the reform is based on three priorities: fostering ‘good’ aid, which promotes growth and quality of public spending; increasing the efficiency of State aid control through broad block exemptions, speedier procedures and a prioritization of the Commission’s efforts; improving consistency across the State aid framework and the Commission’s ability to tackle illegal aid by means of new instruments such as market investigations and sector inquiries. The author

²⁹See, inter alia: Derenne and Merola (2007); Friederiszick et al. (2008), p. 625.

³⁰‘Associazione fra le Società Italiane per Azioni’.

³¹See the chapter by Pesaresi and Peduzzi, this volume.

describes the milestones of the modernization package (regulations, guidelines and other notices) and illustrates the new role played by the European Commission in the modernized framework. Compared to the past, this role is more based on priority setting and providing guidance to Member States and national courts on the application of Article 107 TFEU. Moreover, the Commission has undertaken to establish a new partnership approach with the authorities of Member States.

- b) The third chapter,³² by Andrea Biondi (King's College, London) focuses on the scope of application of EU rules on State aid, and in particular on the notion of State aid. In the new system, the Commission retains the exclusive power to assess whether State aid is compatible with the Treaty. Therefore, the freedom of Member States to decide how to use their public resources to support undertakings closely depends on the scope of State aid control (Article 107(1) TFEU).³³ The modernization project led to the adoption of a notice by the Commission concerning this notion of State aid.³⁴ In addition, Member States and national courts have to refer to the case law of the European Court of Justice. The author discusses the relevant issues concerning the interpretation of the notion of State aid (notion of public resources, selective aid, impact on trade) and illustrates the reasons why a work of 'codification' through an act of soft law appears particularly complex. On the other hand, the interpretation of Article 107 (1) TFEU plays a crucial role in the system, especially since national courts are competent to assess, on a decentralized basis, whether aid has been illegally granted in violation of the notification obligation established by Article 108 TFEU: in this context, national courts often have to assess whether a measure is, or is not, State aid under Article 107 TFEU.
- c) Valerio Vecchietti (Department for European Affairs, Italian Presidency of the Council of Ministers) focuses on the challenges of the modernization of State aid from the point of view of the Member States and, in particular, of the national authorities.³⁵ In a system less based on *ex ante* notification and more focused on transparency and *ex post* control, national authorities have new responsibilities. The modernization package requires Member States to take ownership of the process and to ensure an effective governance of the system at the national level. National authorities have to ensure and monitor compliance with EU rules, including at the regional and local level; this task requires both educational and knowledge-spreading initiatives and a complex coordination activity. Moreover, national authorities have to organize independent *ex post* evaluations of the economic impact of the most relevant aid schemes when the Commission so requires. Member States also participate in new High Level Forum and working

³²See the chapter by Biondi and Stefan, this volume.

³³See, inter alia: Buts et al. (2013), pp. 330–340.

³⁴Commission Notice on the notion of State aid as referred to in Article 107(1) of the Treaty on the Functioning of the European Union, 2016/C 262/01.

³⁵See the chapter by Vecchietti, this volume.

groups set up by the Commission to discuss strategic issues and support the application of the new package. In this chapter the author also describes the initiatives undertaken by some Member States to adapt their national institutional and administrative set-ups to meet the challenges of the new framework for State aid control, and he considers the exchange of best practice between Member States to be essential.

- d) Phedon Nicolaides (College of Europe, Bruges and Maastricht University) discusses the issues raised by the underlined ‘more economic’ approach to the control of State aid, that is, an effects-based approach, as described in this chapter at the end of Sect. 2.³⁶ After State aid modernization, the compatibility of State aid is assessed on the basis of common principles, based on economic notions (e.g. correction of market failures). In addition, for the first time the Commission requires Member States to carry out *ex post* evaluations of large aid schemes. The chapter at hand examines both the economic rationality of the common assessment principles and the *ex post* evaluation methodology. It also reviews how the assessment principles and the evaluation methodology have been applied in practice and whether the practice so far conforms to the initial intentions of the Commission in injecting greater economic rationality in State aid rules. The author also reviews some of the methods that the Commission uses in order to verify the existence of an aid and its proportionality with the aim that it pursued.
- e) Alberto Heimler (National School of Public Administration, Rome) discusses the possible synergies between the control of State aid and the competition impact assessment of public measures promoted by the Organization for Economic Co-operation and Development (OECD).³⁷ The more economic approach undertaken by the Commission suggests following a number of steps in order to ascertain whether an aid measure is an appropriate and effective instrument. A competition impact analysis would require comparing State aid with other ways of addressing the identified market failure. Member States might usefully combine the two approaches in order to adopt the most effective and less distortive public measures to correct market failures. From this perspective, the author suggests that independent national competition authorities, which have the institutional task of promoting competition in the Member States, might be given a formal role in the governance of State aid control at the national level.

³⁶See the chapter by Nicolaides, this volume.

³⁷See the chapter by Heimler, this volume.

4.2 Policy Areas

The second part of the volume focuses on the impact of State aid modernization in some policy areas which are particularly relevant for EU social cohesion and economic growth.

- a) Erika Szyszczak (University of Sussex) discusses the new Almunia Package³⁸ on the control of State aid in the area of services of general economic interest (SGEI).³⁹ The ruling by the European Court of Justice in *Altmark*,⁴⁰ which clarified the conditions under which the compensation of public service obligation does not represent State aid, marked the start of the modernization of public services in the EU. Indeed, it preceded the Commission's modernization agenda. The author argues that the interpretation of the *Altmark* ruling, especially by the European Commission, has focused attention on the financing of public services and away from issues of defining the quality of public services. The European Courts also appear to have embraced an economic approach to the interpretation of State aid for public services. This chapter contains an overview of the recent case law of the Court of Justice aimed at examining what sort of issues arise and who the complainants are. Moreover, it examines the interaction of procurement law and State aid concluding that this may not always be a complementary exercise.
- b) Ginevra Bruzzone (Assonime and School of European Political Economy, LUISS Guido Carli) and Marco Boccaccio (University of Perugia and Assonime) analyse how State aid control affects Member States' choices concerning the creation and management of infrastructures.⁴¹ Fostering investment in infrastructures is a key objective of the EU strategy aimed at re-launching investment and growth. In recent years, the case law of the European Court of Justice has clarified that not only the economic exploitation of an infrastructure, but also the construction of an infrastructure for the purpose of its later commercial exploitation represents an economic activity and is subject to State aid control. In the framework of the modernization of the control of State aid, the European Commission has provided a number of indications on how to ensure that the funding of infrastructures is compatible with EU rules. When assessing whether State aid to infrastructures is compatible with the TFEU, the Commission follows general criteria (existence of an objective of general interest and of a market failure, adequacy, transparency etc.); in specific areas such as airports, energy and broadband, prescriptions for Member States are more detailed and articulated. In October 2015 the DG COMP published a

³⁸See note 13 above.

³⁹See the chapter by Szyszczak, this volume.

⁴⁰Case C-280/00 *Altmark Trans GmbH and Regierungspräsidium Magdeburg v Nahverkehrsgesellschaft Altmark GmbH* [2003] ECR I-7747.

⁴¹See the chapter by Bruzzone and Boccaccio, this volume.

staff working paper explaining its approach to the financing of infrastructures in the different areas (including ports, multiservice centres, highways, concert halls etc.). The authors discuss how the control of State aid increasingly affects public choices in the Member States, also at the local level, and argue that the principles suggested by State aid control broadly coincide with the principles which should be followed to ensure an effective use of public resources (for instance, planning of infrastructures is useful to ensure a rational priority setting). Moreover, they explain how the application of State aid rules to infrastructures requires, at the national level, the coordination of various authorities, including sector regulators.

- c) Mario Siragusa (Cleary Gottlieb and College of Europe) and Cesare Rizza (Cleary Gottlieb) address the specific issue of EU State aid policy in the field of broadband infrastructure financing.⁴² The achievement of the Europe 2020 strategy objective of smart, sustainable and inclusive growth depends to a great extent on the development of the digital economy. The availability of fast and ultrafast Internet access—with smart cities and connecting rural and regional areas to fast broadband networks as two of the core areas of investment—plays a central role therein. The Digital Agenda for Europe⁴³ established the ambitious objective to bring broadband subscriptions above 100 Mbps to at least 50% of Europeans by 2020. Even where the financing of the deployment, operation and management of the broadband network infrastructure primarily comes from commercial investors, the goals of coverage and penetration of fast and ultrafast broadband network cannot be fully achieved in the absence of State intervention. Pillar IV of the ‘Digital Agenda for Europe’ calls on Member State governments to take proportionate and appropriate steps to deal with the gap between private investment and the estimated amount of investment necessary to roll out fast and ultrafast broadband in the EU. The rationale of State aid policy in the broad- and ultra-broadband sectors—which represents a development of the European Commission’s general approach to State aid control of infrastructure funding—is as follows: State intervention is compatible with the internal market as long as the risk of crowding out private investments is minimized. This chapter discusses the principles established by Commission Guidelines on Broadband of September 2009,⁴⁴ as revised in January 2013, with

⁴²See the chapter by Siragusa and Rizza, this volume.

⁴³Communication from the Commission of 19 May 2010 to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions—A Digital Agenda for Europe [COM(2010) 245]. The Digital Agenda presented by the European Commission forms one of the seven pillars of the Europe 2020 Strategy which sets objectives for the growth of the European Union by 2020. The Digital Agenda proposes to better exploit the potential of Information and Communication Technologies in order to foster innovation, economic growth and progress.

⁴⁴Communication from the Commission, Community Guidelines for the application of State aid rules in relation to rapid deployment of broadband networks Text with EEA relevance, OJ C 235 of 30 September 2009, pp. 7–25.

regard both to the notion of State aid and the compatibility assessment. Special emphasis is placed on precedents concerning Italian State aid schemes as well as the Italian Strategy for the Next Generation Access (NGA) Network, adopted by the Italian government in March 2015.

- d) Massimo Merola (Bonelli Erede Pappalardo and College of Europe) and Omar Diaz (Bonelli Erede Pappalardo) address another crucial policy area of the Europe 2020 strategy, namely energy and environment.⁴⁵ The implementation of the State aid modernization communication has led to significant reform in the assessment of energy and environmental projects. It includes an overhauled notification system with higher notification thresholds, greater emphasis on *ex post* monitoring, and enhanced obligations for national authorities. The authors assess the contribution made by this reform to the Europe 2020 strategy from three different standpoints. First, they examine the Commission's initiative to clarify the notion of aid discussing the environmental and energy instruments affected by this interpretative exercise. Next, they look at the reform of the General Block Exemption Regulation and address the new exemptions and higher thresholds applicable to environmental and energy projects as well as the interplay between a broader notion of aid and a wider notification exemption. Finally, they analyse the assessment framework defined by the Environmental and Energy State Aid Guidelines⁴⁶ in light of the growth-enhancing goals of State aid modernization, discussing the stricter compatibility requirements and new aid categories for which guidance is provided.
- e) The final chapter of the volume, Daniele Gallo (Luiss Guido Carli) makes an assessment of the application of the Almunia Package—already discussed from a general point of view by Erika Szyszczak⁴⁷—and the case law of the European Court of Justice to State aid in the area of social services and healthcare.⁴⁸ The author firstly analyses the concepts of social services and health care in light of EU (binding and non-binding) secondary law as well as the jurisprudence of the European Court of Justice. Then, he highlights the evolving nature of those services and the interplay between State aid, social services, healthcare and socio-economic development. The paper then deals with the Commission Decision of 20 December 2011 on the application of Article 106(2) TFEU to State aid in the form of public service compensation granted to certain undertakings entrusted with the operation of services of general economic interest as part of the Almunia Package. In the Decision, the Commission not only sets out the conditions under which State aid in the form of public service compensation is compatible according to Article 106(2) TFEU, but establishes that aid measures covered by the Decision are exempted from the *ex ante* notification requirement.

⁴⁵See the chapter by Merola and Diaz, this volume.

⁴⁶Communication from the Commission—Guidelines on State aid for environmental protection and energy 2014–2020, OJ C 200 of 28 June 2014, pp. 1–55.

⁴⁷See note 14 above.

⁴⁸See the chapter by Gallo, this volume.

Therefore, the Decision aims to simplify the law, and thus it provides a more flexible approach for local and social services than was previously the case. The author addresses a number of open issues relating to the application of the Decision, including its relationship with the Altmark conditions⁴⁹ and the other measures which constitute the Almunia Package; the exhaustive character of the exemption; the notions of hospitals; the concept of entrustment; the local nature of the service provided; and the calculation of both compensation and overcompensation. Overall, in the author's view, the approach followed by the Commission in the Almunia Package has made considerable progress in updating, modernizing and simplifying the legal framework and may eventually lead to a convergence of national policies relating to the provision of social services of general economic interest. By providing and extending a special treatment for welfare services, the Commission seems to have successfully consolidated the social market economy principles in the EU. In other words, the approach adopted by the Commission may represent the right way to reach a fair balance between economic and social development.

5 Concluding Remarks

The main goal pursued by the editors of this volume, after having organized the conference already mentioned in Sect. 4 above, is to provide scholars and practitioners with a useful tool to better understand the State aid modernization process. Indeed, the topics analysed in this volume are of great interest for both scholars and practitioners, given that they concern one of the most controversial aspects of the relationship between the EU and the Member States.

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⁴⁹See note 38 above.

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Part I
A New Institutional Framework for State
Aid Control

1 Introductory Remarks

The European Commission launched State Aid Modernization (SAM) in 2012 with a Commission Communication,¹ carried out a review of a large number of regulatory texts over the following years and recently completed it with the adoption of the Commission Notice on the Notion of Aid (May 2016). SAM should be seen in the context of the Europe 2020 Strategy, which aims to deliver a “smart, sustainable and inclusive economy”. The internal market is a key tool for stimulating economic growth, and a robust competition policy is required in order for the internal market to flourish. Competition is a major driver of growth as it puts pressure on enterprises to innovate, improve productivity and become more competitive globally. State aid control is an essential element of competition policy given that State aid distorts competition. SAM represents an attempt to bring State aid control more in line with the Europe 2020 Strategy, strengthening the Commission’s scrutiny to ensure the sound use of growth-orientated policies and to prevent undue distortions of competition arising from State aid measures. Specifically, SAM has three main objectives: first, to foster smart, sustainable and inclusive growth in a strengthened, dynamic, competitive internal market through encouraging ‘good aid’; second, to focus ex

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¹“EU State Aid Modernisation (SAM)”, COM (2012) 209 final of 8.5.2012.

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ante control on cases with the biggest impact on the internal market; and third, to streamline the rules to allow for faster, more efficient decision-making.

1.1 Foster ‘Good Aid’

In the SAM Communication, ‘good aid’ is described as an aid “well designed, targeted at identified market failures and objectives of common interest, and least distortive”.² This concept is not a novelty brought about by SAM. In fact, the State Aid Action Plan of 2005³ already introduced a ‘balancing test’ in order to assess in a consistent manner the balancing exercise required by the Commission between positive effects of aid measures (i.e. contributing to a common European interest) and negative ones (i.e. distorting competition and trade). However, SAM is clearer about exactly what kind of aid is to be considered as ‘good aid’ for the role it plays in supporting, for example, green technologies, human capital development, employment and competitiveness.

There are a number of common principles of compatibility running throughout SAM as a unifying theme. These horizontal principles clarify how the Commission assesses common features which, up until SAM, had not been treated in the same way in the different State aid guidelines and frameworks. The intention behind these common principles is to lay down a solid and consistent basis to ascertain the compatibility of aid measures across the different policy instruments and their alignment with strategic EU objectives as enshrined in the Europe 2020 Strategy.

In addition to focusing State intervention where it can have the maximum positive impact in terms of economic and social development and competitiveness, the SAM’s emphasis on the quality of public expenditure and efficiency of aid measures may have the effect of helping the Member States to strengthen budgetary discipline, as the better the design of the aid, the better the use of taxpayer’s money. Therefore, State aid control and its modernization, alongside its primary function, could contribute towards Member States targeting public spending correctly to promote growth within the confines of prudent use of public budgets. Nonetheless, it must be stressed that this is merely a possible positive side effect of State aid control, as the overriding criterion for the assessment of State aid remains its impact, the potential distortion of competition and the necessity and proportionality of the aid measures.

²Ibid., para. 12.

³“State Aid Action Plan, Less and Better Targeted State Aid: a Roadmap for State Aid Reform 2005–2009”. COM (2005)107 final of 7.6.2005.

1.2 *Focusing Enforcement on Cases with the Biggest Impact on the Internal Market*

Carrying out effective and efficient State aid control in a European Union of 28 Member States is not an easy task. The Treaty gives the Commission the exclusive responsibility for deciding upon the compatibility with the internal market of all State aid measures, either those that Member States notify or those that the Commission is made aware of, notably through the complaints it receives.

As part of SAM's drive to make the control of State aid more efficient, and to ensure greater prioritization in the enforcement action by the Commission, greater responsibility was given to Member States.

Before SAM, it was already possible for Member States to grant aid without being subject to the notification obligation set in the Treaty, thanks to a set of sectorial block exemption regulations introduced over time and then extended and consolidated in the 2008 General Block Exemption Regulation (henceforth GBER). However, the 2008 GBER⁴ still did not apply to several policy areas and types of aid and had relatively low notification thresholds.

SAM has expanded the scope of these exemptions both horizontally, by including new types of measures and policy areas, and vertically, through the increase of the aid threshold which could fall within an exemption. At the time of the reform, the Commission estimated that 75% of aid measures would be exempted and up to 90%⁵ of aid measures would be so if Member States proactively designed their aid measures in conformity with the new GBER, adopted in 2014.⁶ Guidance was provided on how to follow the GBER's general conditions and ensure that aid remained within its limits.⁷ SAM thus meant a "Copernican revolution" in that block-exempted aid has now become the norm and notification the exception: indeed, the *ex ante* compliance check is performed by the granting authorities themselves in the vast majority of cases, while it is reserved to the Commission for the largest and potentially most distortive cases.

It is fair to say that the State aid control system has always been based on joint responsibility with the Member States. The latter share the responsibility to ensure that aid fulfils the legality conditions (in respect of the GBER conditions on notification of the aid) and the correct implementation of the compatibility

⁴Commission Regulation No 800/2008 of 6 August 2008 declaring certain categories of aid compatible with the common market in application of Articles 87 and 88 of the Treaty (General block exemption Regulation), OJ L 214/3 of 9.8.2008.

⁵Actually, according to the 2016 State aid Scoreboard, around 95% of new aid measures for which expenditure was reported in 2015 was granted under the GBER. In particular, about 43% of all State aid spending for SMEs, 46% for research, development and innovation, 55% for regional development, 69% for employment and 96% for training was granted under the GBER.

⁶Commission Regulation No 651/2014 declaring certain categories of aid compatible with the internal market in application of Articles 107 and 108 of the Treaty, OJ L 187/1.

⁷Commission MEMO/14/369. Commission adopts new General Block Exemption Regulation (GBER), 21.05.2014.

conditions set by the Commission. For instance, the approval of an aid scheme by the Commission implies that Member States carry out *ex ante* and *ex post* controls to ensure that the conditions set in the notification and in the Commission decision are followed by the undertakings and the granting authorities.

The Commission expects Member States to take this responsibility seriously and regularly review the way aid is granted. With the extension of the exemptions from notifications, Member States' responsibility and accountability in the design and in the implementation of the schemes has increased and with it the role for monitoring to ensure that the rules are respected.

To balance the expansion of the GBER, the SAM includes additional safeguards, such as the evaluation of a selection of large aid schemes and the transparency of the aid awards (publication of the beneficiaries and amounts). State aid control has evolved towards more *ex ante* checks carried out by the Member States on the basis of simplified criteria and more *ex post* controls executed by the Commission. On the one hand, this new *modus operandi* responds to the call for more action on the Member States' side; on the other hand, it seeks to design more appropriate mechanisms on the Commission's side to control compliance and favour best practices and efficient control at national level.

This shift to a broader scope for exempted aid has allowed the Commission to prioritize its enforcement activity by focusing on the cases with the biggest impact on the internal market (such as cases with large individual amounts exceeding the GBER notification thresholds) and cases where the market failure, the appropriate support mechanism or the impact on competition need to be carefully assessed; essentially, the cases that create the most substantial competitive concerns.

This is, for instance, the case for the investigations the Commission is currently undertaking in relation to the selective fiscal treatment of undertakings for the purpose of their corporate taxes. The Commission is currently reviewing a number of tax rulings that fiscal authorities have signed with large multinationals which appear to make aggressive tax planning possible, with the result of attracting firms in jurisdictions where the tax burden is the lowest at the expenses of other firms. Some tax rulings, for instance, where they do not respect the arm's length principle for intra-group transactions, may confer an undue advantage and distort competition where a multinational company receives preferential tax treatment that other companies do not enjoy.

1.3 Streamlined Rules and Faster Decisions

Although not explicitly mentioned in the SAM Communication, an important reason for simplifying and harmonizing the rules on State aid control is the need to streamline the system in response to the enlargement of the European Union. Indeed, a Union of 28 Member States requires a State aid control system that is both more proportionate and more effective.

In addition to the challenges of having an increased number of Member States, the different rules on State aid had developed into a complex legal framework, with a considerable number of regulations, guidelines and other guidance documents, which sometimes lacked consistency. In this respect, SAM has also constituted an opportunity to consolidate several State aid guidelines into an overall more consistent and coherent State aid framework. The development of the common principles for the assessment of aid, applicable to the compatibility analysis of all measures, was instrumental to this outcome.

2 Common Compatibility Principles

A key element of SAM is the attempt to put more emphasis on the quality and the efficiency of the State aid system by developing a pool of “common principles” of compatibility, which consolidate the many regulations, guidelines and the guidance on the compatibility of aid into a consistent conceptual framework. As a result, the new guidelines set out common compatibility criteria that make the practice of the Commission more predictable as to how the aid measure will be assessed to the benefit of the expectations of the granting authorities and beneficiaries. There are seven common principles which must be met cumulatively for aid to be considered compatible.

2.1 Contribution to a Well-Defined Objective of Common Interest

A State aid measure must aim at an objective of common interest in accordance with Article 107(3) of the Treaty. In particular, the objectives of common interest have been aligned with the policy priorities advocated in the Europe 2020 Strategy and its flagship initiatives of fostering smart, sustainable, inclusive growth, resulting in more actions targeting, among others, the promotion of research and development and innovation or the fight against climate change. Other goals worth mentioning include improving access to finance and encouraging a more sustainable economy, alongside boosting social and territorial cohesion.

2.2 Need for State Intervention

A State aid measure must be targeted towards a situation where aid can bring about a material improvement that the market cannot deliver itself, for example by remedying a market failure or addressing equity considerations or cohesion concerns. In

order to meet this condition it must be proven, in an *ex ante* assessment, that a market failure does exist.

For example, in the context of risk finance, the *ex ante* assessment must provide evidence of the fact that there is a funding gap for an SME that the market cannot fill due to an information asymmetry or another market failure.

2.3 *Appropriateness of the Aid Measure*

The proposed aid measure must be an appropriate policy instrument to address the objective of common interest. An aid measure will not be considered compatible with the internal market if the same positive contribution to the common objective is achievable through other less distortive policy tools (e.g. regulations) or other less distortive types of aid instruments (e.g. a loan rather than a grant).

For example, in the Guidelines on State aid for environmental protection and energy, the Commission explains that State aid is not always the most appropriate measure to address a market failure such as the negative externality of pollution. Indeed, when the reduction of contaminated emissions is at stake, an effective use of the Polluter Pays Principle (PPP) through environmental legislation, which commits to holding the polluter liable under national or Union law, might be preferred over the granting of State aid.

2.4 *Incentive Effect of the Aid*

The aid must induce the recipient to change its behaviour in line with the common objectives, for instance by pushing it to engage in additional activity that it would not carry out in the absence of the aid or that it would carry out in a restricted or different manner or location. In other words, it must be the case that the aid alters the “natural” course of action and that, in absence of the aid, the same policy objective would not have been reached.

An example of a concrete reinforced application of this common principle can be found in the new Regional Aid Guidelines, which have adopted a stricter approach to assess the incentive effect based on the notion of “added value of aid”. According to it, the granting authorities will have to provide sufficient economic evidence that the aid granted to large undertakings provides a real incentive to invest and set up operations in an assisted area and, hence, that it truly makes a difference in the market.

2.5 Proportionality of the Aid and Keeping Aid to a Minimum

The amount and intensity of the aid must be limited to the minimum needed to induce the additional investment or activity by the undertaking(s) concerned, where limits are expressed as caps on aid amount (e.g. net extra cost to achieve objective) and/or aid intensity (proportion of eligible costs).

For example, in the new Rescue and Restructuring Guidelines, the ‘burden-sharing’ principle has been reinforced, so as to require that losses that a firm in difficulty has accumulated before the public intervention are apportioned to the company’s shareholders and investors before any State aid is granted.

2.6 Avoidance of Undue Negative Effects on Competition and Trade Between Member States

The negative effects of aid must be sufficiently limited, so that the overall balance of the measure is positive and undue negative effects on competition and trade between Member States are neutralized.

For example, in the Framework for aid to Research and Development and Innovation (R&D&I), the Commission identifies two main potential distortions of competition, namely product market distortions and location effects. State aid for R&D&I can hamper competition in the innovation processes in several ways, for instance by distorting dynamic incentives to invest in innovation. State aid increases the likelihood of successful R&D&I activities and strengthens the beneficiary’s market position. This may lead competitors to reduce the scope of their original investment plans (crowding-out effect). Only when these negative effects are kept to a minimum and below the expected positive effects in terms of contribution to the objective of common interest can the aid be found compatible.

2.7 Transparency of Aid

Member States, the Commission, economic operators, and the general public must have easy access to all relevant acts and to pertinent information about aid awarded. This new principle, which is one of the major innovations brought about by SAM, is described further below.

Fig. 1 The SAM Instruments

3 SAM: The Instruments

SAM covered both substantive and procedural rules, as summarised in Fig. 1. Moreover, for the first time ever, the Commission has issued a Notice on the Notion of Aid (NoA). The preparation and publication of such a document, the content of which is discussed below, required time and intense discussions.

3.1 *The Notice on the Notion of Aid*

In May 2016, the Commission published the final key element of SAM, namely the Notice on the Notion of Aid, as referred to in Article 107(1) of the Treaty.⁸ The NoA is an objective concept defined by the Treaty and interpreted by the Court of Justice of the European Union, and the Commission's Notice on the NoA merely clarifies the Commission's understanding of Article 107(1) of the Treaty. Furthermore, the Notice on the NoA covers areas where the Court of Justice has not yet ruled and where there is therefore no case law to provide assistance in interpreting the rules. In these cases, the Notice on the NoA describes how the Commission interprets its role in that particular area, albeit without prejudice to the interpretation that the Court of Justice may make in the future.

It should be underlined that the Commission has no control over this objective notion of aid, as defined by the Treaties, and has a limited margin of discretion in applying it, specifically when an appraisal requires technical and complex assessment, such as those involving specific economic analysis and expertise.

The Notice identifies and clarifies the different constituent elements of the notion of State aid: the existence of an undertaking engaged in economic activity, the imputability of the measure to the State, its financing through State resources, the granting of an advantage, the selectivity of the measure and its effect on competition

⁸Commission Notice on the notion of State aid as referred to in Article 107(1) of the Treaty on the Functioning of the European Union, OJ C 262/1, 19.7.2016.

and trade between Member States. In addition, the Notice provides specific clarification of the Commission's position with regard to the public funding of infrastructures.

Furthermore, the Notice outlines specific situations where the activity may or may not have an economic nature. For instance, it explains that social security solidarity-based schemes often do not involve an economic activity and therefore fall outside the scope for State aid control. Similarly, it also explains when an activity in the area of healthcare, education, research, culture or heritage conservation can be defined as economic.

The Notice provides guidance on the notion of 'State origin', and gives examples of situations where the criteria 'imputability' and 'State resources' are met. Under its clarification of 'advantage', it provides guidance on the market economy operator (MEO) test and specifies when an indirect advantage occurs. In order to clarify the Commission's position on the meaning of 'selectivity of a measure', it discusses *de jure* and *de facto* selectivity, selectivity stemming from discretionary administrative practices, specific issues on taxation, cooperatives and many more. It provides further clarity concerning the Commission's interpretation of 'effect on trade and competition'. In particular, it gives a number of examples where the Commission considered that there was no effect on trade between Member States.

The overall purpose of the Notice is to provide guidance and legal certainty for public authorities and companies, so as to facilitate speedy investments. In this vein, the Notice provides important clarifications on public investment in infrastructure, namely that "public investment for the construction or upgrade of infrastructure is free of State aid, if it does not directly compete with other infrastructure of the same kind".⁹

Similarly, the Notice states that "[e]ven if infrastructure is built with the help of State aid, there is no aid to its operator and users if they pay a market price".¹⁰ For example, if a Member State builds an airport with the use of public funds in accordance with the Commission Aviation guidelines discussed below, there will be no State aid, provided that the operator of the airport is selected through a competitive procedure that awards the contract to the most economically advantageous offer.

The Commission's guidance on public financing of infrastructures represents a welcome and long-awaited clarification on how State aid control applies to an area often considered exempt from the application of competition law. State aid controls hence contribute to increasing legal certainty, to a level playing field and to the integrity of the internal market.

⁹Commission Press Release. IP/16/1782.

¹⁰*Ibid.*

3.2 *The Revised and New State Aid Guidelines*

As part of SAM, most of the State aid guidelines have been thoroughly revised, in line with the seven common principles discussed above. A new Communication for projects of common European interest was also introduced. These nine texts will be briefly presented in the order of their adoption by the Commission, between 2012 and 2014. We do not cover the Guidelines' content in detail, but rather focus on: outlining the objective the Guidelines pursue in each area; briefly describing their scope of application; and highlighting selected major changes compared to the pre-SAM rules.

3.2.1 **Broadband**

The revised guidelines on broadband were adopted by the Commission in December 2012.¹¹ Better broadband connectivity is a flagship priority in the Europe 2020 Strategy (Digital Agenda for Europe), making an update of the rules on public funding for broadband a necessity.

The Commission acknowledges the strategic importance of the broadband connectivity development and deployment in boosting competitiveness and innovation, creating employment and network opportunities, preventing relocation of economic activity and attracting inward investments across all sectors. Indeed, welfare improvement, social inclusion and territorial cohesion do premise on large-scale investments in high-speed internet infrastructures and technology platforms that aim to promote widespread, affordable and enhanced access to online resources and services.

The Guidelines distinguish between different areas that may be targeted. Member States are required to identify geographical areas as “white”, “grey” or “black”, taking into account whether broadband infrastructures exist in the targeted area. In particular: ‘white’ areas are those where no relevant broadband operator exists yet and ‘white NGA (next generation access)’ areas are those where no relevant broadband operator is expected to invest at any time in the following 3 years. ‘Grey’ or ‘grey NGA areas’ are those where potential competition concerns do exist and, thus, need to be analysed very carefully. Finally, ‘black’ and ‘black NGA’ areas are those where there will, in the near future, be at least two basic broadband networks with different operators and broadband services are provided under competitive conditions, thus removing the need for State intervention.

The main changes compared to the pre-SAM rules can be divided into five key areas. First, the new guidelines take into account the fact that super-fast networks can be based on different technological platforms, ensuring a principle of technological neutrality. Second, public funding will now be permitted in urban areas as part of the

¹¹EU Guidelines for the application of State aid rules in relation to the rapid deployment of broadband networks, OJ C 25/1, 26.1.2013.

Digital Agenda's plan of having access speeds of 100 Mbps or more for at least 50% of the population, although it will be subject to very strict conditions to ensure competitive outcomes. Third, to better protect private investors, the guidelines require that any public investment must fulfil a so-called "step change": publicly financed infrastructure is only allowed if it provides a substantial improvement over existing networks and not only a marginal improvement in citizens' connectivity. Fourth, when public funding is used to build a network, it must ensure open access. Finally, the guidelines encourage the use of existing infrastructure to reduce costs and push Member States to set up a national database on the availability of existing infrastructures.

3.2.2 Regional Aid

Adopted by the Commission in June 2013,¹² the Regional Aid Guidelines for 2014–2020 set out the rules under which Member States can grant State aid to undertakings to support investments in the less advantaged regions of the EU, the so-called "Assisted Areas". The Guidelines establish rules on the basis of which Member States can draw up regional aid maps to identify in which geographical areas companies are entitled to receive investment aid (aid to compensate the costs of investments in assets and wages for newly created jobs) or operating aid (aid to cover transportation and operating costs) and at what level.

The Treaty provides for the possibility of granting aid for two types of regions. First, Article 107(3)(a) refers to regions where the economic situation is extremely unfavourable compared to the Community as a whole. These regions are defined on the basis of strict EU-wide criteria. They include NUTS 2 regions that have a GDP per capita lower than 75% of the EU average, and outermost regions as defined in Article 349 of the Treaty. Second, Article 107(3)(c) refers to regions that are disadvantaged in relation to the national average. These regions are defined on the basis of a wider range of criteria, including criteria that reflect socioeconomic, geographical and structural problems at national level. These include sparsely populated regions, former Article 107(3)(a) regions and other regions in difficulty as proposed by Member States.

Under the 2014–2020 guidelines, a shift between 'a' and 'c' regions is evident. Indeed, while in the previous period the poorest regions ('a' regions) covered 33% of Europe, their proportion has shrunk to 26%. Correspondingly, the number of less disadvantaged ('c' regions) has increased from 13.6% to roughly 21.8%.

In response to the concern that there was insufficient incentive effect in the more developed assisted areas, aid in such areas faces closer scrutiny. In addition, anti-relocation provisions were strengthened in order to prevent a beneficiary from closing down the same or a similar activity in another EU region.

¹²Guidelines on regional State aid for 2014–2020, OJ C 209/1, 23.7.2013.

3.2.3 Audiovisual Production

The objective of the new audiovisual production guidelines, adopted in November 2013,¹³ is to allow aid for a wider scope of activities, giving Member States more discretion with regard to identifying cultural products worthy of public support and introducing the possibility of granting more aid to support cross-border productions and to promote film heritage.

The European Commission directs attention to the promotion of audiovisual works, since they have both an economic role in creating employment and wealth and a cultural nature in celebrating European cultural and linguistic diversity. The medium to long-term public support to the production of films, TV programmes and other related activities (scriptwriting, film distribution, film promotion, transmedia storytelling) aims to overcome a number of shortcomings from which the industry is currently suffering.

The expanded scope includes all aspects of audiovisual work creation, ranging from story concept to delivery to audience. Moreover, co-productions funded by more than one Member State may now receive higher aid intensity. In a further move to safeguard Member States' discretion over cultural aid, the new guidelines set no limits on aid for script writing, project development and difficult audiovisual works as defined by the Member State (although they will ultimately be part of the production costs, which do have a limit).

Member States can impose territorial spending conditions, especially those tailoring the preservation of the local know-how and resources, as they are deemed to be essential for the promotion of cultural diversity, yet the revised guidelines aim to ensure that the restriction is proportionate. For instance, Member States can stipulate that a minimum level of production activity is carried out in their territory as a condition of the aid, but its size is constrained not to exceed the 50% of the production budget.

3.2.4 Risk Finance

Adopted in January 2014,¹⁴ the new risk finance guidelines provide the conditions under which Member States can grant aid to facilitate more rapid and generous access to the necessary finance by European SMEs (especially for the innovative R&D intensive companies and high-growth companies in industries with high upfront investment costs) and companies with a medium capitalization (midcaps) at each stage of their development.

¹³Communication from the Commission on State aid for films and other audiovisual works, OJ C 332/1, 15.11.2013.

¹⁴Communication from the Commission, Guidelines on State aid to promote risk finance investments, OJ C 13/4, 22.1.2014.

Market failures may indeed justify the public supply of financial measures (deployed through financial intermediaries or trade platforms) and fiscal incentives (deployed on direct investments in eligible undertakings), which aim at leveraging and channelling private investors' funding into SMEs. If properly directed, State support measures may be essential to cope with the acknowledged problem of the funding gap/liquidity constraints SMEs face, while maintaining profit-driven financing decisions.

The types of aid instruments encompassed in the guidelines have been broadened so as to cover equity, quasi-equity, loans and guarantees, which better reflects existing market practices.

In order to ensure that aid complements, attracts and fuels private funding rather than replacing it (risk of 'crowding out'), the risk finance guidelines have set rules on minimum private investor participation (i.e. a private participation rate of at least 50% in non-assisted areas and 30% in assisted areas).

3.2.5 Aviation

The new guidelines on aviation were adopted in February 2014.¹⁵ Their primary goal is to ensure good connectivity between regions and foster European citizens' mobility while minimizing the distortions to competition in the internal market.

Upgrading the airports system and infrastructure means improving access to regions, easing market access for businesses, sustaining regional development and significantly contributing to employment and GDP at a local, national and Union level.

However, if not properly disciplined, public support has proven to result in duplications of airports in the same catchment area (i.e. an area within 2 h of an airport by bus, car or train), in overcapacity at regional airports and thus in the underutilization and unprofitability of many regional airports. Also, it appears that the vast majority of regional airports do not generate sufficient revenues to cover their massive fixed and operating costs.

The guidelines stress that aid for investments in airport infrastructure must be better targeted, which means that it is allowed provided that there is a genuine transport need and that public support is vital to ensure accessibility for the region. Moreover, operating aid is available for airports (with less than three million passengers per year) for a transitional period of 10 years under certain conditions, in order to give unprofitable airports time to adjust their business model to changing markets. In order to be eligible for receiving an operating aid, airports are requested to develop an *ex ante* business plan that proves they will be able to cover all operating costs with their own resources and may no longer receive operating aid by the end of the 10-year transitional period.

¹⁵Communication from the Commission, Guidelines on State aid to airports and airlines, OJ C 99/3, 4.4.2014.

The aviation guidelines also set special rules tailored to the smaller-size airports (less than 700,000 passengers per year), as they are expected to have greater difficulty in achieving full cost coverage. The reform also allows for simplified rules for start-up aid (permitted for a limited time) to new routes, to induce airlines to fly to new destinations and start taking advantage of these smaller airports. Finally, clear rules for the assessment of agreements between airports and airlines are established in order to make sure they are aid-free and beneficial to the profitability of the concerned airport.

3.2.6 Environmental Protection and Energy

The environmental protection and energy guidelines¹⁶ were adopted in April 2014 for the purpose of supporting Member States in reaching their 2020 climate change and energy sustainability targets (increased environmental protection, higher energy savings and resource efficiency, more widespread renewable energy technologies, lower environmental impact on the use of resources, a competitive and secure energy system), while addressing the market distortions that may result, notably in the field of renewable energies.

Under the new Guidelines, State aid measures that are deemed to contribute to the two dimensions of “environmental protection” (i.e. in favour of actions designed to remedy/prevent damages to physical surroundings or natural resources and to promote efficient use of natural resources) and of “energy-efficiency” (i.e. in favour of plans implementing energy-saving and energy-efficiency improvement measures) can be compatible with the internal market provided that certain conditions are met.

The guidelines encompass a large and varied set of aid measures, such as: aid for going beyond Union standards or increasing the level of environmental protection in the absence of Union standards; aid for the remediation of contaminated sites; aid for energy from renewable sources; aid for energy-efficiency measures; aid for resource efficiency and for waste management; aid for CO₂ capture, transport and storage aid in the form of reductions in or exemptions from environmental taxes; aid in the form of reductions in funding support for electricity from renewable sources; aid for energy infrastructure aid for generation adequacy measures; aid in the form of tradable permits.

Crucially, the guidelines promote a gradual shift towards a market-based approach to renewable energy through the introduction of competitive bidding processes for allocating public support. Given the significance of the move to competitive bidding, it was made gradual and went through a transitional phase between 2015 and 2016, where aid granted through a competitive process made up 5% of planned Renewable Energy Sources (RES) capacity. Since 2017, aid granted through a competitive process amounts to 100% of the planned RES capacity, unless

¹⁶Communication from the Commission, Guidelines on State aid for environmental protection and energy 2014–2020, OJ C 200/1, 28.6.2014.

a Member State demonstrates that the result is suboptimal (e.g. limited number of eligible projects/sites, risk of overcompensation or of underbidding). Also aid must be granted on the basis of a competitive bidding process open to all generators and RES technologies. Exemptions from the requirement to involve all types of RES in the competitive bidding process may be invoked if a suboptimal result is suspected to materialize (especially in view of the long-term potential of a new technology, the need to achieve diversification of resources, the grid stability).

Concerning aid in the form of reductions in the funding of support for energy from renewable sources, the new Guidelines provide a list of eligible sectors, which are exposed to a risk to their competitive position given their electro-intensity and their exposure to international trade.

Furthermore, the area of cross-border energy infrastructure benefits from the introduction of a new set of criteria devised to stimulate projects targeting improvements in cross-border energy flows and advancements in the infrastructure of Europe's less developed regions. Support to electricity generation also underwent a significant change. In response to a real risk of insufficient electricity generation capacity, Member States can introduce 'capacity mechanisms' to encourage producers to build new generation capacity or prevent others from shutting down, but under a set of conditions that aim to foster the integrity of the single market, for instance by promoting cross-border interconnection.

3.2.7 Important Projects of Common European Interest (IPCEI)

Whereas other State aid guidelines mentioned in this section are *de facto* revisions of existing guidelines, the IPCEI Communication, adopted in June 2014, is genuinely new.¹⁷ The Communication sets out the criteria under which Member States can grant support for large, transnational projects of strategic importance for the European Union and for the achievement of the Europe 2020 objectives of sustainable economic growth, job creation and competitiveness for the Union industry and economy. Thanks to their positive spillover effect on the internal market and their capacity to pool together knowledge, know-how, human and physical capital, financial resources and economic agents throughout the Union, IPCEIs can contribute to addressing the market flaws, systemic failures, societal or cohesion challenges that slow the progress of an integrated, dynamic and competitive internal market.

¹⁷Communication from the Commission, Criteria for the analysis of the compatibility with the internal market of State aid to promote the execution of important projects of common European interest, OJ C 188/4, 20.6.2014.

3.2.8 Research and Development and Innovation

The Research and Development and Innovation (R&D&I) framework was updated in May 2014.¹⁸ It covers projects falling within the categories of fundamental research (experimental or theoretical work undertaken primarily to acquire new knowledge), industrial research (research for devising new or advancing already existing goods, services, processes), experimental development (intensive and shared use of knowledge to develop new or improved goods, services, processes), feasibility studies (in-depth analysis of the potential of a project).

In this area, the shift to greater flexibility and responsibility for the Member States is particularly evident through the parallel GBER expansion. Not only have the notification thresholds been doubled for R&D projects, but the scope of the exemptions for notification has been significantly widened to include, for example, pilot projects, prototypes and innovation clusters.

The framework allows aid of up to 70% of the total eligible costs (including the costs of prototyping and demonstration) for large companies and 90% (of the total eligible costs) for small companies engaged in applied research.

In order to simplify the process of granting aid and avoid duplication of the applicable administrative procedures, thanks to the new R&D&I framework, R&D projects that are co-financed by the EU, such as those under the Horizon 2020 programme, are now presumed to constitute necessary and appropriate aid.

3.2.9 Rescue and Restructuring

The new Rescue and Restructuring (R&R) Guidelines, adopted in 2014¹⁹ and replacing a previous version of 2004, set out the criteria under which Member States can grant public funding to all undertakings in financial difficulty, except to those that operate in sectors covered by specific sectorial legislation (i.e. coal, steel, financial).

A Member State that wishes to apply these Guidelines must demonstrate on objective grounds that the undertaking concerned is in difficulty. In other words, it has to furnish evidence that, without the intervention of the State, the beneficiary is doomed to exit the market in the short to medium term. Given that its very continuity in the business is in danger, the undertaking in difficulty is no longer an appropriate vehicle either for making profits or for pursuing public policy objectives.

From an economic perspective, the exit of the less efficient undertakings allows their more efficient and technologically advanced competitors to grow. There is a consensus that R&R aids are among the most distortive types of State aid since, by

¹⁸Communication from the Commission, Framework for State aid for research and development and innovation, OJ C 198/1, 27.6.2014.

¹⁹Communication from the Commission, Guidelines on State aid for rescuing and restructuring non-financial undertakings in difficulty, OJ C 249/1, 31.7.2014.

interfering with this market mechanism, they may substantially hinder and slow down the productivity and economic growth in the sectors concerned. Further, an unconditional State aid support to a firm in difficulty may also harm the internal market by encouraging moral hazard behaviour, causing an undue and anticompetitive drop in its cost of capital, shifting an unfair share of the burden of structural adjustment to other Member States and generating barriers to entry and to cross-border activities.

Therefore, undertakings should be eligible for State aid as a very last resort when they have unsuccessfully exhausted all market-based restructurings (restructuring through agreements with creditors or by means of insolvency or reorganization proceedings) and only once within 10 years (the ‘one time, last time’ principle).

Specifically, the guidelines cover three types of aid:

1. rescue aid—urgent temporary assistance to keep an undertaking undergoing a severe deterioration of its financial/liquidity/solvency situation afloat while it engineers a restructuring/liquidation plan;
2. restructuring aid—more permanent assistance to restore the long-term viability of the undertaking in difficulty;
3. temporary restructuring support—liquidity assistance to back the restructuring and restore the viability of SMEs and small SOEs in danger.

The guidelines provide a simplified and clearer definition of undertakings in difficulty, by substituting subjective qualitative elements with objective quantitative criteria (for example indices or ratios from financial accounts) to be applied to each different company status.

The guidelines strengthen the test of the beneficial effects of the aid by introducing ‘filters’, suitable for ensuring that the aid is capable of producing sizable benefits, such as retaining jobs. The ‘filters’ add objectivity to the cost-benefit analysis by means of using benchmarks, such as evaluating whether the insolvency is at the same time persistent, accompanied by difficulties in creating employment-enhancing opportunities and takes place in a region where the unemployment level is above the national or EU average.

To ensure that aid is used to maintain viable economic activity and jobs rather than bailing out shareholders, the guidelines require the owners of beneficiary companies to contribute to the costs of restructuring (‘burden sharing’). This means that the firm’s owners will bear any loss first, and that the State—and hence the taxpayers—will receive a fair share of any future gain.

Finally, to simplify the provision of aid for restructuring, while also reducing distortions of competition, the guidelines introduce a new concept of temporary restructuring support for SMEs.

3.3 *The Revised State Aid Regulations*

Alongside a number of revised guidelines, SAM includes an update on relevant regulations that, broadly speaking, share the ambition of speeding up Commission decision-making and the mission to focus enforcement on the most distortive aid measures.

3.3.1 **Procedural Regulation**

The Council Procedural Regulation, which governs the State aid procedures in general, was revised in July 2013.²⁰ As far as the handling of complaints is concerned, a significant amendment was put forward to ensure the Commission was provided with all the information necessary to investigate complaints from the very beginning. It also introduces new tools for gathering information directly from market participants and conducting sector enquiries.

On complaints specifically, notwithstanding the fact that they had usually proven to be a rich and useful source of information, the Commission has deemed that in several cases such complaints were not motivated by genuine competition concerns and sometimes were unsubstantiated. As the Commission is legally obliged to address every complaint, this led to an excessive, wasteful deployment of limited resources. Two important changes were introduced to solve this issue. First, a complaint may now only be filed by an ‘interested party’ as defined by the Procedural Regulation. Second, the information must be submitted in a structured manner via a standard complaint form, which is made available by the Commission.

3.3.2 **De Minimis Regulation**

The *de minimis* regulation, which deals with the scope of ‘small aid amounts’, was revised in December 2013²¹ following a public consultation. Small aid amounts are deemed to have no significant impact on competition and trade in the internal market: hence, they fall outside the scope of the EU rules as they do not constitute State aid within the meaning of the Treaty. The Regulation confirms that aid of less than €200,000 per undertaking over a 3-year period is considered to be permissible. It also simplifies the application of the “single undertaking” definition and also allows companies in financial difficulty to receive *de minimis* aid.

²⁰Council Regulation (EU) No 734/2013 of 22 July 2013 amending Regulation (EC) No 659/1999 laying down detailed rules for the application of Article 93 of the EC Treaty, OJ L 204/15, 31.7.2013.

²¹Commission Regulation (EU) No 1407/2013 of 18 December 2013 on the application of Articles 107 and 108 of the Treaty on the Functioning of the European Union to *de minimis* aid, OJ L 352/1, 24.12.2013.

3.3.3 General Block Exemption Regulation

As already pointed out, the new GBER, adopted in May 2014, represents one of the most relevant changes introduced by SAM. Due to its links with the SAM objectives, it is at the heart of the reform.²²

The run-up to this change was the Council's revision of the Enabling Regulation,²³ adopted in July 2013, which authorized the Commission to add new categories of aid which it could decide to exempt from the obligation of prior notification.

In addition to the categories of aid that had already benefited from the block exemption previously (regional aid, aid to SMEs, aid for environmental protection, aid for research and development and innovation, training aid, recruitment and employment aid for disadvantaged workers and workers with disabilities), the new GBER is extended to new categories of aid, including: aid to make good the damage caused by certain natural disasters; social aid for transport for residents of remote regions; aid for broadband infrastructure; aid for culture and heritage conservation; aid for sport and multifunctional recreational infrastructures; aid for local infrastructure; and new forms of innovation aid.

The GBER contains safeguards, however, to ensure that aid does not distort competition. Accordingly, the GBER common provisions exclude export aid (banned by the WTO), aid to facilitate the closure of uncompetitive coal mines, aid to undertakings in difficulty and aid to an undertaking which is subject to an outstanding recovery order following a previous Commission decision.

In addition, it maintains but simplifies the requirement to prove the incentive effect: the aid beneficiary should submit a written application for the aid to the Member State concerned before work on the project or activity starts.

Since several aid categories have already been discussed in the previous sections, in the following we briefly describe those that are only covered by the GBER.

SMEs

The promotion of SMEs is notably allowed through investment aid (aid to cover the costs of investment in tangible and intangible assets and estimated wage costs of employment), aid in consultancy in favour of SMEs (aid to cover the costs of consulting services provided by external consultants), and aid for participation in trade fairs (aid to cover the costs incurred during any participation in a given fair).

²²Commission Regulation (EU) No 651/2014 of 17 June 2014 declaring certain categories of aid compatible with the internal market in application of Articles 107 and 108 of the Treaty, OJ L 187/1, 26.6.2014.

²³Council Regulation (EU) No 733/2013 of 22 July 2013 amending Regulation (EC) No 994/98 on the application of Articles 92 and 93 of the Treaty establishing the European Community to certain categories of horizontal State aid, OJ L 204/11, 31.7.2013.

Training

The new GBER aims to make it easier to support investments in human capital that would not otherwise be made and yet are extremely valuable for the society as a whole. As a consequence, the distinction between specific and general training has been replaced by simpler rules.

The new GBER allows for State support of projects that encourage undertakings to train the workforce, enrich the knowledge of the employees and increase the pool of skilled workers (e.g. management training, language training, measures to cover up to 50% of the costs of trainers' personnel, core operational activities and advisory services). It does not apply to aid granted for training projects which are, or will have to be, carried out to comply with national mandatory standards, since they are, or would be, implemented anyway under national law.

Employment

The new GBER broadens the definition and the scope of employment measures and workers eligible for support as likely to be excluded from the labour market due to their real or perceived lower productivity, limited employment experience or permanent disabilities.

Employment aid may take the form of grants and exemptions from employers' social security contributions or certain taxes. Moreover, States can help disadvantaged workers, severely disadvantaged workers and workers with disabilities to access the labour market by allowing for flexible fiscal arrangements, for example via aid for the recruitment of such workers in the form of wage subsidies, or by covering the extra costs arising from their perceived or real lower productivity.

Natural Disasters

Any aid measure designed to help an undertaking recover from a material damage and/or loss of income caused by a natural disaster (earthquakes, avalanches, landslides, floods, tornadoes, hurricanes, volcanic eruptions and wildfires of natural origin) may be automatically considered compatible with the internal market and exempted from the obligation of prior notification if a direct causal link between the natural disaster and the damage accrued to the company can be proven. Aid to compensate for natural disasters may take the form of reimbursement (which cannot exceed 100% of the eligible costs) of the costs arising from the material damage to assets as well as the loss of income due to the suspension of the activity for a period not exceeding 6 months after the natural disaster.

Social Aid for Transport for Residents of Remote Regions

The GBER also aims to ease the improvement of air and maritime transport connections with remote regions (e.g. outermost regions and islands, including single region island Member States and sparsely populated areas). Aid may be granted in the form of vouchers or of a full compensation for the consumer's transport costs.

Culture and Heritage Conservation

Financing of cultural and heritage conservation represents a further new category to which the revised GBER allows aid to be granted in the form of investment aid (including aid for construction or upgrade of culture infrastructure, aid for the acquisition of cultural heritage, aid for safeguarding and rehabilitating tangible and intangible heritage) and operating aid (including aid to sustain the costs of the institution's or site's activities and projects). Given their commercial character and huge distortion potential, aid to the press and magazines as well as aid to fashion, design and videogames are not envisaged by the GBER.

Sport and Multifunctional Recreational Infrastructures

The GBER allows investment and operating aid for the construction, upgrade and operation of sport infrastructures—in particular in the field of amateur sport—offering cultural and recreational services with the exception of leisure parks and hotel facilities. The GBER provides that access to both sport and multifunctional recreational infrastructures must be open to several users and granted on a transparent and non-discriminatory basis.

3.3.4 Local Infrastructures

The GBER also exempts from prior notification a new category of aid for local infrastructures, provided it does not exceed €10 million. The aid should target the construction of new or the upgrade of existing local infrastructures. State aid is allowed provided that prices charged match the market prices and that open, transparent and non-discriminatory access to the infrastructures upon which investments are made is granted.

4 A Renewed Partnership on State Aid Between the Commission and the Member States

In light of the increased responsibilities for Member States over the design and implementation of State aid measures, the SAM has been accompanied by a strengthening of a so-called “partnership approach”, whereby a better cooperation between the Commission and the Member States is pursued in order to ensure that each Member State has sufficient capacity to carry out its new responsibilities.

In the first half of 2014, a High Level Group of Member States (multilateral partnership) was convened for the first time by the Commission to prepare, and later to accompany, the transition to the SAM rules through developing soft coordination mechanisms.

The multilateral partnership has its main focal point in a Member States-led Working Group for SAM implementation (WG). The mandate of the WG is fairly broad.²⁴ Typically, the WG selects a few topics for discussion in each meeting, with a view to identifying best practices that can form the basis for recommendations in areas such as organization, training, prioritization of cases, use and compliance with the GBER, evaluation and transparency.

Alongside the horizontal Member States’ WG, specific WGs chaired by the Commission have been convened to discuss sectorial issues, such as infrastructure or energy.

In addition to the multilateral partnership, Member States may also voluntarily opt for a strengthened bilateral partnership with the Commission. This is a promising new avenue that could be developed further in the near future.

5 Transparency

An important core purpose of SAM has been to foster transparent procedures for awarding State aid. As of 1 July 2016, Member States are required to put in place comprehensive websites at regional or national level²⁵ in order to publish the name of the beneficiary, the date of granting, the form and the amount of the aid granted. This disclosure obligation applies to all individual State aid awards over €500,000 and is binding within the 6 months following the date of the granting (or within

²⁴The mandate of the Group includes the following: implementation of the new SAM instruments (evaluation, transparency, new procedural regulation), share Member States’ experience with the Best Practices Code and if necessary make recommendations for its review, share Member States’ best practices on specific topics (e.g. cumulation rules, incentive effect), identify effective mechanisms for State aid control in the context of structural funds, share best practices on the mechanisms in place to ensure State aid compliance and legal certainty (e.g. under GBER) including processes, cases and institutional set-up.

²⁵Cf. <https://webgate.ec.europa.eu/competition/transparency/public?lang=en>.

1 year in case of fiscal aid). The requirements also include the obligation to provide further basic information concerning the beneficiary entity, such as indicating whether the beneficiary is an SME or a large company, the location of the beneficiary and the sector in which it is active. Further details that must be made publicly accessible cover the measure itself, such as the full text of the aid measures, the aid instrument, the granting authority, the date the aid was granted and its legal basis.

Transparency is now a compatibility requirement: an aid may not be declared compatible unless the pertinent information is published within the time limit set by the rules. Transparency promotes accountability, disclosing the legal/economic rationale underpinning the State aid measures, and consequently can provide grounds for more effective policies. Competitors of aid recipients, citizens and other stakeholders will be able to check whether the aid has been granted legally and see which companies have received State aid, how much and for what purpose. Eventually, transparency may facilitate more market-based enforcement and discipline, thereby contributing to a level playing field across the internal market.

In order to facilitate this drive for transparency, the European Commission has developed a new IT platform, the Transparency Award Module (TAM), where all Member States are able to encode and publish the requisite information. The system has been developed so as to be sufficiently flexible to deal with the different institutional set-ups in Member States so that data can be put into the TAM regardless of whether the granting authority is decentralized or not, or any other combinations of administrative set-up that may exist in a Member State.

A transparency Steering Group has also been created to review progress and discuss IT and methodological issues. The Commission is also drawing up guidance and other tools for assisting the Member States in meeting their transparency obligations. In particular, this guidance concerns more complex areas, such as tax aid.

6 Evaluation

Evaluation represents one of the major innovations of SAM. Its intrinsic objective is to gather reliable evidence to better comprehend the impact of the aid measures on the markets and thus allow for more informed future policy-making by the Member States and by the Commission.

The introduction of a systematic evaluation requirement also complements the major expansion of the GBER and serves, alongside transparency and monitoring, as a necessary *ex post* safeguard to promote the quality and effectiveness of aid policies, as a tool to verify that the objectives of the measures are achieved, and finally as an opportunity to identify scope for long-term improvement.

To date, when applying EU State aid rules, relatively limited importance has been attached to *ex post* evidence on what has actually been achieved with public funds or on the impact of State aid on competition. It is however essential for decision makers both at the Member State and Union level to consider the measurable results of State

aid granted in the past and the lessons learnt. This information will help to ensure that schemes financed by State aid are more effective and create less distortion in markets, and will also improve the efficiency of future schemes and, possibly, of future rules for granting State aid.

As of 1 July 2014, evaluation is required for large GBER schemes in certain aid categories²⁶ and is also provided for some notified schemes under the new generation of State aid guidelines.²⁷ Large schemes under the GBER for which the evaluation requirement applies remain exempted under the Regulation for an initial period of 6 months, which can be extended by the Commission upon approval of an evaluation plan.

A key requisite for Member States is the notification of an evaluation plan at the outset of an aid scheme's implementation. This provision guarantees that the evaluation will be carried out according to high quality standards in line with the Methodological Guidance provided by the Commission's services.²⁸ In addition, it ensures consistent treatment across the board while respecting the need for a proportionate, case-by-case approach to evaluation.

The Staff Working Document, in particular, describes the key elements of the required evaluation plans with the aim of assisting Member States in preparing and conducting evaluations of their aid schemes. The evaluation plans should include information on:

1. The objective of the aid scheme to be evaluated;
2. The evaluation questions;
3. The result indicators;
4. The envisaged methods of conducting the evaluation²⁹;
5. The data-collection requirements;
6. The timeline of the evaluation, including the date of submission of the final evaluation report;
7. The description of the independent body conducting the evaluation or the criteria that will be used for its selection;
8. The modalities for ensuring the publicity of the evaluation.

As of May 2017, a total of 35 evaluations have been required. The schemes for which an evaluation will be conducted account for approximately €40 billion in total

²⁶Schemes with an average annual State aid budget above €150 million in the fields of regional aid, aid for SMEs and access to finance, aid for research and development and innovation, energy and environmental aid and aid for broadband infrastructures.

²⁷Evaluation might apply to notified aid schemes with large budgets containing novel characteristics or when significant market, technology or regulatory changes are foreseen.

²⁸Commission Staff Working Document "Common methodology for State aid evaluation"—SWD (2014)179 final.

²⁹The recommended econometric evaluation methods (including randomized experiments, difference-in-differences and regression discontinuity design) should allow the causal impact of the scheme itself to be identified, undistorted by other variables that may have had an effect on the observed outcomes.

annual budget, which—to provide an order of magnitude—corresponds to 40% of the total non-crisis aid expenditure reported by Member States for the year 2015.

Thus far, evaluation has concerned schemes in 13 Member States and more than half of the evaluations concerned either R&D&I or regional aid schemes. However, there is also a significant and increasing presence of broadband or energy schemes.

At the beginning, evaluation exclusively pertained to large schemes under the GBER, for which an ad hoc decision approving the evaluation plan needs to be adopted. But evaluation is increasingly required in the compatibility assessment of notified schemes as well.

The evaluations to be conducted will provide rigorous estimations of the incentive effect of the aid on its beneficiaries (did the aid achieve its objectives?), differentiated by categories of beneficiaries (e.g. did large and small enterprises benefit in the same way?), and of the proportionality of the aid (was the scheme cost-effective?). These evaluations will also provide useful evidence on the indirect impact of the schemes (what were the costs and benefits for other firms?) and on the appropriateness of the instrument (was it the best way to achieve the scheme's objectives?).

While evaluation results should be used primarily by the Member States in designing future measures, they may also help the Commission in reviewing its State aid rules. Although it will take some time to materialize, the knowledge that will be gathered in the coming years has the potential to make State aid more targeted and cost-effective as well as less distortive.

7 Conclusions

The European Commission launched the SAM initiative in May 2012 through a Commission Communication, which laid out the main priorities and reform programme for the Commission's action, and committed through it to revise the majority of State aid regulations and guidelines and to introduce new features of State aid control. SAM was enacted to tackle a number of current challenges, such as the urgent need for a more proportionate and effective State aid control system, the ever-expanding body of case law concerning the definition and the scope of State aid, the shortcomings of the State aid framework and procedures, and the fact that too many complaints filed to the Commission were *de facto* insignificant to the internal market.

The overriding theme of SAM has been enhancing efficiency in State aid control by means of shifting its focus to the biggest cases with the most significant potential for distorting competition in the internal market. One can observe that the Juncker Commission's slogan to be 'big on big, small on small' and promote investments have since made SAM even more relevant.

With the clarification on the notion of aid and the significant extension of the set of measures exempted from prior notification to the Commission, administrative costs have been reduced. Furthermore, another major advance is that the new

compatibility rules have been designed so as to discourage useless and counter-productive aid and rather promote ‘good aid’, whose notion is deeply entrenched in the Europe 2020 Strategy and whose aim is fixing actual market failures while minimizing any negative impact.

To accompany the process and promote change, the Commission has strengthened the partnership with the Member States, both at the multilateral and at the bilateral level, with the Member States most interested to seize the challenges and opportunities of the modernization. This is expected to lead to more effective State aid control at national level.

Transparency and evaluation are two crucial novelties, which are expected to pave the way for a new approach based on evidence-based policy-making and to strengthen the legal and the political responsibility for the design, implementation and use of State aid through a wider, more transparent and accessible public debate.

The Notice on the Notion of State Aid: Every Light Has Its Shadow

Andrea Biondi and Oana Stefan

1 Introduction

In July 2016 the European Commission published a Notice on the notion of State aid as referred to in Article 107(1) of the Treaty on the Functioning of the European Union.¹ The Notice is the last piece of the State aid modernization jigsaw and, in theory, as with all last pieces, it is the most crucial one as it aims to clarify key concepts on the definition of what constitutes an aid. The Notice manifesto is that this is a necessary operation in the interest of transparency, consistency, and easy application of the law across the European Union.² It is difficult not to agree as these are laudable objectives and certainly the Notice is an impressive document: it should increase legal certainty for businesses and national administrations alike by offering an explanation of Article 107(1) case law. It also streamlines policy developments in the sector. Notwithstanding the ambitious task the Commission undertook in publishing this Notice, there are in our view certain reservations that are only fair to discuss, once again acknowledging the considerable effort made to clarify an extremely complex area of EU law. Our contentions are mainly two: the first stems from old fashioned debates on hierarchy of sources and legality. Second, that concerns on these fronts might in turn impede the regulatory goals envisaged by the European Commission upon publication of the Notice. In other words, the

¹Commission Notice on the notion of State aid as referred to in Article 107(1) of the Treaty on the Functioning of the European Union, OJ C 262, 19.7.2016, pp. 1–50. Hereafter ‘Notice on the notion of aid.’

²Ibid., para 2.

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definition(s) of the notion of aid as made explicit in the Notice end(s) up being unavoidably partial and thus questionable.

This paper will not deal with every specific point raised by the 60 pages of the Notice as this would be an impossible task, but it will look at the Notice through the prism of its legal status and of the evolution of the case law on the notion of aid. It will start by discussing the place of the Notice within the hybrid framework of State aid regulation in Europe. It will then clarify several aspects related to the legal nature and legal effects. The criteria for establishing the legality of the Notice on the notion of aid will be briefly discussed before moving to a legal analysis of the text of this instrument.

2 The Place of the Notice Within the Hybrid State Aid Regulatory Framework

The Notice belongs to a category of legal instruments assimilated to the recommendations and opinions mentioned in Article 288(4) TFEU, often referred to as ‘soft law’. Such instruments are not legally binding according to the Treaty, but may produce practical and even legal effects.³ Soft law is not new to EU State aid. In fact, regulation in this field has been characterized by hybridity,⁴ as binding and non-binding legal instruments have been employed in various combinations by the European institutions in order to achieve a scaling down and a better rationalization of subsidies throughout the European Union. In the first decades, State aid enforcement relied solely on the Treaty articles, with the Commission issuing decisions on a case-by-case basis—an approach perceived as problematic from a transparency point of view.⁵ After failing in its attempts to fill this regulatory gap, the Commission resorted to soft law, because of the advantages it represented: its speedy adoption process and its potential to increase flexibility, transparency, and legal certainty of decision making in the State aid field.⁶ Communications, notices, guidelines, or frameworks have been issued by the Commission ever since the 1970s and for a long time constituted the main tool for State aid regulation. The soft law approach was formalised by the adoption of Commission (hard law) decisions in individual cases based on the various soft law instruments,⁷ or by Court endorsement.⁸

Much of the soft law issued in State aid dealt with the application of Article 107 (3): aid, which may be declared, at the Commission’s discretion, compatible with the

³Snyder (1995), p. 64 amended during the 6th International Workshop for Young Scholars, Dublin, November 2007.

⁴On the concept of hybridity see Trubek et al. (2006).

⁵Rawlinson (1993), p. 58.

⁶Rawlinson (1993), pp. 56–58.

⁷Cini (2001), pp. 192, 200.

⁸See on this Snyder (1994).

internal market. The initial approach to regulation was industry-specific and soft law instruments were issued in various sectors, such as coal and steel, motor vehicles, and fisheries. For the past decade, State aid has been undergoing a process of modernisation, streamlined in the 2005 State Aid Action Plan⁹ and subsequently in the 2012 Communication on State Aid Modernisation¹⁰—both soft law instruments. These initiatives were spurred by the Lisbon and the Europe 2020 agendas, respectively, and lead to the amendment of several guidelines, notices, and frameworks, as well as to the issuing of new ones, such as the Notice on the notion of aid. The approach to regulation is now horizontal, as the support from individual undertakings shifted in recent instruments to objectives of Union interest such as education, research, employment, and regional development.

The Notice was issued following a consultation process on a draft document, open from January through March 2014. The target group included public authorities, citizens, companies and organisations, with a particular focus on national authorities including courts dealing with State aid, academics and lawyers.¹¹ A bit more than 2 years after the end of this first—and only—round of consultations, the final version of the Notice was published. While the positions of various organisations are available online, there is no information on whether supplementary negotiations or consultations have been carried out. A majority of Member States intervened, and a number of public and private organisations also replied to the consultations.

Conducting consultations for soft law instruments is fairly standard in competition and State aid. It responds to the need to ensure openness of decision making, as laid down in Article 15 TFEU. Indeed, openness relates not only to access to information but also to the possibility for the different actors to ‘monitor and influence legislative and executive processes through access to information and access to decision-making arenas.’¹² While public consultations might inject some legitimacy into the decision making process, as with other soft law instruments, there is no evidence that the European Parliament was involved in the adoption of the Notice on the notion of aid. It is beyond the scope of this chapter to engage in an empirical analysis of how and whether the responses to the consultation were taken into account by the European Commission. We would only want to flag that, in the interest of openness, it might be useful for the Commission to give some details of the way in which they took into account the views expressed by the participants in its

⁹European Commission, State Aid Action Plan: Less and Better Targeted State Aid A Roadmap for State Aid Reform 2005–2009 COM (2005) 107.

¹⁰Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions—EU State Aid Modernisation (SAM) COM/2012/0209 final.

¹¹See http://ec.europa.eu/competition/consultations/2014_state_aid_notion/index_en.html. The authors have contributed to this process—see Biondi et al. (2014).

¹²Curtin et al. (2013), pp. 1, 6.

consultations. This might alleviate some of the criticisms that soft law is sometimes issued according to procedures that completely lack transparency.¹³

2.1 *Legal Nature and Legal Effects*

As mentioned in the Preamble, the Notice aims to foster general principles of law such as clarity, transparency, and consistency.¹⁴ Such a statement is frequently found in soft law instruments issued by the European Commission, underlining the function of notices or communications to create links between the institutions and individuals, natural or legal persons, thus enhancing legal certainty and transparency of administrative activity. Through instruments such as the Notice on the notion of aid, the Commission explains the existing EU law in a specific sector, and it presents its own views on the law and clarifies those provisions of an open and indeterminate character.¹⁵ In this context, Snyder talked about ‘regulation by publication’,¹⁶ and Hoffman about ‘regulation by information’.¹⁷ In principle, the mechanism is as follows: the European Commission publishes guidance and regulates without recourse to binding rules. Individuals would adjust their behaviour in accordance to the guidelines issued by the Commission in order to pre-empt potential challenges to their practices. National administrations would also be guided by the communications of the Commission, and hence the different levels of governance and enforcement would be connected, in the European Union, ‘not by binding decisions but by transfers of information’.¹⁸ However, in practice, soft law cannot always promote clarity, consistency, and transparency at *all* levels of governance and enforcement. This is because, in the absence of legally binding force, the effects of such instruments are rather difficult to determine and the enforceability of soft law is problematic.

At the EU level, the Notice on the notion of aid creates legally binding effects for the European Commission (assuming consistency with hard law provisions, an issue we will discuss in the next section). As noted by the European Court of Justice, by publishing soft law, the Commission imposes a limit on the exercise of its discretion and cannot depart from those rules under pain of being found, where appropriate, to be in breach of the general principles of law, such as equal treatment or the protection

¹³Scott (2011), pp. 329, 336.

¹⁴[...] ‘contributing to an easier, more transparent and more consistent application of this notion across the Union.’ Notice on the notion of aid, para 1.

¹⁵See the Special Issue of *Revue Trimestrielle de l’Union Européenne*, no 575, Feb 2014, in particular B Bertrand, p. 80.

¹⁶Snyder (1994), pp. 199–201.

¹⁷Hofmann (2006), pp. 169–170.

¹⁸Benz (2000), p. 33.

of legitimate expectations.¹⁹ The Court thus established a direct link between on the one hand the principle of legitimate expectations and equal treatment, and the legal effects of soft law on the other. This line of reasoning was reiterated in an established line of case law, including in the area of State aid²⁰; it appears that the objectives of clarity, consistency, and transparency, laid down in the Preamble of the Notice have the potential to be ensured at the EU level.

The effects of the Notice at the national level are less clear, potentially endangering transparency and consistency in the application of State aid rules. Indeed, if it is settled case law that soft law binds the discretion of the enacting institution, the European Courts are more parsimonious when admitting binding effects of soft law instruments for national authorities. For example, in *Expedia*, a competition law case, the Court held that even though Commission notices are intended to give guidance in the application of Article 101 TFEU, national authorities and courts are not bound to apply such instruments.²¹ The Preamble of the Notice on the notion of aid appears to suggest that it needs to be applied by national authorities and Courts²² when they decide on cases involving Article 107 (1). However, an obligation for national authorities and courts to take the Notice into consideration can hardly rely on this paragraph alone. The ECJ found certain State aid soft law instruments binding for national authorities as a result of the duty of cooperation between the Commission and Member States, enshrined in Article 108(1) TFEU. That paragraph places an obligation on the Commission and Member States to cooperate in order to keep under constant review all systems of aid existing in those States. However, for legally binding effects to occur, Member State acceptance of soft law is required.²³ Guidelines lacking Member State endorsement could not—at least in law—fetter the discretion of national authorities.²⁴

In *IJssel-Vliet*, the Court had the opportunity to clarify the issue further when asked to interpret the Guidelines on aid in the fisheries sector. The Court considered, first, the Article 108(1) TFEU obligation of cooperation between the Commission and the Member States in keeping under constant review the systems of aid. It identified the guidelines on fisheries as an element of that obligation. Second, the Court analysed whether the cooperation materialized, and concluded that the Netherlands had agreed to the provisions of the Guidelines following an exchange of letters. Consequently, the guidelines created a framework of cooperation in

¹⁹Joined Cases C-189, 202, 205, 208 & 213/02 *Dansk Rørindustri and others v Commission* ECLI:EU:C:2005:408, para. 211.

²⁰Judgment in Case C-526/14 *Kotnik*, ECLI:EU:C:2016:570, para 40; Judgment in Case C-431/14 *P Greece v Commission*, ECLI:EU:C:2016:145, para 69 and 70.

²¹Judgment in Case C-226/11 *Expedia*, ECLI:EU:C:2012:795, para 28.

²²‘This Notice only concerns the notion of State aid as referred to in Article 107(1) of the Treaty, which both the Commission and national authorities (including national courts) have to apply in conjunction with the notification and standstill obligations provided for in Article 108(3) of the Treaty.’ Notice on the notion of aid, para. 2.

²³Judgment in Case C-313/90 *CIRFS v. Commission*, ECLI:EU:C:1993:111, para. 35.

²⁴Judgment in Case C-242/00 *Germany v. Commission*, ECLI:EU:C:2002:380, para. 35.

accordance with Article 108(1) TFEU from which neither the Commission nor the Member States could be released.²⁵ The same mechanism was reiterated in subsequent State aid cases.²⁶

It follows that the binding legal effect of State aid soft law for the Member States rests on a ‘framework of cooperation’ which includes the Member State’s acceptance of a particular instrument and the specific obligation of cooperation provided for in Article 108 TFEU.²⁷ It remains to be seen whether such a framework of cooperation can be developed for the Notice on the notion of aid. The Notice was issued following a process of consultation, and Member States and stakeholders were asked to contribute. However, the case law appears to suggest that more is needed in order to establish that soft law has been accepted by the Member States and could produce legally binding effects for national authorities. For instance, in *Spain v Commission* the text of the soft law instrument at stake expressly called for the consultation of the Member States with regards to subsequent revisions, and unilateral amendments by the European Commission were judged not binding on national authorities.²⁸ Such an obligation for consultation is not written down in the text of the Notice on the notion of aid. Furthermore, acceptance might be deduced from the application of the Notice by the Member States—in the case of *IJssel-Vliet*, the Court established that not only was the Netherlands consulted when the fisheries guidelines were reviewed, but that cooperation with the Commission was maintained in practice throughout the existence of the Guidelines.²⁹ A sustained practice of compliance, materialized through concrete exchanges between the Commission and the Member State, might constitute grounds for the Court to determine that the Notice has been accepted by a Member State and that, as a consequence, it is binding on national authorities.

Soft law can also produce practical effects for the Member States, such as a route to policy change and inducing subtler changes at the level of discourse, understanding and policy principles. Hence, ‘formally non-binding agreements can gradually become politically, socially and morally binding for the actors involved.’³⁰ In the long run, States may integrate, into their national orders, norms and practices established by way of soft law. Such effects have not yet been given judicial recognition. In the case of the Notice on the notion of aid, participation in the public consultations and the satisfaction that a certain view was heard might entice Member States to comply with the Notice. Indeed, a sense of obligation might simply be

²⁵Judgment in Case C-311/94 *IJssel-Vliet v. Minister van Economische Zaken*, ECLI:EU:C:1996:383, para. 37–44.

²⁶See for a recent example Judgment of the Court in Case C-121/10 *Commission v Council* ECLI:EU:C:2013:784, para 52.

²⁷As summarized also in the Opinion of Advocate General Léger in Case C-382/99 *Netherlands v. Commission*, ECLI:EU:C:2002:169, para. 47.

²⁸Judgment in Case C-292/95 *Spain v. Commission*, ECLI:EU:C:1997:192, para. 30.

²⁹Judgment in Case C-311/94 *IJssel-Vliet v. Minister van Economische Zaken*, paras 39 and 40.

³⁰Jacobsson (2004), p. 359.

generated by the belief that an instrument was adopted through legitimate processes.³¹ However, the consultations or the negotiations for new soft law instruments might be sometimes problematic for certain countries, with smaller Member States feeling ‘neglected and ploughed over in this process.’³² The Commission can also force acceptance of soft law through the threat of opening formal investigations into State aid measures covered by newly adopted soft law.³³ Of course, ‘only if a broad majority of Member States agree with its soft law can the Commission credibly threaten individual Member States and force them into a final approval’,³⁴ which brings us back to the obligation through legitimacy point discussed above.

It follows that even if the Notice might not fulfil the *IJssel-Vliet* criteria in order for the ECJ to acknowledge its legally binding effects, its practical effects might be very important. National administrative authorities might apply the Notice whenever they decide to grant aid to certain companies. Furthermore, national courts might also decide to apply the Notice, given the general recommendation of the ECJ that national judges should ‘take soft law into consideration’ when judging on cases.³⁵ However, in the absence of legally binding effects, national authorities and courts can also choose not to take the Notice into account. The consistency objective is thus undermined, as variation can easily occur at the national level with some of the Member States feeling bound to apply the Notice, whereas others consider that they are free to disregard it. Clarity and transparency are also negatively impacted, given that the decision of national authorities or courts to rely or not on the Notice will ultimately impact on the legal situation of potential beneficiaries or competitors. Individuals would find it very difficult to challenge the Notice before a court without proving that it is formally binding for national authorities. Such lack of judicial review is potentially dangerous, if one considers the important practical effects that soft law can have. Seen from this perspective, it becomes necessary to assess the legality of the Notice on the notion of aid, an issue that brings to the fore a certain constitutional uneasiness.

3 The ‘Oddity’ of the Notice: A Constitutional Uneasiness

From a legality perspective, soft law instruments must comply with hard law provisions—stated as early as in the 1980s case law. One of the first times that the Court dealt with the issue was a State aid case, *Deufil*. The Court held at that time that a

³¹Finnemore and Toope (2001), pp. 743, 749.

³²Aldestam (2004), p. 14.

³³Further references in Blauberger (2009), pp. 729–730.

³⁴Blauberger (2009), p. 730.

³⁵Judgment in Case C-322/88 *Grimaldi v. Fonds des maladies professionnelles* ECLI:EU:C:1989:646, para. 18; Opinion of Advocate General Ruiz-Jarabo Colomer in Case C-415/07 *Lodato Gennaro v. INPS and SCCI* ECLI:EU:C:2008:658, para. 37.

State aid code could not derogate from Articles 107 and 108 TFEU.³⁶ This was reiterated in a number of cases, such as *France vs Commission*, where a communication was annulled by the Court.³⁷ The communication was considered *ultra vires* because it introduced amendments to a directive which could not be done by means of a non-binding legal act. Determining whether soft law is *ultra vires*—or that it introduces new obligations that go beyond what is written in hard law—is not a straightforward task. Indeed, in the case of vague, general hard law norms, it may ‘frequently be impossible to make a clear determination of where the boundaries of the existing obligation begin and end’.³⁸ Even though a soft law instrument might not seem to introduce new legal obligations, it might promote a very radical interpretation of an obligation provided in a regulation or a directive, thus having in practice significant effects on the legal situation of individuals or Member States. Indeed, one can envisage that, in the absence of the soft law instrument, the authorities might interpret the specific obligation provided in the hard law provision in a more lenient or more stringent way.

Such general concerns are also relevant for the Notice on the notion of aid, and, in this connection, two specific issues need to be flagged. First, the Notice on the notion of aid is an instrument issued within the ambit of Article 107(1), whereas so far soft law was mostly confined to interpreting the other paragraphs of Article 107. This approach is significant from a constitutional perspective, specifically with regards to institutional competences. Soft law is generally issued by the Commission in order to explain how it will exercise its discretion. However, as laid down in the case law, the notion of State aid is an objective concept defined by the Treaty, and the competence to interpret this notion belongs solely to the Court of Justice. In contrast with Article 107(3) TFEU, in the area of Article 107(1) there is very little discretion for the European Commission to exert or to explain. In fact, the Commission duly acknowledges in the Notice that its discretion is limited to technical or complex appraisals, ‘in particular in situations involving complex economic assessments’.³⁹ How far the Notice on the Notion of aid can go depends thus on the tight margin of Commission discretion in the field of Article 107(1).

Second, the Commission is limited in its interpretation of Article 107(1) by the case law of the Court, as is also acknowledged by the Preamble to the Notice. Article 107(1) defines the notion of aid, with the Court of Justice distilling four criteria therefrom: advantage, State resources, selectivity, effect on competition and trade.⁴⁰ The criteria have been further interpreted in an important body of case law which defines the boundaries of Article 107(1), and a notice interpreting the notion of aid needs to remain within these boundaries. In fact, the ECJ has been constantly stating that soft law *in general* should be subordinated to judicial precedent, and noted that

³⁶Judgment in Case 310/85 *Deufil v Commission* ECLI:EU:C:1987:96, para 22.

³⁷Judgment in Case C-325/91 *France v Commission* ECLI:EU:C:1993:245, para 31.

³⁸Scott (2011), p. 342.

³⁹Notice on the notion of aid, para. 4.

⁴⁰Judgment in Case C-280/00, *Altmark* ECLI:EU:C:2003:415, para 75.

often soft law merely restates what was already established through judicial practice. For example, when assessing whether the guidelines on antitrust fines remained within the limits established by hard law, the Court analysed their conformity with previous case law. Furthermore, the fact that soft law must not contradict precedent is often mentioned by the courts as an additional safeguard so that what the Commission stated in certain guidelines, notices or communications is in line with EU law. Finally, soft law might be used in order to develop and clarify general requirements laid down in previous case law, but this is only in order to set out tighter limits on administrative discretion. Once imposed, such limits need to be observed and the Commission could not rely, in its favour, on the more permissive provisions of previous case law or hard law instruments.⁴¹

It follows that the Notice on the notion of aid should *mainly* codify the case law of the Court. To a certain extent, the Notice is extremely useful in that it brings together in a structured document many principles laid down in the judgments of the ECJ. However, legality becomes problematic and needs further scrutiny especially because many paragraphs of the Notice refer solely to Commission practice. Some of these paragraphs may fall within the narrow administrative discretion in the area of 107(1)—as fluidly as these limits might be defined. Some others might deal with ‘issues that have not yet been considered by the Union Courts’, on which the Commission promises in the Preamble to ‘set out how the notion of State aid should be construed.’⁴²

All these are of course matters left ultimately to the appraisal of the European Courts. However, given its limited binding effects, judicial review of the Notice is problematic, and one may wonder whether the Court will ever have the opportunity to scrutinize the compatibility of this instrument with its own case law. Furthermore, transparency and legitimate expectations might be diminished with individuals not being able to ascertain whether the paragraphs of the Notice referring solely to Commission decisional practice are—or will be—endorsed by the ECJ in case of legal action. To conclude, while the Notice must be commended for pooling a vast array of subtleties inherent within the notion of aid, its goal to promote clarity is undermined by the uneasy mix of codified case law, views of the Commission on issues not yet decided by the ECJ, and views of the Commission on aspects pertaining to its limited discretion.

⁴¹For a discussion and references on EU soft law and judicial precedent see Stefan (2012), pp. 152–154.

⁴²Paragraph 3 of the Notice on the Notion of aid.

4 The Notion of Aid as It Emerges from the Notice: Some Concerns

To move now to the substance, there are several concerns that the Notice raises. They are in our view classifiable in: agenda setting concerns and playing with the Treaty concerns. It would of course be asking too much from a ‘policy entrusted’ body such as the European Commission to come up with a sort of an aseptic document, totally immune from any subjective evaluations. This is more so for such a complex area of EU law such as State aid control; an area that has been through endless variations and evolutions throughout its 60 years or so of application.⁴³ Thus the Commission should be entirely forgiven for the possible temptation to try to settle with the Notice some of the more uncertain aspects in the judicial application of the notion of aid and to indicate solutions for the future. Still, it all depends to what extent and how in depth this agenda setting task is undertaken.

4.1 Infrastructure

For over 40 years, the European Court of Justice has been repeating that the notion of aid is an ‘objective’ one and thus ‘Article [107] does not distinguish between the measures of State intervention concerned by reference to their causes or aims but define them in relation to their effects.’⁴⁴ This principle encompasses another one, that is to say the irrelevance in the context of the application of Article 107(1) of the kind of regulatory competence exercised by the Member State. In the old and celebrated *Italy v Commission*, the Court vigorously rejected the argument presented by the Italian Government that, as the power to tax was to be reserved to the Member States, this would have prevented the application of EU law.⁴⁵ Thus from the perspective of the nature of the measure, State aid as a notion is ‘blind’ (whilst State aid as a policy is not, obviously). The Notice seems instead to prefer to *highlight* some very specific areas. In particular, the Notice contains two very large sections, one devoted to fiscal aid and the other to infrastructure.

We will deal with fiscal aid below, let’s concentrate here on Infrastructure. This specific topic is even given an *ad hoc* section, the number seven, following the six classic ones on the notion of undertaking, State resources, the market operator principle, selectivity and effect on trade and competition (the Introduction is number one!). For a reader not venturing beyond the index, infrastructure looks like one of the constitutive elements of the notion of aid. The more alert reader will learn that the reason for such a prominence of infrastructure is the fact that Member States sought

⁴³See for an attempt to trace such an evolution Biondi and Righini (2015).

⁴⁴Judgment in Case C-487/06 *British Aggregates Association v Commission* ECLI:EU:C:2008:757, para 85.

⁴⁵Judgment in Case C-173/73 *Italy v Commission* ECLI:EU:C:1974:71.

specific guidance on the strategic sector of public funding of infrastructure.⁴⁶ This is certainly true, and it is even truer that public support for infrastructure is an area of EU State aid control where legal certainty is badly needed. Infrastructure has been traditionally considered as the expression of State functions and thus falling outside the scope of Treaty rules on State aid. The EU Courts, in a relatively small number of cases, most notably *Aéroports de Paris* and *Leipzig Halle*, held instead (and for the first time) that the funding of infrastructure that can be commercially exploited falls within the scope of Article 107(1). Conversely, in cases whether the infrastructure serves only the exercise of public powers, the measures will not fall foul of State aid rules.⁴⁷

The fact that these two judgments somehow reversed a sort of perennial belief that infrastructure was a State aid free-zone, did indeed create some uncertainty especially for all those projects started in a pre *Aéroports de Paris* era. The Court of Justice itself, in *Leipzig Halle*, while rejecting a claim based on a breach of the principle of non-retroactivity, hinted to the fact that pre- *Aéroports de Paris* funding for infrastructure could be legitimately considered as measures of general economic policy and thus not a violation Article 107(1).⁴⁸ In the Notice of aid, the Commission takes such a hint to its extreme consequences by fixing a precise cut-off time. It states that ‘it follows that the Commission cannot put such funding measures definitively adopted before the *Aéroports de Paris* judgment into question on the basis of State aid rules. This does not imply any presumption as regards the presence or absence of State aid or legitimate expectations as regards funding measures not definitively adopted before the *Aéroports de Paris* judgment, which will have to be verified on a case by case basis.’⁴⁹ You can already spot here some lucrative litigation going to Luxembourg, especially as the ECJ case law on the matter is far from being settled, with publicly run airports being allowed recently a certain margin of discretion to fix their own charges and fees. In *Lubeck*,⁵⁰ for instance, the Commission lost a case challenging airport pricing policies as the Court of Justice rejected the argument that selectivity could be presumed for measures laying down the conditions on which a public undertaking offers its own goods or services. Following a narrow reading of the reference framework within the *Adria Wien* selectivity test, such measures were considered by the Court to fall outside the ambit of Article 107 TFEU.

Further, the Notice continues with a comprehensive analysis of several types of infrastructure from airports, to ports, to broadband. All the ‘principles’ regulating

⁴⁶Notice on the notion of aid, paras 5 and 200.

⁴⁷Judgment in Case T-128/98 *Aéroports de Paris v Commission*, ECLI:EU:T:2000:290, confirmed on appeal in Judgment in Case C-82/01 P *Aéroports de Paris v Commission*, ECLI:EU:C:2002:617 and Judgment in Case C-288/11 P *Mitteldeutsche Flughafen AG and Flughafen Leipzig-Halle GmbH v Commission*, ECLI:EU:C:2012:821; see also Judgment in Case C-518/13 *Eventech v The Parking Adjudicator*, ECLI:EU:C:2015:9. See in general Papandropoulos and Righini (2016).

⁴⁸*Mitteldeutsche Flughafen AG and Flughafen Leipzig-Halle GmbH v Commission*, C-288/11 P, ECLI:EU:C:2012:821, para 62 and ss.

⁴⁹Notice on the notion of aid, para 209.

⁵⁰Judgment in Case C-524/14 *European Commission v Hansestadt Lubeck*, ECLI:EU:C:2016:971.

these activities are supported with a mere reference to the Commission decisional practice and do not refer to any case law, raising once again the concerns discussed above. The choice to include an *ad hoc* section on infrastructure is even more questionable as the Commission experience in some of these specific areas is still relatively limited. Evidence of the ongoing evolution in this area is the fact that the Commission itself has, since the Notice, approved an amendment of the GBER, which includes—*inter alia*—new rules on regional airports and ports.⁵¹ As the discussion is still ongoing on some key areas both in the case law of the ECJ and the administrative practice of the Commission, it could be argued that it was neither necessary nor desirable to ‘codify’ something that it has not been codified yet.

4.2 *Effect on Trade/Distortion of Competition-Some Ambiguities*

More worryingly—from a constitutional point of view—is the temptation to use the Notice to settle questions directly related to the wording of the Treaty—the holy domain of the ECJ. Such a temptation is succumbed to, in our view, most evidently in the section devoted to the ‘explanation’ of the so-called negative conditions laid down by the Treaty: effect on competition and on trade. It is to be preliminarily acknowledged that the Commission finds itself between a rock and a hard place. As for the rock, the case law of the Court on whether a measure can be classified as having a distortive effect and an impact on trade is, as it is well known, particularly generous: so far as the effect on competition is concerned, it is sufficient to prove that when financial aid is granted by a State this strengthens the position of an undertaking compared with other undertakings competing in intra-EU trade.⁵² With regard to the effect on trade, the Court *acquis* is consistent in refusing to apply any threshold or percentage below which it may be considered that trade between Member States is not affected.⁵³ As for the hard place, the Commission for many years has been fiercely criticised for devoting time, money and resources to investigate measures that had very limited impact on competition and trade. In State aid circles, a mythological Commission decision on funding to build a swimming pool in the Netherlands has become a totem of everything that goes wrong in DG Competition, despite the fact that, in that decision, the Commission did not qualify the measure as

⁵¹See Commission Regulation (EU) 2017/1084 of 14 June 2017 amending Regulation (EU) No 651/2014 as regards aid for port and airport infrastructure, notification thresholds for aid for culture and heritage conservation and for aid for sport and multifunctional recreational infrastructures, and regional operating aid schemes for outermost regions and amending Regulation (EU) No 702/2014 as regards the calculation of eligible costs, OJ L 156, 20.6.2017, p. 1–18.

⁵²Judgment in Case 730/79 *Philip Morris* ECLI:EU:C:1980:209.

⁵³Judgment in Joined Cases C-197/11 and C-203/11, *Libert and others*, ECLI:EU:C:2013:288 and case law cited.

aid.⁵⁴ The Commission has—this time it is true—been reprimanded by the EU judicature for failing to provide some solid reasons for the application of the two conditions. Thus, in *Wam* the Court annulled a Commission decision as in the case at stake the effect on intra-Community trade and competition was ‘*less immediate and even less discernible*.’⁵⁵ More recently, the Commission suffered the indignity of being sanctioned for breaching Article 41 the Charter of Fundamental Rights for the failure to provide adequate reasons on why a certain national fiscal measure was distortive on competition and why it had an impact on trade.⁵⁶

Thus, not an easy conundrum for the Commission. However, the way in which the Commission is attempting to solve it, is by ‘creating’ what is basically a new test specifically for the effect on trade condition. On the basis of its own practice, the Commission states that, as far as the effect on trade is concerned, Article 107(1) will not be triggered when *the measure has a purely local impact*. In these cases, the Commission needs to ascertain *that the beneficiary supplied goods or services to a limited area within a Member State and was unlikely to attract customers from other Member States, and that it could not be foreseen that the measure would have more than a marginal effect on the conditions of cross-border investments or establishment*.⁵⁷ It seems that two conditions are now necessary to comply with the effect on trade criteria: some kind of physical or economic cross border ‘attraction’ and the possibility of direct investment or establishment. No traces of such approach can be found in the case law of the Court.

On the contrary, most recently in the *Eventech* case, dealing with whether the use of bus lanes reserved for black cabs only could have an effect on trade, the Court restated that it is never necessary that the beneficiary undertakings are themselves involved in intra-Community trade and that there is no threshold or percentage below which it may be considered that trade between Member States is not affected.⁵⁸ In our view, the Commission’s aim is laudable as times might be ripe to ‘refine’ the case law, but such a task should have been undertaken by relying on the pathway indicated by the Court itself. As a matter of fact, the case law is less monolithic than it looks, as the Court tends to stress the ‘likelihood’ of a possible impact on trade. Thus, in *Eventech*, the Court emphasized for instance that, despite the small amount of aid and the circumstance that black cabs were per se extremely small undertakings, it was rather likely that the fact that other companies could not use the bus lane would make what was potentially big business—taxi services in London—less attractive. The Court so concludes ‘*it is conceivable that the practice*

⁵⁴Commission Decisions on State aid cases in N 258/2000 Leisure Pool Dorsten (OJ C 172, 16.6.2001, p. 16).

⁵⁵Case C-494/06 *Commission v Italy and Wam*, ECLI:EU:C:2009:272, para. 62.

⁵⁶Judgment in Joined Cases T-515/13 and T-719/13, *Spain and others/Commission* ECLI:EU:T:2015:1004.

⁵⁷Notice on the notion of aid, para 196. Same criteria are also applied for infrastructure and SGEI. For a criticism see Sanchez-Graells (2016), pp. 157–187.

⁵⁸Judgment in Case C-518/13, *Eventech v The Parking Adjudicator*, ECLI:EU:C:2015:9, para 66.

of permitting Black Cabs to use bus lanes on public roads during the hours when the traffic restrictions relating to those lanes are operational, while prohibiting minicabs from using those lanes, except in order to pick up or set down passengers who have pre-booked such vehicles, may be such as to affect trade between Member States within the meaning of Article 107(1) TFEU.⁵⁹ A *contrario* where such an effect is not even conceivable, Article 107(1) should not be applied.⁶⁰ It is not infrequent even in the context of free movement law, cases where the Court excluded the application of the Treaty on the basis of the unlikelihood of effects on trade.⁶¹ It would have been thus preferable for the Commission to cast its Notice within a Court case law framework. As we tried to suggest,⁶² it should have been restated that there is a specific duty for the Commission to provide reasons and such a duty should be discharged, by analogy with recent case law on free movement, by providing ‘conclusive evidence’⁶³ which could include reliable estimates, figures and even patterns of trade,⁶⁴ tools not too difficult to use in a State aid context.

4.3 *Fiscal Aid: Too Much of a Look to the Future*

The Notice, as mentioned above, contains a very large section devoted to fiscal aid. Not since the Code of Conduct on Business,⁶⁵ has the Commission managed to pioneer such an extensive set of rules on one of the most explosive, both in political and economic terms, areas of State aid law: taxation. The sub-section on fiscal aid is actually inserted within the part devoted to selectivity so we are firmly within Article 107(1). Again, the decision to ‘codify’ rules on fiscal aid is a bold one but at the same time questionable. One example will suffice: the most important Commission fiscal aid decisions at the moment are those on national tax rulings. In a series of recent investigations dealing with Starbucks, Fiat, and Amazon, the Commission found that national individual tax rulings involved State aid as they provided selective advantages to a specific company or group of companies and they influenced the allocation of taxable profit between subsidiaries of a group located in different countries. Calculations used to set the tax base allegedly relied on a remuneration of a subsidiary or a branch, and not on market terms, therefore providing a more

⁵⁹Ibid., para 71.

⁶⁰AG Wahl speaks of a ‘rebuttable presumption on effect of trade’. Opinion of Advocate General Wahl in Case C-518/13, *Eventech*, ECLI:EU:C:2014:2239, para. 85.

⁶¹Judgment in Case C-20/03 *Criminal Proceedings against Burmanjer, van der Linden and De Jong* ECLI:EU:C:2005:307; Judgment in Case C-212/06 *Government of the French Community and Walloon Government v Flemish Government* ECLI:EU:C:2008:178.

⁶²Biondi et al. (2014), 9.1.

⁶³Judgment in Case C-400/08 *Commission v Spain* ECLI:EU:C:2011:172, para 62.

⁶⁴Judgment in Case C-147/03 *Commission v Austria* ECLI:EU:C:2005:427, paras 64–66.

⁶⁵Resolution of the Council and the representatives of the Governments of the MS, meeting within the Council on a code of conduct for business taxation [1998] OJ C2/2.

favourable treatment of the company compared to the treatment other taxpayers.⁶⁶ In the case involving Ireland and Apple, the Commission has already ordered the recovery of allegedly unpaid taxes.⁶⁷

Crucially, the Notice defines tax rulings as a selective advantage *where a tax ruling endorses a result that does not reflect in a reliable manner what would result from a normal application of the ordinary tax system*.⁶⁸ The Commission identifies compliance in the at arm's length principle as the benchmark against which the 'normal application of the ordinary tax system' should be tested. If a tax ruling endorses such a methodology this would imply that a company is not treated favourably under the ordinary rules of corporate taxation of profits in the Member State concerned *'as compared to standalone companies who are taxed on their accounting profit, which reflects prices determined on the market negotiated at arm's length'*.⁶⁹ The arm's length principle is based on current OECD international guidelines and, in a nutshell, it means that a transfer price should be the same as if the two companies involved were indeed two independent entities, not part of the same corporate structure.

The Notice deals extensively with this question and it lays down specific principles that are however still to be tested, and whether one agrees or disagrees with the Commission's analysis,⁷⁰ there is hardly a mention of a Court judgment. The footnotes provided are actually references to the *Fiat*, *Starbucks* and *Belgium Excesses* tax ruling Decisions, which is a bit tautological. The only judgment of the Court of Justice referred to is the *Forum 187* case.⁷¹ In that case, the relevant Belgian rules reduced artificially the taxable base by excluding without justification certain expenses. The Court, quite logically, strikes it down as the national measure in question had the clear effect of reducing that tax basis with a fiscal 'trick'. We re-read the *Forum 187* judgment carefully and the OECD principle is mentioned once, not in exactly the same terms advanced by the Commission in its Notice, and it is definitely not used by the Court as a general principle.⁷² As the various tax rulings

⁶⁶See Commission Decision of 21 October 2015 in Case SA.38374, Starbucks, JOCE L/83/2017, Commission Decision of 21 October 2015 in Case SA.38375, Fiat, JOCE L/351/2016, Commission Decision of 11 January 2016 in Case SA.37667, excess profit exemption state aid scheme, JOCE L/260/2016, all cases are under appeal.

⁶⁷See Commission Decision of 30 August 2016 in Case SA.38373, JOCE L/187/2017.

⁶⁸Notice on the notion of aid, para. 170.

⁶⁹*Ibid.*, para. 172.

⁷⁰For a detailed analysis see P. Nicolaidis at <http://stateaidhub.eu/blogs/stateaiduncovered/post/6919> [consulted 20/11/2016].

⁷¹Judgment of the Court of Justice in Joined Cases C-182/03 and C-217/03, *Belgium and Forum 187 v Commission* ECLI:EU:C:2006:416.

⁷²*Ibid.*, paras 94–97 *That method of assessment of taxable income is based on the so-called cost-plus method recommended by the Organisation for Economic Cooperation and Development (OECD) for the taxation of services provided by a subsidiary or a fixed establishment on behalf of companies belonging to the same international group and established in other States. In order to decide whether a method of assessment of taxable income such as that laid down under the regime for coordination centres confers an advantage on them, it is necessary, as the Commission suggests*

decisions are all currently challenged before the General Court, the Notice is much more a results-oriented policy than just an explanation of the Treaty.

4.4 A Selective Reading of Selectivity

Another set of concerns deals with those parts of the Notice that seem to attribute to the case law of the Court a meaning and a clarity that it might not necessarily have. Once again, it is understandable for the Commission to try to ‘rationalize’ the abundant quantity of case law on State aid, but while on one hand this might be an arduous task as—with all due respect—not every single judgment of the Court is crystal clear, and, on the other, it is tempting to ascribe to the Court findings that might not necessarily be there. Once again, because of the impossibility of examining every single paragraph of the Notice we will limit ourselves to one example—selectivity.⁷³

The Notice rightly divides selectivity into ‘regional’ and ‘material’. The latter is subdivided in *de jure* when it ‘*results directly from the legal criteria for granting a measure that is formally reserved for certain undertakings only*’ and *de facto*. This category of 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*.’⁷⁴ The Commission decisional practice on the *de facto* selectivity has proven to be rather controversial. For instance, in 2015, the Commission concluded an investigation into a Spanish measure that allowed the tax amortization of the financial goodwill granted to Spanish companies that acquired some participation in undertakings established in another Member State. Such a tax break was not granted to acquisition within Spain. The Commission considered the measure to be selective on the ground that the amortization of goodwill was *per se* a divergence from the general tax system.

The General Court annulled the Commission decision and put forward what has to be considered a true new test of selectivity. The Court held that the mere existence

at point 95 of the contested decision, to compare that regime with the ordinary tax system, based on the difference between profits and outgoings of an undertaking carrying on its activities in conditions of free competition. In that regard, the staff costs and the financial costs incurred in cash-flow management and financing are factors which make a major contribution to enabling the coordination centres to earn revenue, inasmuch as those centres provide services, particularly of a financial nature. Accordingly, the effect of the exclusion of those costs from the expenditure which serves to determine the taxable income of the centres is that the transfer prices do not resemble those which would be charged in conditions of free competition. It follows that such an exclusion confers an economic advantage on the centres.

⁷³The interpretation of such a criteria created several problems for the ECJ itself. See in general Prek and Lefevre (2012), p. 335.

⁷⁴Notice on the notion of aid, para. 121.

of a derogation from or an exception to a tax regime does not, by itself, establish that a measure favours ‘certain undertakings or the production of certain goods’ for the purposes of EU law, since that measure was available, *a priori*, to any undertaking. The Court also emphasised that a national tax regime that is not aimed at any particular category of undertakings or the production of goods, but a category of economic transactions cannot be considered selective. Thus, despite being a derogation, such a derogation can be so broad as to exclude its selectivity.⁷⁵ The ECJ, on appeal, reversed the decision of the General Court and found the tax measure selective and thus considered it as a State aid. In a rather robust passage it held that *‘a condition for the application or the receipt of tax aid may be grounds for a finding that that aid is selective, if that condition leads to a distinction being made between undertakings despite the fact that they are, in the light of the objective pursued by the tax system concerned, in a comparable factual and legal situation, and if, therefore, it represents discrimination against undertakings which are excluded from it’*⁷⁶ The contrast between the two EU courts could not have been more strident and it seems very unlikely that the *Financial Goodwill* saga will be the last word on fiscal aid.⁷⁷

As for the tax rulings decisions, regardless of the side one is taking in support of a narrower reading of selectivity or in support of the Commission’s position, the Notice seems to us already in need of constant updating.

5 Conclusions

The main legal effect of the Notice is that it binds the discretion of the European Commission. The fact that the Notice is a document streamlining administrative discretion at the supranational level raises three important sets of concerns. First, the effects of the Notice at the national level are far from clear, given that not all the Member States have participated in or negotiated this document. According to the case law of the EU Courts, an instrument such as the Notice on the notion of aid

⁷⁵Judgment in Case T-219/10, *Autogrill España/Commission* ECLI:EU:T:2014:939, para 60.

⁷⁶Judgment in Joined Cases C-20/15 P and C-21/15 P, *Commission v World Duty Free Group and Others* ECLI:EU:C:2016:981.

⁷⁷See also the recent judgment in appeal in Joined Cases C-66/16 P to C-69/16 P *Comunidad Autónoma del País Vasco and Others v European Commission* ECLI:EU:C:2017:999. The ECJ itself is not always consistent. In other judgment the Court seems to have embraced a rather restrictive interpretation of the selectivity criteria as it held that the requirement as to selectivity *‘must be clearly distinguished from the concomitant detection of an economic advantage, in that, where the Commission has identified an advantage, understood in a broad sense, as arising directly or indirectly from a particular measure, it is also required to establish that that advantage specifically benefits one or more undertakings.’* Judgment in Case C-15/14, *Commission / MOL* (C-15/14 P) ECLI:EU:C:2015:362. See also Judgment in Case C-524/14 *Hansestadt Lubeck*, cit. *supra*, decided on the same day as the *Autogrill* case, where the Court adopted a narrow interpretation on selectivity.

cannot be legally binding on national authorities and courts⁷⁸; however, in practice, these authorities might decide to apply it when deciding on cases. Individuals are left in a situation of legal uncertainty; given that they might expect the Notice to be applied by the Commission but they do not have the guarantee that their national authorities will also take it into consideration. Judicial review of this instrument might be jeopardized,⁷⁹ as its practical effects are unlikely to be recognized in a court of law. Second, given the very limited margin of discretion that the Commission has in the area of Article 107(1) TFEU,—one may wonder whether it has the competence to adopt the Notice in its current form. This might fuel concerns that the procedures leading to the adoption of soft law lack the legitimacy safeguards provided for by the Treaty for hard law, with academics and institutional actors warning that the European Commission might attempt to legislate through the back door.⁸⁰ Legality is thus at stake, especially if, unfettered by judicial control, the Commission could introduce through a Notice new rules, adding to those written down in Article 107(1) of the Treaty. Third, because of the constant evolution of the case law the Notice will be by definition an ongoing project a bit like a Wikipedia page that needs to be updated incessantly.

The Modernization of State aid plan contains some amazing achievements and, in our view, reflects the evolutions of the market and the social and economic concerns of these difficult years. The Notice was the very last measure to be approved. One might wonder whether the Commission should have stopped short of taking such a definitive step, but as it had taken it, it is important that all interested parties—including the Commission—should exercise a certain degree of responsibility and carefulness. Albeit a great hitchhiker's guide to State aid law, the Notice cannot replace reading (the sometimes very long) State aid judgments. As far as ultimate questions are concerned, following deep thought, the Court will have an answer.

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⁷⁸Judgment in Case C-226/11 *Expedia*, ECLI:EU:C:2012:795, para 29.

⁷⁹Scott (2011), pp. 344–348.

⁸⁰Snyder (1994), p. 216.

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A More Economic Approach to the Control of State Aid

Phedon Nicolaides

1 The Common Principles of Compatibility of State Aid

In the General Block Exemption Regulation (Regulation 651/2014), the Commission explains that its assessment of State aid will be based on “a set of common principles that ensure the aid serves a purpose of common interest, has a clear incentive effect, is appropriate and proportionate, is granted in full transparency and subject to a control mechanism and regular evaluation, and does not adversely affect trading conditions to an extent that is contrary to the common interest.”¹

In the guidelines that were adopted in 2013–14 and apply to the period 2014–2020, the Commission elaborates in detail the following seven principles:

1. Contribution to a well-defined objective of common interest: Member States must identify policy targets and relevant performance indicators that demonstrate that the aid is in the common interest.
2. Need for State intervention: Aid must remedy market failure or have an equity objective. That is, aid must bring about outcomes not achieved by the market mechanism.
3. Appropriateness of State aid: Member States must show, on the basis of an impact assessment, that there is no other policy instrument which is less intrusive or less distortionary than aid.
4. Incentive effect: The aid must be capable of changing the behaviour of the beneficiaries and of inducing them to do something that goes beyond what they

¹Recital 5 of the GBER.

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normally do. Alternatively, the aided project should not be possible without the aid. To prove the existence of an incentive effect, Member States have to establish a credible counterfactual situation without the aid and show that the aid makes a difference in comparison with the outcomes in the counterfactual scenario.

5. Proportionality of aid: Aid must be kept to the minimum amount necessary. Any excess aid is unnecessary and therefore incompatible with the internal market.
6. Avoidance of undue negative effects: Aid should not crowd out private investment, should not strengthen the market power of beneficiaries, should not support unviable firms in stagnant markets and should not be granted only to selected beneficiaries.
7. Transparency of aid: All aid awards exceeding €500,000 and the names of beneficiaries must be published on a centrally managed website. In 2015, the Commission and the Member States agreed that this centrally managed website would be launched by the Commission. Member States have been submitting information for publication since the end of 2016.

To understand whether these seven compatibility principles represent a more economic approach to controlling State aid, it is first necessary to define what such an economic approach would be.

2 Economic Approach to State Aid

Any public measure is economically rational when it generates more benefits than costs to society. It is important to note that the criterion is what society as a whole gains or loses, rather than whether particular groups, sectors or regions are better or worse off.

For a public measure to be able to generate any benefits, there must be some kind of market failure. Otherwise, there can be no justification for government intervention because it cannot improve on the market outcome. Of course, there may be other reasons for government intervention (e.g. political, social), which are ignored here.

In this sense, the first three of the common assessment principles appear to correspond to the economic requirement for a prior market malfunction. To a large extent this is true. However, there can be many otherwise legitimate common interest objectives which are not true market failures. The fact that the market fails to generate the desired outcome from a public policy perspective (e.g. broadband networks in rural areas) does not mean that the market does not function well. This is because market outcomes are determined by the ability to pay, whereas desired outcomes from a policy perspective depend on the perceived obligations of the State or the perceived needs of citizens.

For public intervention to be justified, the monetized amount of benefits must exceed the monetized amount of costs. The application of the common assessment principles is not based on a quantification of either benefits or costs. More importantly, the amount of State aid does not have to be limited to the extent or magnitude

of the market failure, nor, under the current State aid rules, can it be raised as much as it is necessary to eliminate the failure.

Lastly, an economic approach to State aid requires that all private and external benefits and costs are taken into account. The sum of private and external benefits and costs make up the social benefits and costs. The external benefits and costs are the gains not appropriated by the aid beneficiary or the costs not borne by the beneficiary.

3 A Case Study on the Application of the Common Assessment Principles

The purpose of this case study is to examine how the European Commission applies the common assessment principles and consider how closely they correspond to a proper economic assessment of State aid. As it will become evident, the correspondence is incomplete.

In August 2011, the Commission received a complaint from a private company alleging that the Czech Republic had granted State aid to non-profit organizations to construct and operate sports facilities. The Commission investigated the complaint, found that the measures it referred to did indeed contain State aid and, although the aid had been granted illegally (i.e. without prior notification to the Commission), it approved it as being compatible with the internal market (Commission Decision SA.33575).²

Although the name of the complainant is not revealed in the Commission Decision, presumably it is the same company that lodged an appeal against that decision. On 12 May 2016, the General Court rendered its judgment in case T-693/14, *Hamr-Sport v Commission*.³ The Judgment is of interest because it explicitly endorses the Commission's balancing test (introduced by the 2005 State Aid Action Plan) and the methodology it embodies. Admittedly, EU courts have endorsed related principles on numerous occasions. But analysis of the balancing test as a whole is rare. Since the current methodology of the common assessment principles is very much based on the balancing test, the positive view of the General Court indirectly implies approval of the common principles.

²The full text of the Commission Decision can be accessed at: http://ec.europa.eu/competition/state_aid/cases/248558/248558_1565281_160_2.pdf.

³The text of the Judgment, which at present exists only in French and Czech, can be accessed at: <http://curia.europa.eu/juris/document/document.jsf?text=&docid=178121&pageIndex=0&doclang=FR&mode=lst&dir=&occ=first&part=1&cid=146975>.

3.1 The Aid Measure and Its Assessment by the Commission

The Czech Republic had granted subsidies to non-profit organizations for the purpose of promoting sports, especially among young persons. The subsidies were given on condition that funded sports facilities would be operated for at least 10 years. The aid intensity was high: 70% or 100% of eligible costs. The non-profit organizations had to be based exclusively in the Czech Republic, had to put the funded facilities at the disposal of their members or general public and, because they could not make a profit, any revenue from the use of the facilities had to be ploughed back into sport activities.

The complainant operated sports facilities and therefore claimed that the aid distorted competition to its disadvantage.

The Commission's assessment of the possible existence of aid focused on two issues: whether the non-profit organizations were performing economic activities and whether cross-border trade was affected.

With respect to the question of whether the beneficiaries were undertakings in the meaning of Article 107(1) TFEU, the Commission considered them to be undertakings because they made their facilities available to the general public against remuneration.

The Commission also found that despite the fact that the beneficiaries operated only in the Czech Republic and most of them only at local level, the aid was likely to impact on cross-border trade through the renting of sports grounds, sale of sports equipment, services of professional trainers and restaurant services.

With respect to the compatibility of the aid with the internal market, the Commission found that the positive effects of the aid outweighed the negative effects. The aid was in the common interest, was necessary and proportional and did not affect trade and distort competition to an undue extent.

On the issue of distortion of competition, in particular, the Commission stated the following:

(89) While defining the size of their facilities and their offer, non-profit organisations take account in the first place of their members. In such circumstances, the distortion of competition is limited.

(91) The majority of the activities of the non-profit organisations (particularly activities of members and socially disadvantaged persons) has no potential to affect competition to an extent contrary to the common interest. What is more, the Commission considers that the activities performed in the sport facilities of the non-profit organisations is not a professional sport, but a non-profit making amateur sport for masses, schools or socially disadvantaged persons. The distortion of competition with commercial sport is also reduced by the fact that these sport facilities are in the first place used by their members.

(92) The Commission acknowledges that the operation of a sport facility of a non-profit organisation may lead to a loss of revenue for an existing private operator. However, private operators are unlikely to meet the public interest in the provision of affordable sport facilities. They have the possibility to offer more sophisticated services.

In the paragraphs quoted above, the Commission makes two assertions. First, it believes that there is no or insignificant substitutability between facilities for amateur sport. Second, it believes that private operators would not offer services at affordable prices or of better quality, simply because they would seek to make a profit.

These assertions may be true, but they are unsubstantiated. For example, the fact that private operators can offer “more sophisticated services” does not in itself preclude them from offering more basic services at affordable prices.

The important point to note, however, is that the Commission considers competition not to be distorted to an undue extent when the aid is granted to activities that target niche market segments or groups that appear not to be well served by the market.

3.2 The Judgment of the General Court

After considering the usual arguments both in favour of and against admissibility and finding that the appeal was admissible, the General Court focused on the method by which the Commission concluded that the aid was compatible.

The Court accepted that Hamr-Sport was different from the aid beneficiaries because it sought to make a profit and because it did not aim to provide access at affordable prices to the general public (paragraph 78 of the Judgment).⁴

The Court rejected the argument of Hamr-Sport that there was no background study that showed the need for the subsidies. The Court agreed with the Commission’s findings that the need for the aid was demonstrated by the existence of a funding gap for the projects, that without the aid sports services could not be offered, that the non-profit organizations were committed to keep the facilities for 10 years and that they had to reinvest any profits into sport (paragraphs 58–60 and 81).

It should be noted that although the existence of a funding gap does demonstrate the need for aid to a particular project, it does not prove that the aid measure as a whole was necessary. The needs of the Czech population did not necessarily coincide with the services of the subsidized facilities. More importantly, the requirements imposed by the Czech authorities on the beneficiaries do not prove the need for the aid.

The Court also agreed with the Commission that the aid would likely have a very limited impact on cross-border trade (paragraph 84).

On the issue of distortion of competition, again the Court agreed with the Commission’s analysis that although there could be loss of revenue for Hamr-Sport, the aid beneficiaries offered services mostly to their own members who were in fact captive clients and therefore unlikely to turn to other service providers (paragraph 86).

On the basis of the above reasoning, the General Court dismissed the appeal.

⁴This is my own translation, as no official text exists in English.

3.3 *An Assessment*

This judgment leads to the following conclusions. First, the General Court has endorsed the balancing test and, by implication, the currently used common assessment principles.

Second, the Commission enjoys significant discretion in the application of these principles, especially those concerning the appraisal of the contribution of an aid measure to the common interest and of its impact on competition.

Third, the Commission is not expected to carry out a full market analysis to determine the relevant product and geographic markets as it normally does in cases concerning Article 102 on abuse of dominance.

Fourth, and most importantly, aid measures that target consumers or citizens with particular needs who are not adequately provided for by the market will be found not to distort competition to an undue extent, even if there is some substitutability between the subsidized activities or services and market activities or services.

Fifth, there is no quantification of the effects of the aid, no attempt to measure the degree of distortion of competition and, therefore, no analysis of whether the amount of the aid corresponds to the extent of the market failure.

4 **Reasons for Incompatibility**

As the case study above has demonstrated, no weighing of benefits and costs is carried out during the compatibility assessment. This finding immediately raises the question of the grounds on which the Commission concludes that aid is incompatible with the internal market. A review of the cases where the outcome was negative suggests that most decisions prohibiting the aid that was granted or was about to be granted concerned measures that had either no incentive effect or had unnecessary distortionary impact. In none of these cases were there any calculations that actually demonstrated that costs exceeded benefits.

For example, the Commission found that the aid was incompatible with the internal market because:

1. Aid was used to support investment for rationalization or the manufacturing of new products that had to be carried out anyway by the recipient in order to remain in business (e.g. rationalization of operations or launch of new models by GM, Ford, Volvo and Vauxhall).
2. Aid was used to support the acquisition of legally required permits and/or certificates that had to be obtained anyway by the aid beneficiary (e.g. aircraft handling by DHL).
3. Aid was used to shift operations or activities from one plant to another or one subsidiary to another but which would still have to be carried out by the group as a whole (e.g. allocation of operations to a particular BMW plant in another part of Germany).

4. Aid was used to support products and/or services which were already provided by the market (e.g. digital TV services in Berlin-Brandenburg; broadband network services in Appingedam, Netherlands).
5. Aid was used to favour a particular technology when there was no legitimate reason for discriminating against other technologies (e.g. decoders for terrestrial broadcasting in Italy).

More recently, in applying the seven common principles the Commission prohibited aid that was unnecessary (e.g. aid to COSCO, the operator of the Piraeus container terminal) and, more notably, aid that was not in the common interest (e.g. aid to the airports in Gdynia in Poland and Zweibrücken in Germany). The last two cases are indeed notable because it is rather unusual for the Commission to find that aid does not promote an objective of common interest. The reason for reaching this conclusion in these two cases was that the aided airports were in close proximity to other airports. The Commission was of the opinion that duplication of infrastructure was not in the common interest.

5 Ex Post Evaluation

An innovation of the new GBER is the requirement for *ex post* evaluation, as opposed to *ex ante* assessment, of State aid. The evaluation is required for measures with average annual budgets exceeding €150 million and for “novel” measures.

The Commission approves such measures for a period of 4 years and then, if Member States want to have them renewed, they must re-notify them to the Commission. The re-notification must include the results of the *ex post* evaluation and must indicate how the lessons from the evaluation have been taken into account in adjusting or re-designing the re-notifying measure.

In order for the Commission to approve the measure for the initial 4 years, Member States must notify an evaluation plan. The Commission reviews the robustness of this plan and the *ex post* evaluation has to be carried out according to the methodology of the approved plan.

The Commission has issued guidelines on appropriate methodologies for *ex post* evaluations.⁵ *Ex post* evaluation plans must contain the following eight elements:

1. Definition of the objectives of the evaluated scheme, including the intervention logic, the problems to be addressed, the target beneficiaries and investments and the expected impact.
2. Precise questions that can be answered quantitatively with regard to the direct impact on recipients, any possible indirect impact and spillovers.

⁵Commission Staff Working Paper on a Common Methodology for State Aid Evaluation, 28 May 2014. The text of the Commission guidance can be accessed here: http://ec.europa.eu/competition/state_aid/modernisation/state_aid_evaluation_methodology_en.pdf.

3. Result indicators that show what is eventually achieved.
4. Credible methodology that can identify causal effects in relation to a counterfactual.
5. Description of the data collection process.
6. Timeline for the completion of the evaluation.
7. Identification of an independent organization that will carry out the evaluation.
8. Publicity for both the plan and the final report.

Although the Commission has so far approved about 35 plans, no preliminary or definitive results have yet been submitted by Member States. The first such results are expected in 2018.

6 Quantitative Methods

The Commission is increasingly using more sophisticated methods either to establish the existence of aid or to estimate the amount of aid. With respect to the establishment of the existence of aid in cases of injection of capital or the granting of loans and guarantees, the Commission has had to apply the market economy investor principle (MEIP). The MEIP has always required the identification of a rate of return that would satisfy a private investor. The Commission has used different methods to calculate such a rate of return. One such method which is now becoming more frequently used, and was endorsed for the first time by the General Court in case T-319/12, *Spain v Commission*, is the Capital Asset Pricing Model (CAPM).

6.1 *Capital Asset Pricing Model*

According to the CAPM, the return that an investor needs to obtain is equal to the sum of the opportunity cost of capital and the risk margin associated with any particular investment. The CAPM is reduced to the following formula:

$$R = R_f + (R_m - R_f)\beta$$

where R is the required rate of return, R_f is the risk-free rate of return (normally given by a 10-year government bond), R_m is the average market return and β is a parameter that indicates how closely the share price of the company in which the investment is made correlates with the average market return. If β is less than 1, then the company is safer than the market, while if β is more than 1, then the company is riskier than the market.

The required rate of return becomes the benchmark against which the profitability of the investment is assessed. This is because the return required by a private investor is in fact the cost of capital of the company that receives the investment. The

recipient company has to generate a return or profit that exceeds or is at least equal to its costs. The required rate of return is therefore used to discount the expected profits of the company in which the investment is made. If the outcome or Net Present Value (NPV) is positive, then the investment is acceptable to a private investor. If the outcome or NPV is negative, then the investor will lose money and therefore the investment is not acceptable. Hence, the CAPM translates into a simple rule. If the required rate of return shows that the NPV is positive, the investment satisfies the MEIP.

An alternative way of performing this comparison is to calculate the Internal Rate of Return (IRR) of the investment or project in general. The IRR is the rate of discount that makes the NPV equal to zero. This means that if the required rate of return is higher than the IRR, the NPV will turn negative because future profits at a higher rate of discount will become smaller in present value and therefore will not be able to cover the cost of the initial investment. If, on the other hand, the required rate of return is smaller than the IRR, then future profits discounted at a lower rate will be larger in present value and therefore will exceed the initial cost. The use of the IRR also results in a simple rule. If the IRR is larger than the required rate of return, the investment satisfies the MEIP.

6.2 Guarantees

State guarantees are normally used to support loans. Companies obtain loans not just for investments in buildings and equipment but also for working capital to cover their day-to-day expenses. Normally public funding of working capital is prohibited because it covers operating costs. However, public funding for working capital may be granted in compliance with the rules on risk finance in the GBER or the risk finance guidelines.

If a public authority does not want to use the GBER or the guidelines, it must ensure either that the guarantees it grants are free of State aid (i.e. priced at market rates) or that any State aid remains below the *de minimis* threshold of €200,000. In all cases, however, and regardless of whether a guarantee contains State aid or not or whether the amount is below or above the *de minimis* threshold, it is necessary to establish the market price of the guarantee. Without determining the market price, it is impossible to know whether the guarantee contains State aid and how much aid. The only exception to this is when Member States faithfully follow the conditions laid down in the *de minimis* aid regulation (Regulation 1407/2013). The Commission has provided guidance on how to calculate the market price of a guarantee in its 2008 Notice on guarantees.⁶

⁶The text of the 2008 Notice can be accessed at: [http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:52008XC0620\(02\)](http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:52008XC0620(02)).

Therefore, a public authority that wishes to grant guarantees needs to develop a methodology for pricing such guarantees.

A guarantee is normally granted to a company that wants to borrow money from a bank but cannot do so because the interest rate charged by the bank is excessively high. The interest rate corresponds to the riskiness of the borrower. Small companies or newly established companies which have no credit rating, no track record and no collateral to pledge are riskier clients for banks. A guarantee enables such companies to borrow at a lower rate of interest or at more favourable terms (e.g. loan of longer duration which normally means more risk for the lender).

The gross grant equivalent of State aid (GGE), S , in the form of a guarantee is the difference between the market premium that should be charged, P^* , and the premium that is actually charged, $P^\wedge$.

The premium that should be charged must be equal to or more than the expected loss, E , given the risk, r , of default on the underlying loan. Normally, the premium should be increased by an additional amount to cover administrative costs, A .

The expected loss is the amount that is guaranteed, G , multiplied by the probability of default, r .

Therefore, the amount of State aid is:

$$S = P^* - P^\wedge = [E + A] - P^\wedge = [(G \times r) + A] - P^\wedge$$

This formula applies to one-off guarantees that are granted to companies which are not in financial difficulty. If a guarantee is provided in the context of a measure that offers guarantees to many different companies, then it becomes very likely that one or more of the beneficiary companies will fail to repay the loans and the guarantees will be called. It is then necessary to back up the assumed liabilities with capital that itself needs to be remunerated. The remuneration of capital is an additional cost that has to be added to the premium.

If the beneficiary company represents such a high risk that no market premium exists, then the real amount of aid it receives is not the difference between the hypothetical premium and what it is actually charged, but the difference between the high interest rate that the company would have to pay for the loan and the interest that it actually pays as a result of the guarantee, minus any premium it may have already paid for the guarantee. If the company is in financial difficulty so that no bank would offer it a loan at all, then the amount of aid is the total sum of the loan.

6.3 *Funding Gap Method*

With respect to calculating the amount of State aid that is needed by a project, the Commission has been increasingly reliant on the “funding gap” method that has been extensively used in structural fund operations. The funding gap method demonstrates both the necessity and the proportionality of aid.

The funding gap is the difference between the initial investment costs and the NPV of the net revenue. It is given by the following formula:

$$F = I - NPV(N)$$

where F is the funding gap, I is the initial investment cost and $NPV(N)$ is the NPV of the net revenue or profit. N is the difference between operating revenue and operating costs.

If F exceeds zero, then no private investor would undertake a project that would result in losses. The aid that is necessary is an amount that is sufficient to bridge the gap between investment and net revenue. Anything more would be unnecessary and therefore disproportional. Since aid can be up to 100% of the funding gap, the aid intensity as measured by the ratio of F/I can also be up to 100% when the NPV is zero. For example, if a project just breaks even over its lifetime, then net revenue, N , will be close to zero and the funding gap, F , will be almost equal to the initial investment, I . Hence the ratio F/I will be close to 1. Unlike the typical cases of regional aid, environmental aid or R&D aid where the corresponding rules define fixed maximum aid intensity, with the funding gap method, the maximum allowable aid intensity varies with the performance of the project. A profitable project will result in a low aid intensity while an unprofitable project will be eligible to receive aid at a higher aid intensity.

7 Conclusions

The economic approach to State aid control is predicated on the tenet that the purpose of State aid is to correct market failure. However, market failure is a necessary, but not sufficient condition to justify government intervention. This is because the costs of government intervention to correct market failure may outweigh any benefits. These costs include the cost of distortion to competition, the cost of taxation for raising subsidies, the cost of administering the disbursement of subsidies and the opportunity cost of not aiding alternative projects or activities.

The Commission's practice on State aid control has evolved significantly over the past two decades. It is now based on the more coherent and economically rational approach which is embodied in the seven common assessment principles. The recent practice of the Commission can be summarized as follows:

All State aid that falls outside the scope of block exemption regulations or exceeds the notification thresholds laid down in the regulations is subject to detailed assessment irrespective of the amount of aid (as long as it exceeds the thresholds) or the size of the beneficiary undertakings.

When aid is individually assessed, it is considered to be compatible with the internal market when:

1. It promotes the common interest;
2. It addresses a market failure or an equity objective;
3. It is an appropriate instrument (i.e. it is more effective than regulation);
4. It is necessary (i.e. induces beneficiaries to change their behaviour);
5. It is proportional (i.e. it offers the minimum possible amount of assistance);
6. It does not cause an undue distortion of competition.

Aid is likely to be found to cause undue distortion of competition in the following situations:

1. It is granted to inefficient or dominant companies or companies in declining sectors;
2. It displaces private investment or research efforts; and
3. It discriminates against certain companies or technologies.

When aid causes undue distortion of competition, the Commission cannot declare it to be compatible with the internal market. Incompatible aid is prohibited and therefore it may not be implemented by Member States.

State Aid Control: Are the Standards and the Institutional Setting Appropriate?

Alberto Heimler

1 Introduction

In most areas of the law, European rules are not self-contained and domestic measures are often very important for proper enforcement. Sometimes these accompanying domestic rules are actually the key drivers of effective decision-making. This is why the best results in terms of outcomes are achieved when domestic and European rules smoothly complement one another. Instead, when domestic rules try to weaken or inhibit the European provisions, the end result is much worse than what would have happened if domestic rules were adopted in isolation. In other words, as long as the European Union acts as a policeman trying to discipline Member States, the achieved outcomes will be unsatisfactory. Only when domestic policies become willingly coherent with the spirit of the European Treaties will economic regulation become welfare enhancing, as it is meant to be. For example, the objective of European public procurement rules is to open up domestic markets so that foreign suppliers can easily enter and purchases of higher quality and at lower prices are promoted. If domestic rules or enforcement practices resist the opening up of these markets, the benefits of greater competition will be much weaker, and the end result may be worse than if governments adopted procurement laws without the European constraints. The exception to this state of affairs is antitrust enforcement, where European rules are self-contained (because the Commission is also an enforcer) and domestic rules are applied by national competition authorities in a way that is fully in line with the European approach, even contributing to the development of common European best practices. Unfortunately, antitrust is the isolated exception, although

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it represents the ideal institutional framework to achieve in other areas of European jurisdiction, including State aid.

The European internal market is created through negative and positive harmonization measures. With negative harmonization, the domestic provisions that restrain the free movement of goods, services, capital and people are eliminated. With positive harmonization, domestic regulations that represent an obstacle to free movement are substituted by a commonly agreed, European-wide policy. In both instances however, the objective pursued by the European Treaties is free trade, not necessarily achieving an optimal regulatory structure. As a result, even in the case of positive harmonization measures, many essential elements of convergence are left to the discretion of Member States. In most cases it is not sufficient to simply transpose domestically the EU rules, but it is necessary to accompany them with domestic procedures and finalize them. In public procurement, where positive harmonization has been the long standing adopted approach, European provisions address adjudication only, while execution and sanctioning remain domestic. As a result, if execution and sanctioning are disconnected from the opening-up objective of adjudication, the end result may be unsatisfactory. Of course, the relevance of domestic legislation increases in areas where negative harmonization applies and even more so for activities that are not subject to the internal market provisions.

An editorial article in the *Economist* discussing the (then yet to be decided) exit of the UK from the EU contains a statement that provides a good description of the pro-competitive nature of domestic regulation: “As the Remain campaign often points out, membership of the European Union has not prevented Britain being one of the most flexible, and least regulation-bound economies in the rich world”.¹ As it is well known, Remain is the side that argued for remaining in the Union and what is interesting to note is that in the UK, in contrast to what is argued elsewhere in the EU, competition-oriented reform is not credited to Europe. In the UK, almost uniquely among Member States, Europe is seen as a source of bureaucracy and rigidity, not a promoter of competition and flexibility. It is ironic that the first country that is questioning its EU membership (and indeed decided for exit) is one of the few that has fully adopted domestically the EU spirit.

The UK decided to leave the EU, and something must have gone wrong with the way Europe presents itself. Certainly, within the Union, the Treaty guarantees the respect of the four fundamental freedoms, that is, the free movement of goods, services, labour and capital; it introduces antitrust provisions and it impedes anti-competitive subsidies. All these provisions are necessary to address private and government restraints that segment national markets, thus potentially undermining the common market. No other international organization or sovereign country has a similar portfolio of instruments aimed at achieving an integrated market. The problem is that the respect of the four freedoms does not imply the full adoption of a competition-oriented regulation. For this the centre of the action, as the UK clearly understood, is domestic.

¹The *Economist* (2016).

This is true also for State aid, a policy that has been administered in isolation by the Commission from the start. Of course, the amount and extent of State aid has been reduced as a result of the enforcement of the Treaty provisions, but European decision-making has not always been effective, in the sense that not all aid that should have been prohibited was indeed prohibited, and aid that should not have been prohibited was indeed allowed. Furthermore, Member States' lack of support for the Commission's action against prohibited State aid has further weakened the effectiveness of the system of control introduced. This is the antithesis of antitrust, where the European Commission faces friendly national competition authorities as counterparts in every meeting with Member States either on proposals for new legislation or when discussing enforcement decisions. In State aid, the counterparts to the disciplining role the Commission is promoting are spending-prone domestic institutions. As a result, while the Commission's antitrust action is fully endorsed by Member States, the State aid discipline that it promotes is at best resisted and often opposed. A change is needed in this respect because anticompetitive State aid is to the benefit of the domestic economy of all Member States. National competition authorities are the institutions best placed to help the Commission in identifying and blocking anticompetitive State aid and represent an effective domestic ally for the Commission. Since domestic action is so important for achieving effective results, the European Commission should promote domestic reforms that are able to advance the European agenda, including promoting the involvement of domestic competition authorities in State aid.

This paper will start with a brief discussion of the economics of State aid and the reasons why State aid control is necessary. A big improvement would be to subject State aid decisions to an assessment of their validity from a competition perspective, so that the objective to be achieved is clearly identified and the most appropriate instrument to address the identified market failure is chosen. Section 3 suggests that State aid decisions, especially those falling under the block exemption regulations and those considered *de minimis*, should be subject to a competition assessment evaluation before being granted, so that alternatives to subsidies may be considered. Section 4 describes the role domestic institutions, and in particular the national antitrust authorities, could play in the control of anticompetitive State aid. Section 5 concludes the article.

2 The Economics of Anticompetitive State Subsidies: The Optimal Institutional Setting and Some Domestic Experiences with State Aid Control

State aid is widespread for economic, social, industrial, redistributive reasons. Like any other public policy instrument, subsidies should only be granted when they are beneficial, providing a multiplier effect on the activity that they are meant to promote. Subsidies, however, may also hurt competitors of the subsidized firm and

lead to a weakening of competition in the market. Economic analysis is necessary to identify beneficial subsidies and to make sure they do not restrain competition.

For many years, Commission decisions on State aid contained hardly any evaluation of market rivalry or description of the way competition was being distorted by the aid. In fact, in contrast to antitrust, the Commission and the Courts had not provided much incentive for economic experts to become involved with the substance of State aid cases and economists did not participate in the State aid policy debate. Around a decade ago when the Commission started thinking about the modernization of State aid policy, there were only a handful of articles on State aid by economists. Besides an OECD roundtable discussion on subsidies held in 2001 (which I am honoured to have chaired)² and two papers written a year or two earlier, one by Tim Besley and Paul Seabright³ and the other by Damien Neven and Lars-Hendrik Röller,⁴ not much was available.

With the 2005 State aid action plan (SAAP), the Commission moved towards a more economic approach. The reason for the shift in the emphasis of State aid control originated in the lack of a rigorous market analysis that had often led the Commission to take decisions without much regard for the distortions of competition associated with State aid measures, or to impose remedies in State aid cases without paying much attention to their effect on competition. Maintaining effective competition should be the objective of State aid control.

However, contrary to existing practice, State aid measures should not be considered in isolation. Once a market failure of some kind is identified the best policy to address it should be chosen, implying that the counterfactual in State aid control analysis should not be the absence of the aid, but any other regulatory intervention that could be considered appropriate for overcoming the issue.

For example, subsidies for research and development (R&D) are usually considered efficient because the level of R&D decided autonomously by a firm may be much lower than optimal. Indeed, there are outcomes from R&D that may benefit firms other than the one making the investment. Should these spillover external effects be significant, they tend to lead to underinvestment in R&D, since the innovating firm is not rewarded on the basis of the full benefits its investments are likely to generate. As a result, subsidies may promote higher, more efficient levels of R&D activity by increasing the rewards received by firms investing in it. But this is true only in the presence of spillovers.

As a result, subsidies for R&D should be granted only when the probability of spillover effects is high, a probability that is very difficult, if not impossible, to assess *ex ante*. This is why the analysis of spillovers has generally been ignored and subsidies for R&D have been justified on the basis of widespread presumptions. Something better could be done, for example by restricting the categories of R&D which may be allowed to be financed through subsidies. Indeed, evaluating State aid

²OECD (2001).

³Besley and Seabright (1999).

⁴Neven and Röller (2000), pp. 25–38.

decisions with respect to a plurality of options, as could be done by evaluating how to overcome the identified market failure, may lead us to a reduction of inefficient direct subsidies and encourage us to adopt a more effective policy, even towards R&D expenses.⁵

In any case in the EU practice, the counterfactual remains the absence of the aid. As the Commission Communication on EU State Aid Modernisation suggests, “modernised State aid control should facilitate the treatment of aid which is well-designed, targeted at identified market failures and objectives of common interest, and least distortive (“good aid”)”.⁶ In order for a measure to fall within the scope of application of the prohibition of anticompetitive State aid, five cumulative criteria must be met:

- (1) the use of State resources;
- (2) the measure must confer an advantage to certain firms;
- (3) the advantage must be selective;
- (4) the measure must distort competition; and
- (5) the measure must affect trade between Member States.

Without going into the operational details of European State aid policy, which is beyond the scope of this paper,⁷ I will simply discuss the private investor principle in order to show the importance of identifying the right counterfactual and the importance that domestic specialized institutions can play in the process of State aid control.

As is well known, government ownership was widespread in Europe (at least until the late 1990s). As a result, the notion of State aid was expanded in order to identify the circumstances when investment decisions in government-owned firms were incompatible with State aid legislation. The main instrument developed was the private investor principle, introduced in 1981,⁸ according to which no State aid is involved if it can be shown that the capital investment by the State would also have been made by a private investor at market conditions—an easy standard to declare, but a difficult one to enforce in a rigorous way. For example, it is not clear what standard of reference is applied, the profitability of the additional investment or the overall returns that the firm achieves otherwise. As von Witzacker (2002) argues, the problem with the private investor test adopted by the Commission is that the profitability is calculated with respect to the addition of capital to an existing firm as if it were a stand-alone investment. This is not the right test for a company that the government already owns. Indeed, “if the new capital increases the value of the old capital, then the return which the owner achieves overall as the result of the injection

⁵The European Commission is slowly moving in this direction by requiring Member States to evaluate the effects of block exempted State aid schemes.

⁶Cf. Communication from the Commission, EU State Aid Modernisation (SAM), 2012.

⁷There are a number of textbooks on EU State aid policy. See for example Hancher et al. (2006), Flett (2008) and Nicolaides (2008).

⁸Commission decision (ECSC) 2320/81 OJ L228/14 (the Steel Aid Code).

of new capital can be higher than the return which an outsider achieves from injection of new capital into the enterprise under the same conditions”.⁹

In order to overcome such difficulties, many shortcuts have been identified by the Commission to assess the private investor test. For example, when a private investor participates in the capital investment together with the government, the private investor test is automatically passed and it is not State aid. This is not always the appropriate conclusion because the private investor may participate just because of the protection that State ownership guarantees. The test suggested by von Witzacker is the only one appropriate. It shows that a complete counterfactual analysis is needed. Indeed recent European case law moves firmly in this direction.

The same should be true for exemptions. Unfortunately, the commonly used counterfactual for granting an exemption is the absence of the aid. In particular, if it could be shown that the net effect of the aid is strictly positive, then the exemption is granted. This approach has been confirmed also with the adoption of the modernization package in 2014, as shown by the seven-step analysis for the control of State aid suggested by DG Comp in its 2014 Annual Report:

- 1) the aid measure must aim at an objective of common interest;
- 2) it must be targeted towards a situation where aid can bring about a material improvement that the market cannot deliver itself, for example by remedying a market failure or addressing an equity or cohesion concern;
- 3) it must be an appropriate policy instrument to address the objective of common interest;
- 4) the aid must change the behaviour of the undertaking(s) concerned in such a way that it engages in additional activity that it would not carry out without the aid, or it would carry it out in a restricted or different manner or location;
- 5) the aid amount must be limited to the minimum needed to induce the additional investment or activity;
- 6) negative effects on competition and trade between Member States must remain sufficiently limited;
- 7) the relevant acts and pertinent information about aid awards must be transparent (public).

What is interesting in this list is that in point three, instead of suggesting that the aid measure should be the most appropriate policy instrument for addressing the objective of common interest, which would require a full assessment of the aid taking all possible alternatives into consideration, the Commission simply requires that the aid be an appropriate measure. A full analysis of all possible alternatives to the aid measure is therefore not required. It is sufficient, as clarified by step 4, that the net effect of the aid is positive in the sense that the firm engages in an additional activity that otherwise, without the aid, it would not have carried out.

This is the more so if an aid falls within the general block exemption. As described by the Commission in the *Vademecum* on Community law on State aid,¹⁰ “(T)he GBER consolidates into one text and harmonises the rules previously existing in different regulations. It also enlarges the area covered by notification exemptions by five types of aid which have not been exempted so far (environmental

⁹See von Witzacker (2002).

¹⁰Available at: http://ec.europa.eu/competition/state_aid/studies_reports/studies_reports.cfm.

aid, innovation aid, research and development aid for large companies, aid in the form of risk capital and aid for enterprises newly created by female entrepreneurs). The GBER applies only to transparent aid, i.e. grants and interest rate subsidies, loans where gross grant equivalent takes account of the reference rate, guarantee schemes, fiscal measures (with a cap) and repayable advances under certain conditions. Aid is only allowed if it has an incentive effect. The GBER provides different criteria for the verification of the incentive effect with ranging complexity: (i) for certain types of measures, incentive effect is presumed; (ii) for SMEs, the incentive effect is present if the application for aid was submitted prior to the start of the project; (iii) and for large enterprises, in addition to the above, the Member State would have had to verify basic conditions of the documentation.”¹¹

All these exemptions are granted presuming that the aid is beneficial, overcoming very widely defined market failures, an assumption that would need a much more rigorous justification had it been done on a case-by-case basis, considering, for example, that SMEs can very often finance themselves in the market without the need of any aid, that investment into innovation is always appropriable, and so on.

In addition to these exemptions based on some sort of substantive analysis, the *de minimis* regulation¹² excludes that aid below a given amount¹³ affects trade between Member States or distorts competition. Indeed, the *de minimis* regulation identifies a threshold below which competition is presumed not to be affected, but it does so in a very mechanical way: all measures that fall below the *de minimis* threshold (defined in terms of the amount of the granted aid), irrespective of the market share of the aided firm, do not fall within the area of application of Article 107(1) and therefore do not need to be notified to the Commission.

Should there be domestic control of State aid, the measures below the *de minimis* threshold could be addressed by domestic legislation. Furthermore, with domestic legislation in place, block exemptions would not be required to be so wide, since some of the control now performed by the Commission could be done domestically by a domestic authority.

For example, Denmark recently entrusted the competition authority with enforcing a domestic law against anticompetitive State aid. In Denmark the standard to be applied for a prohibition is not selectivity but that the aid “has the objective or effect to distort competition, and it is not lawful according to public regulation”.¹⁴ Similarly, in 2010 Sweden enacted new legislation according to which the State, a municipality or a county council that operates in a market is prohibited from adopting conduct that distorts, by object or effect, the conditions for effective

¹¹Pages 19 and 20 of the Vademecum.

¹²Commission Regulation (EC) No 1998/2006 of 15 December 2006 on the application of Articles 107 and 108 of the Treaty to *de minimis* aid, Official Journal L 379 of 28.12.2006.

¹³€200,000 (cash grant equivalent) over any three-fiscal-year period.

¹⁴See Section 11a of the Danish consolidated competition act, available at http://www.kfst.dk/fileadmin/webmasterfiles/konkurrence/Fusionskontrol/Consolidated_Act_No._1027_of_21_August_2007_as_amended_as_of_1_October_2010.pdf.

competition in the market, or impedes, by object or effect, the occurrence or the development of such competition.

State aid therefore could be prohibited in Denmark and in Sweden even if it falls under the *de minimis* block exemption, but only if it distorts competition, a standard that requires distortions of competition to be shown, irrespective of the benefits that the aid may provide. There is no balancing of positive and negative effects in the Danish and Swedish test.

3 Competition Assessment and *Ex Post* Evaluation

The fact that an aid falls within a block exemption or that the Commission declares an aid compatible with the common market does not imply that it represents the best solution to address “a common objective”. An assessment of all possible alternatives is required and such an analysis is to be performed at the domestic level. Indeed, it is the duty of Member States, not the Commission, to make sure that the instrument chosen to pursue a given objective is the most effective.

In recent years competition assessment tools have been developed by the OECD “for identifying unnecessary restraints and developing alternative, less restrictive policies that still achieve government objectives.”¹⁵ The toolkit is organized around a checklist, and then if, according to a *prima facie* analysis, a measure is likely to restrict competition, a more thorough review of alternatives is required. There are four very broad categories of issues that are considered by the checklist: does the regulation limit the number or range of suppliers? Does it limit the ability of suppliers to compete? Does it reduce the incentive of suppliers to compete? Does it limit the choices and information available to customers? If the answer to some of these questions is yes and there are no *prima facie* general interest justifications for the restrictions, a thorough analysis of alternatives is suggested.

State aid decisions are not sufficiently broad to be identified in the toolkit as a general category of assessment. However, State aid decisions fall in the category of regulations that may limit the ability of suppliers to compete. For example, subsidies for the generation of electricity via renewable sources may be authorized by State aid rules, but they may be excessive with respect of the actual benefits they provide. Before introducing a subsidy for renewables, which is meant to reduce the demand of electricity generated through traditional sources, it may be necessary to analyse whether, for example, a tax on carbon emissions may be more effective in achieving the general interest result of reducing air pollution. Such an analysis remains outside State aid control and needs to be undertaken domestically. Similarly, locational subsidies should be analysed with respect to the effects they provide on the relevant market where the subsidized firms compete, assessing the negative effect on

¹⁵OECD (2011).

competition in a market that may be much wider than the local market to which State aid analysis would be limited.

A more complete analysis should also be undertaken in order to allow aid that otherwise would be prohibited. As the seven steps of the analysis of compatibility of State aid suggest, it is first necessary to assess whether the aid is in the common interest (elimination of market failures), whether the aid is well designed to achieve it, and finally whether it leads to an unacceptable degree of distortion of competition and of trade between Member States.

As a result, once a measure is defined as State aid under Article 107(1), a competition analysis can only be performed in the final part of the exemption test and only if the aid provides some overall general interest benefits. In other words, the analysis of the effect of the aid on competition is only done when the suitability, necessity and adequacy of State aid is to be assessed under the criteria of Article 107 (3).

Many measures never arrive at the balancing stage. For example, if the aid does not remove a market failure or is not necessary to this end, the Commission would stop its analysis and declare the aid incompatible.

The whole process would be different with a competition analysis in the initial appreciation of State aid, when it would be most important since it would be one of the necessary conditions for a measure to be defined as incompatible State aid in terms of Article 107(1). At that stage, if the measure has no effect on the competition process, even a selective measure would not be considered State aid. Many cases of very little significance would not have been subject to scrutiny by the Commission and a few others would have been reversed.

Indeed, the German Monopolkommission suggests that “the objective likelihood that an aid measure will noticeably distort competition . . . should be examined in the state aid control procedure” under Article 107(1) all the time, not only when evaluating whether to allow an incompatible aid.¹⁶

For example, in the Charleroi Decision,¹⁷ the Commission concluded that the reduction of landing charges by the Walloon Region and of ground handling charges by Brussels South Charleroi Airport all in favour of Ryanair (the low-cost Irish carrier) were incompatible with the common market. According to the Commission, by favouring an Irish company, Belgium had violated the State aid rules. As Heimler (2010) argues, “under a political economy perspective this is quite surprising. The fact that one jurisdiction had granted incompatible State aid to a firm of another jurisdiction should have raised some doubts on the part of the Commission that the aid was not anticompetitive. If Ryanair would have been a Belgian company, at least the political economy objective (the protection of national champions) and the State

¹⁶German Monopolies Commission (Monopolkommission) (2008). See also Heimler (2010) in note 18.

¹⁷Commission Decision of 12 February 2004 concerning advantages granted by the Walloon Region and Brussels South Charleroi Airport to the airline Ryanair in connection with its establishment at Charleroi (notified in Number C(2004) 516) (2004/393/EC).

aid policy objective (favour national champions) would have coincided. In the circumstance of the Charleroi case, the political economy objective pursued by the Charleroi airport is unclear.¹⁸ There is a further, much more substantive problem with that decision. Although there is no question that the State measures favour Ryanair with respect to the other airlines serving Charleroi Airport, it is at least questionable that these measures distort competition in the relevant market where Ryanair operates. Indeed, most competitors of Ryanair are not in Charleroi, as the Commission suggests, but in Zaventem, the major Brussels airport. Had the relevant market been correctly established and had the competition analysis been carried out before starting the case, the conditions offered to Ryanair at Charleroi might have been considered compatible with the common market. Although the Commission decision against Ryanair was annulled by the General Court, suggesting that the private investor test was not run properly, the lack of a competition assessment of the relevant affected market questions current practices.

Finally, since most State aid schemes (63% of all aid measures in 2012, but 89% in 2016) are exempted because they fall within the exemption provisions of the General Block Exemption Regulation (GBER), they are usually not subject to any sort of scrutiny. The problem is that the GBER identifies presumptions on the lack of restrictive effects of State aid schemes that may or may not be confirmed once the scheme is in force. In recent years a number of schemes were thoroughly analysed in terms of the net effects that they produced.¹⁹ Results are mixed. The studies are yet too few and their results yet too general to provide any guidance for inducing changes in enforcement practices or in legislation. Similar exercises have recently been promoted by the Commission and the evidence that will be collected will be very useful for effectively revising the GBER. In other words, *ex post* evaluation exercises will help us to understand the effectiveness of schemes and of individual decisions, and provide feedback on the authorization process, leading to revisions of the GBER and to individual enforcement decisions. Competition assessment of State aid decisions will also substantially benefit from greater information on what works and through which channels.

4 The Possible Role of the Domestic Antitrust Authority

The bigger the Union, the more difficult it becomes to effectively administer the State aid rules. In the case of antitrust, the Commission dealt with the problem by adopting Regulation 1/2003 which eliminated the possibility firms had in the past to

¹⁸Heimler (2010).

¹⁹See among others, Report for DG REGIO (2012) A. Martini, D. Bondonio: “Counterfactual impact evaluation of cohesion policy: impact and cost effectiveness of investment subsidies in Italy”; Criscuolo et al. (2012); Lokshin and Mohnen (2011); González et al. (2005); Eisenach and Caves (2011).

notify otherwise restrictive agreements and allowed national competition authorities (and national judges) to fully examine the characteristics of an agreement, including the possibility of assessing the exemption provisions, but giving them only the power to adopt prohibition decisions. The same approach cannot be adopted for State aid because the process of notification is essential here. What the European Union did in the case of State aid in order to reduce the number of notifications was to enlarge the area covered by the block exemption regulation and expand the notion of *de minimis*. Contrary to antitrust, the Commission did not seek the cooperation of domestic institutions in State aid control, mainly because it could not trust them in an area where their role of disciplining other parts of government was much less established and much riskier in terms of the results to be achieved.

This approach should change. Antitrust authorities are institutions that the Commission could trust and their role in State aid control could be very effectively enhanced. First of all, domestic provisions could subject to the control of the national competition authority State aid decisions that fall under the *de minimis* notice and give the antitrust authority the power to prohibit them should they significantly distort competition, along the lines of the Danish and Swedish examples.

Antitrust authorities could also have a larger role in the assessment of the effectiveness of State aid decisions. As Nicolaides (2003)²⁰ argues, while it is important that the Commission maintains a centralized decision-making function for reasons of consistency and legal certainty, national independent authorities entrusted with a partial State aid responsibility could be very important in adding greater discipline to the whole process, measuring “the economic impact of State aid they propose to grant and to demonstrate how it corrects market imperfections”, serving a disciplinary function at the decision-making stage of State aid. Jenny (2006)²¹ adds that from a political economy perspective, decentralization would help bridge the gap “between Member States’ politicians and the general public, on the one hand, and the Commission, on the other hand, by promoting a public and transparent debate at the national level that would show that the Commission trusts national institutions and wants to cooperate with them. This will undoubtedly make State aid policy better understood and increase its effectiveness. It would be a particularly important result at a time when there is renewed, if misguided, interest in industrial policy measures and the promotion of ‘national champions’ in many Member States”.

As Heimler (2010) and Heimler and Jenny (2012) argue, the role of the national competition authorities would be justified and substantiated, particularly if the seven steps that the Commission suggests for correctly evaluating the restrictiveness of State aid are slightly revised so as to anticipate the competition-oriented analysis at the stage of the definition of an incompatible aid. Finally, as Nicolaides has suggested, national competition authorities would be in an excellent position to

²⁰Nicolaides (2003), pp. 263–276.

²¹Jenny (2006), pp. 79–81.

undertake the analysis of the regulatory or fiscal alternatives to a State aid decision, identifying the most effective one.

Competition assessment is an analysis that national competition authorities regularly undertake in their competition advocacy activity. They are very well placed to extend this analysis to State aid decisions.

5 Conclusion

The European Union is one of the very few jurisdictions in the world that has introduced an active policy against State aid. The objective of the Treaty, creating an integrated economic area within the Union, could not be achieved by free trade alone, even by an extended free trade regime, that is, the free movement of goods, services, capital and people. In addition, antitrust provisions were meant to impede private restraints of trade, while State aid provision aimed to ensure that the governments of Member States would not subsidize their firms to the detriment of competitors. Considering that the Treaty entered into force on January 1958, it is a set of extraordinarily forward-looking policy instruments.

However, the monopoly that the Commission has rightly kept on the enforcement of State aid provisions led Member States to flood the Commission with notifications that were dealt with in turn by issuing quite wide block exemptions and ever-increasing *de minimis* rules. If Member States would enact domestic legislation for the control of State aid (and create domestic institutions in charge of State aid), they would be able to fine-tune the existing block exemptions and also *de minimis* subsidies would be subject to control. As a result, the EU policy against State aid would become much more effective.

National competition authorities would be well placed to perform an evaluation of State aid decisions under a competition assessment framework. As a result, it would be possible to extend the counterfactual to other options, fiscal policy and regulatory reform, that would strongly benefit the policies that will be actually adopted to remedy identified market failures and lead to decisions to grant State aid only when they are strictly necessary and appropriate.

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Part II

Policy Areas

Services of General Economic Interest

Erika Szyszczak

1 Introduction

Public services have had an uneasy relationship with the economic law of the EU and have been described as a “persistent irritant”.¹ But the assumption of the State aid regime as the framework by which to regulate the *financing* of public services through the concept of Services of General Economic Interest (SGEI) has created a domicile for SGEI in the European Union. Mario Monti, the author of the “irritant” phrase, brought the role of public services into the modernisation of the Single Market agenda, embracing them within EU state aid, competition and procurement policies. The modernisation of public services now assumes a clear role in the EU Horizon 2020 agenda,² anchored by State aid and procurement policy and the economic rules of the Treaty found in the Single Market legal framework. The scope of SGEI has also been realised as part the Citizenship and access to fundamental rights project of the EU. Since the ruling in *Altmark*³ the European Commission has secured a crucial role in the regulation of SGEI as a result of the State aid framework, mediated through a mix of hard and soft law interventions.

¹A phrase coined by Mario Monti, A New Strategy for the Single Market. At the Service of Europe’s economy and Society. Report to the President of the European Commission Jose Manuel Barroso, 9 May 2010. Often referred to as the Monti Report. The Report was followed by the Single Market Act I and II, http://ec.europa.eu/growth/single-market/smact/index_en.htm.

²Europe 2020: A strategy for smart, sustainable and inclusive growth, European Commission COM (2010) 2020 final 3 March 2010.

³ECLI:EU:C:2003:415.

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However, it is not possible to generalise on how far the modernisation of SGEI has permeated the whole of the EU. A study examining the decisions of the State aid monitoring authorities in the EU candidate states in South-East Europe in relation to the SGEI acquis reveals that these bodies do not always apply, or may misapply, the EU rules (Ciric and Marco Botta 2015). These countries continue to heavily subsidise SGEI and the failure of the national monitoring authorities and the European Commission to delve deeper into the way SGEI are funded during the accession phase may have long-term negative consequences on accession to the EU.

A second factor that affects the uniformity of approaches towards modernisation is that the most recent revision of the SGEI framework coincided with the economic and financial crisis. This has led to greater scrutiny of public expenditure and the introduction of austerity measures in the Member States. This was implemented using new macro-economic tools of economic governance.⁴ For some Member States this entailed the imposition of austerity measures where bailouts were prescribed. In almost all of the Member States such measures have not been popular, with allegations that the new governance processes are not democratic and undermine the traditional welfare state in Europe.⁵ But arguably the use of EU State aid law to mediate the way in which public money may be used to organise and run public services is also inherently undemocratic. European Court rulings, European Commission Decisions⁶ defy democratic processes and yet play a central role in the way a Member State chooses to allocate resources.

The formal State Aid rules are complemented by the European Commission pursuing a soft law agenda to encourage the modernisation of public social services as part of the over-arching Europe 2020 objectives. The new language of public spending is designed to create efficient and effective social policies that are adequate and fiscally sustainable. Social innovation is seen as a form of “social investment” to be tested through evidence-based decision-making.⁷

2 SGEI: The Birth of a Concept

The awkward nomenclature of “Services of General Economic Interest”, placed in what is now Article 106(2) TFEU, was the legal device to *protect* public services from the economic rules of the EEC Treaty. This unfortunate christening, tainted

⁴Szyszczak (2015).

⁵Anti-austerity demonstrations have been a response in many Member States, especially in Spain and in Greece. In Portugal the Constitutional Court struck down the Government’s austerity package in Judgment 187/2013. For an appraisal see Cisotta and Gallo (2014).

⁶Including the European Commission’s Package of measures introduced to respond to the *Altmark* ruling of 2003. The history of the measures and the current Almunia Package can be found at http://ec.europa.eu/competition/state_aid/legislation/sgei.html.

⁷See the 2013 Social Investment Package: European Commission (2013): Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions. Towards Social Investment for Growth and Cohesion—including implementing the European Social Fund 2014–2020, Brussels, 20 February 2013.

with a linguistic awkwardness, left the development of SGEI uncertain of their role in an economic union based upon free trade and competition. With the exception of what is now Article 93 TFEU (in the chapter on Transport), the original EEC Treaty declined to acknowledge the role of public services in the European integration project. Instead the Treaty re-invented the concept of public services as SGEI, as a *derogation* from the fundamental economic policy provisions of the EEC in what is now Article 106(2) TFEU.

In fact the derogation took on a more aggressive role. Opportunist litigants, either as competitors or consumers, tired with out-dated and inefficient public services, used Article 106 TFEU to provoke the modernisation of public services through litigation, questioning the need to protect state monopolies from the free market and competition rules.⁸

The mediation of SGEI through the competition and free market rules moved to the State aid arena where the challenges to the financing of public services became the central legal question. The outcome of this line of litigation bored much deeper into questioning the fundamental nature of *why* public services are necessary in modern economies and *how* they should function and operate. The result is a shift in the political and legal discourse on the role and function of public services in modern EU economies towards a focus on *financing and efficiency* of public services, with less emphasis upon the traditional role of the publicly funded welfare state.⁹

3 *Altmark*: The Turning Point

The critical turning point in this shift in the public services' paradigm in EU law is the ruling in *Altmark*,¹⁰ acclaimed as the vehicle for modernising public services. Thouvenin (2009) describes it as part of the constitutional architecture of EU law. *Altmark* moved away from seeing compensation for public services as an automatic assumption and introduced a more rigorous "State aid" approach towards public subsidies by requiring stricter scrutiny of the manner in which public services are created and financed. The significance of this case was reinforced by the European Commission's reaction to it: the European Commission seized control over the application of the *Altmark* ruling through a Package of measures, the "Monti-Kroes Package".¹¹ This Package was subject to review in 2009, just as the effects of the recession were beginning to kick in. The second Package of measures, the

⁸Szyszcak (2007).

⁹In the Brexit debates taking place in the UK in 2017 the impact of EU law in restraining State intervention in the market, including nationalisation of essential services, is part of the political agenda of the Labour Party. See Szyszcak (2017c).

¹⁰ECLI:EU:C:2003:415.

¹¹Known as the "Almunia Package", http://ec.europa.eu/competition/state_aid/legislation/sgei.html.

Almunia package, was far more detailed and prescriptive than the Monti-Kroes Package, curtailing the Member States discretion to identify and finance larger SGEI.¹²

The European Commission and the European Courts preferred to see the payment for public services as a State aid issue, with the State aid rules providing few escape clauses to capture the range and level of State funding for public services. This necessitated secondary legislation and soft law to provide some flexibility in applying the State aid rules. In contrast, Article 106(2) TFEU and Article 14 TEU adopt a 'Community' concept of Services of General Economic Interest, providing a place for the co-existence of national and EU ideas on the role of public services.

4 The Modernisation of SGEI: The Procurement Rules

The modernisation of the procurement rules took the form of a revision of Council Directives 2004/18/EC and 2004/17/EC. From 18 April 2016, the old Procurement Directives were replaced by Directive 2014/24/EU and Directive 2014/25/EU.¹³ The process was part of the wider Europe 2020 strategy,¹⁴ which included using public procurement as a market-based instrument to achieve smart, sustainable, and inclusive growth.¹⁵ It was argued that by modernising the Procurement Directives there would be greater efficiencies in the use of public funds, whilst at the same time, facilitating better access to public contracts for small and medium-size enterprises (SMEs).¹⁶

This process presented an opportunity for Member States to negotiate new provisions to support national restructuring and commercial changes necessitated by the 2008 global financial crisis. One crucial opportunity, which affects SGEI, is the manner in which the UK government succeeded in introducing a level of limited protection for public service mutuals¹⁷ through the inclusion of Article 77 'Reserved

¹²For a detailed discussion see the Essays in Szyszczak and Van de Gronden (2013).

¹³Directive 2014/24/EU on public procurement, OJ L 94, 28.3.2014, pp. 65–242 and Directive 2014/25/EU on procurement by entities operating in the water, energy, transport and postal services sectors, OJ L 94, 28.3.2014, pp. 243–374. See also: European Commission (2014), Fact Sheets Revision of public procurement directives, Fact Sheet no. 8. Social Aspects of the new Rules: http://europa.eu/rapid/press-release_MEMO-14-20_en.htm?locale=en.

¹⁴Europe 2020: A strategy for smart, sustainable and inclusive growth, European Commission COM(2010) 2020 final 3 March 2010.

¹⁵Ibid p. 16.

¹⁶Small and medium-sized enterprises (SMEs) are defined in Commission Recommendation of 6 May 2003 concerning the definition of micro, small and medium-sized enterprises (Text with EEA relevance) (notified under document number C(2003) 1422) L 124/36.

¹⁷The UK government defines a public service mutual as an organisation that has left the public sector but continue delivering public services and employee control plays a significant role in their operation. Available at <<https://www.gov.uk/government/get-involved/take-part/start-a-public-service-mutual>>.

Services’ in Directive 2014/24/EU.¹⁸ Increasing the number of public service mutuals was a key part of the UK government’s public sector reform strategy.¹⁹ The protection did not provide a full exemption from competition but restricted participation in competitive tenders to only qualifying undertakings meeting specified eligibility criteria.²⁰

Directive 2014/24/EU also introduced two other important provisions that affect SGEI. Article 12 addresses ‘Public to Public Contracts’. This Article codified existing case law and clarified the rules on exemption from procurement rules for award of contracts between qualifying public undertakings.

The second aspect of the procurement modernisation programme was the introduction of a new ‘Light Touch Regime’ to procure Social and Other Specific Services in accordance with Articles 74–76 of the Directive. Under these provisions, the contracting authority has the flexibility to procure and award a contract using processes and procedures that do not conform to the procedures specified in the other parts of the Directive, as long as certain conditions are met.²¹

The European Commission also took the opportunity during the modernisation process to abolish the existing Part B service rules and replace them with a more transparent and simple regime.²² The Regulations did not require contracting authorities to undertake any form of prior advertising or competitive tendering for services falling under the Part B provision. However, the procurement was still caught by the TFEU obligations of transparency, equal treatment, non-discrimination, and proportionality. The European Commission was concerned that if the existing provisions in Directives 2004/18/EC and 2004/17/EC remained in a new and modernised Directive, some Part B services contracts would be of cross-border interest and were therefore not being exposed to EU wider competition.²³

The new ‘light-touch’ regime introduced a set of rules relating to specific services that, in the view of the European Commission and Member States, were of minimal cross border interest. These rules apply to services with a threshold value higher than

¹⁸Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC, OJ L 94/65.

¹⁹The UK Conservative Party (2015), p. 49.

²⁰Article 77(3).

²¹Article 76(3).

²²Part B services were those services that the Commission considered would largely be of interest only to bidders located in the Member State and included health services, education services, recreational, cultural, and sporting services.

²³The UK government opposed the introduction of a new regime during the modernisation consultation and negotiation process, preferring to preserve the existing Part B rules but there was enough support from other Member States to implement the change: Crown Commercial Services, *The Public Contracts Regulations 2015: Guidance on the new light touch regime for health, social care, education and certain other service contracts*, (Crown Commercial Services, London 2015), p. 3.

for services not subject to the light touch regime.²⁴ The purpose of the new rules is to provide sufficient flexibility for contracting authorities to use any process or procedure they want when procuring a qualifying service, as long as the obligations in Articles 74–76 are respected. This will allow them to tailor their procedures according to their own requirements or design an alternative and innovative approaches. The inclusion of Article 12 ‘Public to Public Contracts’, Article 77 ‘Reserved Services’ and Articles 74–76 ‘light touch’ regime in Directive 2014/24/EU raises the potential for conflict with State Aid law in that certain undertakings delivering public services may obtain a competitive advantage.

5 Shifting the Definition of a SGEI

Initially a compromise appeared to be working with the understanding that the Member States controlled the definition of a SGEI. This identification of a SGEI could only be reviewed in cases of manifest error²⁵; a concept not defined in case law. A significant aspect of modernisation is that the framework of review has altered, and by implication, a process of Europeanisation of SGEI began as a result of Decisions of the European Commission and the case law of the European Court. The greater interest in procurement and commercialisation of SGEI has led competitors to seek review of the Member States’ choice and financing of SGEI providers.

If a service is a *Service of General Interest*, and functions as a non-economic activity it is not normally covered by EU economic law. Member States will argue that a range of services are in the *general interest* and are SGI. Protocol No 26 to the TFEU refers to SGI, but does not define the concept. The European Commission has clarified the concept in its Quality Framework, where it explains that SGI are services that public authorities of the Member States at national, regional or local level classify as being of general interest and, therefore, subject to specific public service obligations.²⁶ The term covers both economic activities (SGEI) and non-economic services. While the latter are not subject to specific EU law on the Single Market and competition rules, the way in which some aspects of *how* these services are organised may be subject to other general Treaty principles, such as the principle of non-discrimination. They may also be subject to the Citizenship provisions of the Treaty, particularly Articles 18 and 21 TFEU.

²⁴Light Touch Services threshold €750.00 (£589,148 for 2016) compared to general service thresholds €135,000 (£106,047) for Schedule 1 bodies and €209,000 (£164,176) for other bodies.

²⁵This position was also affirmed in the European Commission’s soft law communications which are found at: http://ec.europa.eu/competition/state_aid/legislation/sgei_archive_en.html.

²⁶Communication from the Commission, A Quality Framework for Services of General Interest in Europe, COM (2011) 900 final, p. 3.

6 A New Regulatory Framework

The European Commission has driven a policy agenda on the definition, and by implication, the legality and role of SGEI using soft law. In a Notice on the *Notion of State Aid*²⁷ the European Commission set out the understanding of many of the fundamental concepts that regulate SGEI. Although the European Commission uses its own Decisions and European Court case law as the basis for the Notice it has also developed the use of *de minimis* as a tool to demarcate Member State and European Commission interest in the use of State aid. The *de minimis* approach is used for services that appear not to have an effect on cross-border trade. It has been suggested by Sanchez Graells²⁸ that the European Commission used the Notice to create a new *exemption* for local, *de minimis* services. Such a policy is at odds with the European Court's ruling in *Altmark*,²⁹ that *de minimis* does not have a role to play in EU State aid law. The General Court (GC) examined at length the case law on cross-border trade in *Ireland v Commission*³⁰ and reiterated that 'there is no threshold or percentage below which trade between Member States can be said not to be affected'.³¹ Nevertheless, in September 2016 the European Commission adopted five Decisions finding that there was no impact on cross-border trade in small, local projects and that the State aid rules would not apply.³²

The European Commission has built upon the *de minimis* concept. In an amendment³³ to the General Block Exemption (GBER)³⁴ the European Commission has continued a policy of identifying areas where public support of projects will be in the public interest and deemed not to affect competition and trade between the Member States to a significant degree. This amendment will obviate the need for the Member States to declare such projects as a SGEI and the obligation to work through the complex and technical legal framework governing the funding of SGEI projects.

²⁷The text of the Notice is available at: http://www.ec.europa.eu/competition/state_aid/modernisation/notice_aid_en.html.

²⁸Sanchez Graells (2016).

²⁹ECLI:EU:C:2003:415.

³⁰ECLI:EU:T:2012:134.

³¹Para. 115.

³²See also: European Commission Press Release, State Aid: Commission gives guidance on local public support measures that can be granted without prior Commission approval, IP-15-4889, Brussels, 29 April 2015.

³³Commission Regulation (EU) 2017/1084 of 14 June 2017 amending Regulation (EU) No 651/2014 as regards aid for port and airport infrastructure, notification thresholds for aid for culture and heritage conservation and for aid for sport and multifunctional recreational infrastructures, and regional operating aid schemes for outermost regions and amending Regulation (EU) No 702/2014 as regards the calculation of eligible costs, OJ L 156, 20.6.2017, pp. 1–18.

³⁴Commission Regulation (EU) N°651/2014 of 17 June 2014 declaring certain categories of aid compatible with the internal market in application of Articles 107 and 108 of the Treaty, OJ L 187, 26.6.2014, pp. 1–78.

Funding for airports and infrastructure projects has created a number of legal issues for the European Commission. Now Member States may make public investments in regional airports handling up to three million passengers per year without the need to notify the measures to the European Commission. Public authorities may also cover operating costs of small airports handling up to 200,000 passengers per year.

In relation to ports, Member States may make public investments of up to €150 million in sea ports and up to €50 million in inland ports without the need to notify the European Commission. The Regulation also allows public authorities to cover the costs of dredging in ports and access waterways. The Regulation includes simplifications to the State aid process.

7 The Role of Public Interest in a SGEI

An unusual example of the complexity of a public interest task being classified as a SGEI is seen in a Commission Decision concerning a system of nature conservation.³⁵ The Netherlands government considered that nature conservation was an SGEI. This was unusual in that normally a SGEI is a service that can be made available to consumers. Thus while it could be argued that there was a public interest involved it was difficult to identify a “service”.

Thirteen Nature Management Organisations (NMO) received subsidies to buy or lease land in order to protect it and manage it. The status of the NMOs as “foundations” under Dutch law prevents them from making profit. The NMOs set land aside and engaged in economic activities such as wood cutting, selling land-based products, issuing fishing permits and operating camping sites. The Netherlands argued that the NMOs were not undertakings because they were non-profit entities with the main task of nature conservation. The secondary activities generating revenue, were marginal and intrinsically linked to their core task of nature conservation. The European Commission accepted that NMOs were not involved in economic activities when they were carrying out their nature conservation tasks, referring to the judgment in *Germany v Commission*.³⁶ In this case the CJEU stated that nature conservation was based on solidarity and was *not* an economic activity. But the European Commission then found that revenue generating activities of the NMOs were economic. This made the NMOs undertakings carrying out an economic activity and subject to the economic rules of the Treaty.

The case of *Germany v Commission* merits further scrutiny in the light of attempts by the Member States to transfer public assets to NGOs, charities, or, as in the case of the UK, to public service mutuals. This case concerned the free of charge transfer of woodland by the Federal government in Germany to environmental NGOs, in order

³⁵SA 27301.

³⁶ECLI:EU:T:2013:418.

to relieve the government of the costs of maintaining the land. The NGOs took on all responsibilities of the landowner for the woodland and were permitted to retain any revenues raised, subject to any surplus of revenue over cost being either handed to the Federal government or re-invested in the land. The German government did not consider the NGOs to be undertakings for the purposes of State aid law. However the GC upheld the European Commission's finding that the NGOs were carrying out economic activities. They sold wood, hunting and fishing licences on commercial terms. These activities could not be seen as purely social and environmental objectives. It was irrelevant that the NGOs did not have the objective of making profits, were largely financed by gifts, and had to re-invest any profit made.

An example of the lengths a Member State is prepared to go in order to finance a public activity is seen in the protracted litigation in *Germany v Commission and Zweckverband Tierkörperbeseitigung in Rheinland-Pfalz v Commission*.³⁷ This was a scenario of long-running litigation which concluded at the EU level in February 2016. The European Commission had decided that illegal State aid had been granted to ZT, which operated a business of collecting and disposing of dead animals.³⁸ Germany had imposed a public service obligation on ZT to maintain a spare capacity if an epidemic broke out. A similar issue had already been discussed in the ruling in *GEMO*³⁹ where the disposal of dead animals (and also slaughterhouse waste) was held to be an intrinsic part of economic activities of farmers and slaughterhouses and, under the 'polluter pays' principle, the financial burden should be carried by the farmers and slaughter houses. The European Commission applied the same principles in *ZT*, extending the polluter pays principle to the costs of preventative measures as well. The GC evoked Article 14 TFEU reiterating that the European Commission could not limit the discretion of the Member States to define SGEI, but then referred to the ruling in *GEMO* by finding that the disposal of dead animals was part of the economic activities of farmers.

At para. 44 of the ruling, the GC repeats the understanding that the Member States have a wide discretion to define an SGEI and that the European Commission may only challenge a nominated SGEI for manifest error. But then, in para. 45, the GC then states that the Member States' power to determine an SGEI is not absolute. The power cannot be exercised in order to evade the application of the competition rules. The Member State should show the special characteristics of the SGEI by comparison with other economic activities.

The CJEU upheld the Commission Decision and GC judgment, finding that the European Commission and the GC had not erred in the appraisal of the activity and that the first *Altmark* criterion was not satisfied.⁴⁰

³⁷ECLI:EU:T:2014:675; ECLI:EU:T:2014:676.

³⁸Commission Decision 2012/485, OJ L236, 1/9/2012.

³⁹ECLI:EU:C:2003:622.

⁴⁰ECLI:EU:C:2016:97.

8 Market Failure

Is market failure a necessary component of the identification of a SGEI? And in what circumstances should the State should finance the SGEI? In *Colt Telecom v European Commission*⁴¹ the French authorities granted aid of €59 million in compensation for the public service costs for the establishment and operation of very high speed broadband in the The Hauts-de-Seine department (an administrative area immediately bordering Paris). The aid was to compensate for the heterogeneous nature, in economic, sociological and infrastructural terms, of the municipalities in that department. After a competitive tendering procedure a company, Sequalum SAS, was chosen to implement the project and the French authorities notified the aid under the State Aid rules. Several electronic communications operators active in the Hauts-de-Seine department sent letters to the European Commission challenging the compatibility of the project with the State aid rules. The European Commission decided that there was no State Aid because there was a SGEI and that the *Altmark* criteria were fulfilled. The competitors challenged the Decision before the GC.

The GC reiterated that the Member States have a wide discretion when determining what they regard as an SGEI, but an SGEI must meet certain minimum criteria such as, inter alia, the universal and compulsory nature of such a mission. The Member States must also indicate the reasons why they consider that the service in question, because of its specific nature, deserves to be characterised as an SGEI and to be distinguished from other economic activities. The GC accepted that these conditions had been met. The GC states that not only is market failure relevant to the assessment of the compatibility of state aid but also to determining the existence of state aid and the existence of a SGEI.⁴²

The GC ruled that “market failure” is an “objective concept” that depends on factual situation in the market.⁴³ In this case, market failure is equivalent to under-supply of the service in question. This ruling supports the 2012 SGEI package, which has been criticised by Member States for the designation of SGEI on the basis of the failure by the market to provide it adequately (in terms of price or quality). Member States have always been of the opinion that their discretion, which is enshrined in the EU Treaty, is circumscribed by the 2012 Package and this ruling would appear to confirm this fear.

In contrast, the GC in *Spain v Commission*,⁴⁴ upheld the European Commission Decision⁴⁵ following a complaint from a satellite operator, finding that the aid granted by the Spanish government to the operators of the terrestrial television

⁴¹ECLI:EU:T:2003:463.

⁴²Para. 150.

⁴³Para. 158.

⁴⁴ECLI:EU:T:2015:891. The case is under appeal but the European Commission has referred Spain to the CJEU for failure to recover incompatible aid from digital terrestrial television operators and suspend aid payments, 10 January 2017 European Commission—Press Release.

⁴⁵Decision 2014/489, OJ L 217, 23.7.2014, pp. 52–87.

platform for the deployment, maintenance and operation of the digital terrestrial television network to be a State Aid incompatible with the common market, and ordering its recovery.

The European Commission took the view that the measures were a form of illegal State aid because the aid discriminated in favour of terrestrial platforms and therefore violated the principle of technological neutrality. Spain appealed the Decision, contending that the operation of the terrestrial TV network was offered as a public service to rural communities and therefore did not constitute an economic activity.

The GC found that the European Commission had not made an error in deciding that, in the absence of a clear definition of the operation of a terrestrial network as a public service, the measures should be qualified as State aid. Following *Altmark*, the recipient undertaking must have public service obligations to discharge, and the obligations must be clearly defined. The GC adds that at no point were the Spanish authorities able to determine which public service obligations were entrusted to the DTT network operators or able to prove it.

In *Andersen* the General Court avoided addressing the issue of whether a Member State may combine profitable and unprofitable parts of a service in order to avoid committing a manifest error in the definition of a SGEI.⁴⁶ Andersen, a bus operator, challenged Commission Decision 2011/3 which upheld a PSO concluded between the Danish Ministry of Transport and DSB, the incumbent train operator. Andersen argued that the bus routes adequately covered the PSO route, and, at a lower cost, and therefore there was no market failure requiring a PSO to be compensated. The Danish government justified the use of a PSO in that it wanted to ensure regular and integrated transport services between Copenhagen and the island of Bornholm and this entailed a wider (and seamless) route than the services offered by Andersen. The GC upheld the right of the Danish government to reinforce the transport options for access to Bornholm. In relation to the complaint from Andersen that DSB was over-compensated for the PSO, the GC does not spend any time discussing whether the definition of a PSO can cover parts of a market where there is competition alongside the unprofitable parts of a market where there is market failure.

The European Commission also glosses over a detailed discussion of market failure in the healthcare sector. Healthcare is a difficult area in EU economic law, and raises the question of whether, or how far, this sector is a special case. The European Commission does not explicitly carve out a special approach in its decision-making, perhaps leaving the specifics of a policy choice to the special treatment of healthcare found in the Almunia Package, and the procurement rules. But an analysis of the funding of a public hospital in Germany reveals a subliminal understanding that the provision of universal healthcare services underwritten by the State is a special case.

The European Commission investigated a complaint that a 100% public guarantee for a loan of €28 million and a capital increase of €1 million to Klinikum Osnabrueck (a 100% publicly owned hospital) was an illegal State aid.⁴⁷ Germany

⁴⁶T-92/11 *Andersen v Commission*, ECLI: EU:T:2017:14.

⁴⁷SA.36798.

defended the allegation by arguing that the capital increase conformed with the MEIP and that both measures complied with the 2012/21 SGEI Decision.

The complainant argued that the hospital was not an efficient body and therefore any SGEI aid could not be legal. The European Commission dismissed this argument and affirmed that SGEI providers do not have to be efficient, relying on the case law on Article 106(2) TFEU.⁴⁸ The SGEI Framework only obliges Member States to incentivise the recipient to improve its efficiency during the period of the assignment of the PSO.⁴⁹

The European Commission found that the entrustment created a legitimate SGEI because public authorities in Germany are obliged to offer hospital care where other providers cannot do so, and, indeed, private hospitals have a discretion as to what services they will provide. It was this legal difference that guided the European Commission, focusing upon the obligation of public hospitals to provide a universal emergency care service. The European Commission does not engage in an investigation as to whether there was a market failure: a gap in the market where a SGEI was necessary. Instead the European Commission cites the judgment in *Olsen*⁵⁰ where the GC held that the presence of competitors providing *some* of the services was not indicative that the market supplied *all* services on the same terms as those defined in the PSO. This approach is similar to the reasoning underpinning the *Andersen* case: the fact that there was an alternative to the PSO was not a sufficient reason to deny a PSO as the policy choice of the Member State.

The European Commission takes a formal approach, recognising that the compulsory nature of the provision of emergency medical services is the crucial factor, rather than any economic analysis of what the healthcare market actually provides.

The bundling of profitable and non-profitable services together in the definition of a SGEI has also been raised before the GC in transport cases. In *SNCM v Commission* a company providing ferry services between Marseille and Corsica legitimately received PSC for the extra costs incurred in providing a PSO.⁵¹ However, PSC for additional services during the summer, when there was increased traffic, was not regarded as part of the PSC. The European Commission found that France had committed a manifest error in classifying the additional services as a SGEI. In contrast to the finding of a justification in *Andersen*, the European Commission found that France had not provided an acceptable explanation for the bundling of different commercially viable and non-viable services. A Member State may only bundle profitable and non-profitable services where it can show that there are technical or economic efficiency reasons. This lends support to the idea that network

⁴⁸See: C-660/15 P, *Viasat Broadcasting v Commission*, ECLI:EU:C:2017:178 and T-137/10, *CBI v Commission*, ECLI:EU:T:2012:584.

⁴⁹Communication from the Commission—European Union framework for State aid in the form of public service compensation (2011), OJ C 8, 11.1.2012, pp. 15–22. *Efficiency Incentives*, para 39–43.

⁵⁰T-17/02, *Fred Olsen v Commission*, ECLI:EU:T:2005:218.

⁵¹ECLI:EU:C:2017:178.

industries, such as the roll-out of broadband services, are indeed special services and this is why the ruling in *Colt* may *not* be a generalised principle. But it does not lend support to the ruling in *Andersen* where there was the potential for competitors to feed into an integrated transport service recognised as a SGEI.

In relation to identifying market failure and the ability of a Member State to intervene by creating a PSO, the decision of the GC in *SNCM v Commission* lends increased support to the European Commission in applying a rigorous analysis of the evolution of the market. The GC dismissed the challenge of SNCM against the European Commission's Decision 2013/435 finding that SNCM received illegal State aid. The GC held that Member States may only limit the PSO to the identified market failure. Here the GC uses the language of proportionality. The PSO must be proportionate to the market failure.

This was a tough Decision for France. The GC held that because the PSC did not fall within the *Altmark* criteria *all* of the PSC received by SNCM was State aid. The additional summer services were not regarded as a SGEI because there was no market failure identified. Thus the aid could not fall back on Article 106(2) TFEU. This resulted in all of the PSC being recovered. Even tougher is the response by the GC to the plea that recovery of the illegal State aid would result in bankruptcy of SNCM. This plea elicited the response that if this was the outcome the State aid was being used to allow SNCM to remain in the market where it was not viable and that exit of an undertaking from the market is a natural consequence of the restoration of competition.

A similar transport dispute arose in the GC judgments in *RAS* and *Saremar*.⁵² This was a challenge by the Autonomous Region of Sardinia (RAS) and Saremar against a European Commission Decision that found that aid granted in the form of PSC by RAS to Saremar was illegal. Saremar provided ferry links to Sardinia (and outlying islands) and Corsica. The GC found that the second *Altmark* criterion, of identifying *ex ante* the parameters for calculating PSC, had not been settled in a transparent and objective way. The PSC was only allocated *after* Saremar incurred financial losses. This ruling confirms that the PSC must be settled in the mandate to provide the PSO. The European Commission had found that the PSO was not necessary because it was not effective in guaranteeing the affordability of the ferry fares to be charged by Saremar; the RAS had not defined the exact level of fares and therefore the European Commission considered that the PSO was not properly defined. The GC makes the point that a Member State must adhere to a procedural requirement of identifying the EU legal provisions on which a Member State relies in order to avoid notifying a PSC to the European Commission.⁵³ In this case RAS was attempting to bail out a company in difficulty by granting operating aid as a form of rescue aid, using the guise of a belated SGEI.

⁵²Case T-219/14, *Regione autonoma della Sardegna (Italy)*, ECLI:EU:T:2017:266.

⁵³Para. 165.

9 State Aid Law as a Determinant of Economic and Non-economic Activity

The bright line between ‘economic’ and ‘non-economic’ activity is one of the most definitive tests in EU economic law since it determines when an activity is caught by EU competence. The challenges for the European Commission in applying this test to public services appear to be threefold. The first challenge is to effectively monitor long-standing activities that Member States would categorise as non-economic activities or as SGEL. Such services may change over time as markets become competitive, especially as a result of cross-border trade. The second challenge is to monitor the evolution of new activities. A third contentious area in State aid litigation, which raises unresolved legal issues, is where bodies such as charities, or religious organisation, provide services such as healthcare and education as part of the duties of the State and are therefore subsidised. In *Ferracci*⁵⁴ and *Montessori*⁵⁵ challenges to a European Commission Decision⁵⁶ were brought to the GC by competitors (who had made the earlier complaints to the European Commission) concerning Italian provisions granting tax exemption from the municipal tax on real estate and a corporate tax reduction to entities that were seen as non-commercial entities and, as such, were deemed not to be carrying out economic activities. The European Commission found that certain tax exemptions did not constitute State Aid, except in one instance an exemption was found to constitute unlawful State aid where it related to activities in involving real estate and the entities were engaged, in part, in economic activities. But, remarkably, for technical reasons the European Commission found that this was an exceptional case and that it was impossible for Italy to recover the illegal State aid.

The legal issue of determining the bright line between economic and non-economic activity arose in the context of the extent of the recovery of illegal State aid. In order to obtain tax exemptions a non-commercial entity had to show that it was engaged in non-economic activities. However, the Italian system did not create a structure where a beneficiary of the tax concession was able to show the mix of economic and non-economic activities. Overall, the Italian authorities argued that the entities in question were not undertakings because their activities mainly targeted very specific categories of recipients. The activities did not constitute an offer of goods or services on the market and thus were not in competition with the activities carried out by commercial undertakings. In most cases the activities had specific social characteristics, for example, they were performed in the public interest or for solidarity purposes, were either free of charge or services were provided for reduced fees. The European Commission was not able to discover if, or what proportion of,

⁵⁴ECJ:EU:T:2016:485.

⁵⁵ECJ:EU:T:2016:484.

⁵⁶Commission Decision of 19 December 2012 on State aid SA.20829 (C 26/2010, ex NN 43/2010 (ex CP 71/2006)) Scheme concerning the municipal real estate tax exemption granted to real estate used by non-commercial entities for specific purposes implemented by Italy.

previous activity was economic or non-economic. In this situation it was not possible for the European Commission to find positive evidence that there was economic activity taking place in the past and that the tax concessions gave an undertaking a selective advantage for the purposes of satisfying the State Aid rules.⁵⁷

The GC examined the reform of the exemption in Italian law which tightened up the tax exemptions by applying them to only non-economic activities. As the case law and Decisions of the European Commission reveal, it is not easy to apply a clear bright line to non-economic activities, especially where there are mixed economic and non-economic activities and where an entity is able to ask for payment for any ancillary services provided.⁵⁸ In the *Montessori* case the entities were allowed to charge small, or nominal, amounts for their services and economic activities were not prohibited.

The GC reiterates its position that the fact that the supply of goods and services is made on a non-profit basis does not prevent the supplier from being considered as an undertaking where it competes with other operators who pursue profit.⁵⁹ The Court also noted that new tax rules were introduced to ensure that if the property was for mixed use, the tax exemption applied only to the part of it which was used for non-economic activities.⁶⁰

The Court took a formal approach to identifying a set of indicators which were evidence that the tax exemption could apply to non-economic activities. These indicators included the not-for-profit nature of the activities,⁶¹ the fact that the entities were not inherently in competition with undertakings operating on a for-profit basis. Other indicators were drawn from an examination of the statutes of the entities. For example, the statutes prohibited the distribution of some profits (or operating surpluses); any profits had to be reinvested in activities that contributed to social solidarity. Where a non-commercial entity was dissolved, its assets had to be transferred to another non-commercial entity. In the *Montessori* case, where entities operated in the education sector, specific conditions were imposed: the activities had to be of a quality comparable to that of public education and the school had to operate a non-discriminatory entry policy for students; a school had to accommodate students with disabilities; the school had to provide for the publication of its accounts; education had to be provided free of charge or for a nominal amount covering only a proportion of the actual cost of the service.⁶²

⁵⁷Para. 106 of the judgment in *Montessori*.

⁵⁸See, for example SA 27301 (Dutch Nature Management Organisations) discussed above.

⁵⁹Para. 133 of the judgment in *Montessori*.

⁶⁰Para. 135 of the judgment in *Montessori*.

⁶¹But cf: Case AT.39759—ARA Foreclosure, published 11 October 2016 where an Austrian waste management company operating on a non-for-profit basis was held to be an undertaking for the purposes of Article 102 TFEU. Here a competitive market was likely to materialise if the dominant entity had not prevented access to the infrastructure.

⁶²Paras. 136–141 of the judgment in *Montessori*.

The GC emphasises the commercial negotiation side of remuneration when it constitutes consideration for a service. This aspect of negotiation is missing in the provision of a national system of universal education. Thus, in the situation in *Montessori*, the State was not acting in a commercial sense but merely fulfilling its public duty towards its population. The nature of the activity was not affected by the fact that pupils *occasionally* were asked to pay certain fees in order to contribute to some extent to the system's operating costs.⁶³ This aspect of the ruling shows the limitations of the EU-level approach of defining an undertaking and economic activity according to a functional set of criteria compared with what operates in practice where there are mixed activities.

The Grand Chamber of the CJEU had the opportunity to rule on the question of whether Church bodies providing educational provision can fall into the realm of economic activity in a preliminary ruling request from Spain.⁶⁴ Again the source of the complaint was a tax dispute. In Spain the Church is normally exempt from property taxes, but the tax authorities refused an exemption for the renovation of property used by the Church for the purposes of education and offering meals to pupils. The tax authorities considered these activities to be non-religious activities and economic in nature. The core question of whether there was an undertaking involved, carrying out economic activities, was addressed by the Court following its now hallowed traditional functional approach to the definition of an undertaking.⁶⁵ Moving on to examine the nature of economic activity the Court also draws upon its traditional dicta, pointing out that even where goods and services are provided on a not-for-profit basis this does not prevent a body which carries out activities on a market from being classified as an undertaking since the offer of goods and services exists in competition with other operators which are aiming to make a profit.⁶⁶ For the Court, the essential characteristic of remuneration is the fact that it constitutes consideration for the service or good in question.

Turning to the funding of education the Court sees the difference between privately-funded and publicly-funded schemes as the crucial issue. It found that the Church delivered three activities: religious activity, education services paid by the State and non-compulsory education (early-years teaching, extra-curricular activities and post-compulsory education) which was not supported by the State. The education services also included the provision of food and transport. The Court found that the tax exemption was being sought for the renovation of property relating to the educational services provided by the Church, and did not relate to mainstream religious activities. Thus the tax exemption sought appeared to have no connection to either the strictly religious, or complementary education services, of the Church.⁶⁷

⁶³Para. 141 of the judgment in *Montessori*.

⁶⁴Case C-74/16 *Congregación de Escuelas Pías Provincia Betania v Ayuntamiento de Getafe*, ECLI:EU:C:2017:496.

⁶⁵Para. 45.

⁶⁶Para. 46.

⁶⁷Para. 53.

The Court was unwilling to make a decisive ruling. It instructed the national court to decide, and verify, the extent that the educational activities of the Church were subsidised by the State and were part of the Spanish system of public education. This was a question of fact, which would be crucial for two reasons. First, in determining if the fees charged to recipients were more than purely nominal fees then the activity could be classified as economic activity. If the fees were nominal it would be possible to create a safe harbour to protect the provision of education as a non-economic activity, as part of the Spanish public education system. Secondly, if the educational activities are classified as economic because the fees charged are a significant amount of the cost of the education service provided, the property could become classified as a property being used for economic activities and prevent the tax exemption from applying.

To date the European Courts have not provided a clear threshold of when a proportion of mixed activities can tip the balance between economic and non-economic activity. Some guidance on what proportion of ancillary economic activity of a non-commercial entity is acceptable is now found in the procurement rules, for example, Article 12 of Directive 2014/24,⁶⁸ allows in-house entities to develop 20% of their services or goods in the market and still be considered under the control of the contracting authority for the purposes of the direct award of contracts. Whether this excludes the existence of State aid or not is unclear.

10 Healthcare: A Special Case?

Healthcare poses a number of questions for State aid law and policy on how the economic rules of the EU should apply to this sector. In all Member States healthcare is regulated. It will be recalled that the GC in *BUPA*⁶⁹ indicated that there should be some flexibility in the application of the *Altmark* criteria to the Irish healthcare scheme that was undergoing a process of reform and liberalisation.⁷⁰

In contrast the European Commission has been obliged to open an investigation as to whether there is illegal State aid in the organisation of the Belgium hospital sector. In 2005, the European Commission received a complaint from two associations of Brussels private hospitals, alleging that unlawful state aid had been granted to the five public IRIS hospitals in Brussels since 1995. The cause for complaint was that certain public financing measures covering the deficits of the public hospitals,

⁶⁸OJ 2014 L 94/65.

⁶⁹ECLI:EU:T:2008:131.

⁷⁰The price paid to protect the Member States' choice of how they operate a social security scheme is stark in this case. After the ruling by the GC the healthcare scheme was successfully challenged in the Irish High Court. However a *Francovich* action was unsuccessful (*BUPA Ireland v Health Insurance Authority*) [2013] IEHC 177 and BUPA eventually pulled out of the Irish healthcare market, making the market *less* competitive.

but not of the private hospitals, went beyond the public financing envisaged in the Belgian federal hospital law that applies equally to both public and private hospitals.

The Belgian authorities argued that the IRIS hospitals performed *additional* SGEI functions and that these accrued special costs that have to be compensated through the deficit financing. In 2009, the European Commission found that the deficit financing met the criteria of the EU SGEI rules. The GC annulled the Decision, ruling that the European Commission should have opened an in-depth investigation since the complainants' arguments raised doubts as to the compatibility of the deficit financing of the additional SGEI missions. The GC ruling reveals that where undertakings are in competition for services and funding for those services, the Member States and the European Commission must ensure that the conditions for competition can materialise. This may explain the difference between this ruling and *BUPA*⁷¹ and *FENIN*⁷² where the fundamental nature of a State's social security scheme is being challenged.

The issue in EU economic law is to determine whether healthcare is a non-economic activity and shielded from the free market and competition rules, or whether it is a special form of a (social) service of general interest, or a SSGEI, or whether it is a commercial activity where State intervention could prevent a market from operating or distort the market.

In *PICFIC*, the European Commission investigated rescue aid granted to a healthcare provider in Italy.⁷³ The European Commission found that *PICFIC*, a religious order created in 1858 to provide health and social services, was engaged in economic *and* non-economic activities. In relation to the social services that were provided for remuneration, the European Commission found that there was economic activity and *PICFIC* was held to be an undertaking, bringing its activities under the remit of EU law.

There are several decisions of national competition authorities deciding that healthcare insurers are not undertakings (Taylor and Warren 2015). The Antimonopoly Office of the Slovak Republic also concluded that public health insurance companies were not undertakings and were exempt from national competition law because they do not carry out economic activity (Augustinič 2009). The European Commission examined the organisation of healthcare in Slovakia in Decision 2015/248.⁷⁴ Healthcare insurance is compulsory in Slovakia and provided by the private sector and State-owned bodies that are allowed to create profits. The insurers are not only funded through members' contributions but also receive subsidies from the State as well as the State making contributions on behalf of economically inactive persons. Under the health insurance rules, persons can choose their insurer and pay contributions to the schemes in proportion to income, not

⁷¹ECLI:EU:T:2003:463.

⁷²ECLI:EU:C:2006:453.

⁷³SA 39426.

⁷⁴SA 23008.

benefits received. There is a risk-equalisation scheme in place. The health insurance market in Slovakia has become concentrated with three main providers: a State-owned body (SZP/VZP) and two private undertakings (Dôvera and Union Health).

The issue that concerned the European Commission was the capitalisation of one of the health insurance companies. In 2007, Dôvera lodged a complaint alleging that unlawful state aid was granted in 2005–2006 to one of the two state-owned health insurers (SZP), in the form of a €15 million capital increase. In 2011, the complainant extended the scope of its allegations to several other measures (additional capital increases, debt discharges, and direct subsidies) in favour of SZP as well as VZP, the other Slovak state-owned health insurer with which SZP had merged in 2010.

The European Commission began its inquiry by reiterating the case law on economic activity, acknowledging that any service may alter from being an economic, or non-economic activity over time. The European Commission focussed upon the CJEU case law on healthcare, where the concept of solidarity plays an important role in delineating the bright line between economic and non-economic activities.

The Decision provides a summary of the case law and the indicators used to determine whether a social service has enough factors to trigger the solidarity principle. These are identified as follows: (1) Is affiliation compulsory? (2) Does the scheme have an exclusive social purpose? (3) Is the scheme not for profit? (4) Are benefits linked to contributions? (5) Are benefits paid in proportion to earnings? (6) Is the scheme supervised by the State? Solidarity-based schemes are contrasted with schemes categorised as involving an economic activity by characteristics involving optional membership, the use of capitalisation, for profit, and benefits that supplement the basic State insurance schemes.

Drawing upon these indicators, the European Commission concluded that the Slovakian health insurance scheme was based upon the principle of solidarity and that the insurance companies were not undertakings.

This conclusion is surprising, given that some of the health insurers were private, for-profit companies that competed with the State-owned insurer, VZP. The deciding factor that swung the balance in favour of the solidarity principle was the fact that the compulsory nature of health insurance in Slovakia highlighted the social nature of the activity where the solidarity principle played a central role under the tight supervision of the State.

The European Commission noted that the non-economic nature of the activity was not affected by the fact that health insurance companies engage in quality competition and procurement efficiency competition by buying healthcare and related services of good quality from providers at competitive prices. This activity was severable from the contracts with insured persons within the compulsory health scheme. Thus, from the *FENIN*⁷⁵ case, the European Commission concluded that if the system of compulsory health insurance was of a non-economic nature, then the activity of procuring inputs necessary to run the system was likewise of a

⁷⁵ECLI:EU:C:2006:453.

non-economic nature. The fact that the health insurance scheme allowed insurers to operate on a for-profit basis did not alter the non-economic nature of the activities. This was because the insurers operated within a system that displayed strong features confirming the non-economic nature of activities. The mere fact that health insurers were allowed to make profits and to distribute profits to shareholders could not, in itself, overturn the predominance of the system's social features and objectives, the central role played by the principle of solidarity and the tight degree of State regulation and supervision, under which the whole system operated.

The European Commission appreciates that the Slovakian health insurance system was designed to encourage efficiency and sound management, allowing limited quality competition but not price competition, in order to create a system based upon the solidarity principle that would ultimately be of benefit to the consumers of healthcare services. The Decision was challenged by *Dovera* where the GC found that the European Commission had committed a manifest error of assessment by finding that SZP and VZP were not undertakings because healthcare was not considered to be an economic activity.⁷⁶

The interaction of the *Altmark* criteria and the public procurement rules creates constant challenges at the national level, and an example is seen in the ruling of the CJEU in *Spezzino*.⁷⁷ This was a challenge to an Italian law whereby emergency ambulance services must be awarded on a preferential basis without a procurement process to voluntary bodies, such as the Red Cross. In Italy, the voluntary associations can engage in economic activity of a commercial nature. Evidence suggests that this commercial activity is not necessarily marginal, but it can account for up to 25–30% of the activity pursued by such undertakings. This rule has a constitutional status in Italy because ‘... the Italian Republic has incorporated into its constitution the principle of voluntary action by its citizens. It thus provides that citizens, acting individually or in an association, may participate in activities of public interest with the support of the public authorities, on the basis of the principle of subsidiarity’.

The case raised a number of aspects of the application of EU law in relation to the freedom of establishment, procurement, and competition rules. But the CJEU chose to examine the issues from the perspective of the procurement and internal market rules.

The CJEU ruled that as a matter of principle, EU law does not preclude the Member States from entrusting the provision of certain social services on a preferential basis and without a procurement process where the activity actually contributes to the social purpose and the pursuit of the objectives designed for the good of the community and budgetary efficiency as established in national legislation.

As Sanchez-Graells (2015) comments, this ruling appears to be at odds with the fourth *Altmark* criterion and indeed creates a new standard, and potentially much lower standard, of ‘contribution to budgetary efficiency’. According to Sanchez-Graells, this new test is ‘riddled with interpretive difficulties’. He argues that the

⁷⁶ECLI:EU:T:2018:64.

⁷⁷ECLI:EU:C:2014:2440.

ruling could potentially deactivate a significant number of secondary State aid law requirements applicable to the remuneration for the provision of public services under the Almunia Package, particularly the Decision on public service compensation granted to certain undertakings entrusted with the operation of services of general economic interest.⁷⁸ More fundamentally the ruling creates uncertainty as to whether the *Altmark* criteria apply when the commissioning of the SGEI falls on voluntary, third-sector (or) non-profit organisations.

The *Spezzino* ruling is at odds with the case law of the CJEU that stresses that the non-profit nature of the body being awarded a public contract is incapable of altering the rules applicable to such an award where the entity engages in economic activity in competition with other (types of) providers. This is seen in the in the *Centro Hospitalar de Setúbal*⁷⁹ case where the Court states that EU public procurement rules apply to the award of contracts for the provision of public services to entities that ‘despite their status as social solidarity institutions carrying out non-profit activities, are not barred from engaging in economic activity in competition with other economic operators’. Thus, it may be questioned whether the CJEU is signalling that certain preferences for the provision of healthcare services may be capable of creating new exemptions from the application of the EU rules relating to the procurement and provision of SGEI.

Another example of the issues that are arising in the interaction of the procurement and competition rules is seen in *Data Medical Service*⁸⁰ where the CJEU reiterates previous case law to the effect that national procurement rules cannot exclude public hospitals from participating in tendering procedures for the award of public contracts as a result of their status as a public economic entity. It is likely that such issues will recur in the future as public bodies are encouraged to be competitive.

The European Commission investigated a complaint that a 100% public guarantee for a loan of €28 million and a capital increase of €1 million to Klinikum Osnabrueck (a 100% publicly owned hospital) was an illegal State aid.⁸¹ Germany defended the allegation by arguing that the capital increase conformed with the MEIP and that both measures complied with the 2012/21 SGEI Decision.⁸² The European Commission was satisfied that the act of entrustment defined precisely the geographic area and the contents of the PSO and excluded purely commercial activities which are found in hospitals, such as a cafeteria or services not linked to

⁷⁸Commission Decision of 20 December on the application of Article 106(2) of the Treaty on the Functioning of the European Union to State aid in the form of public service compensation granted to certain undertakings entrusted with the operation of services of general economic interest, OJ L7, pp. 3–10.

⁷⁹ECLI:EU:C:2014:2004.

⁸⁰ECLI:EU:C:2014:2466.

⁸¹SA.36798.

⁸²Commission Decision of 20 December 2011 on the application of Article 106(2) of the Treaty on the Functioning of the European Union to State aid in the form of public service compensation granted to certain undertakings entrusted with the operation of services of general economic interest (notified under document C(2011) 9380), OJ L 7, 11.1.2012, pp. 3–10.

public health such as elective cosmetic surgery. The European Commission found that the compensation mechanism defined a limit for the PSC, which was the amount of the incurred net cost. However, it is not obvious in the Decision how the parameters of compensation were defined in advance. Nor, is it clear how the Commission quantified the total amount of aid received by the hospital. The act of entrustment laid down a procedure for preventing over-compensation through account separation. Accounts of the hospital showed that the non-SGEI activities were self-financing so there was no risk that the State aid would cross-subsidise the non-SGEI activities.

In the Decision relating to Klinikum Osnabrueck the European Commission found that there was State aid, granted over a period of time and its compatibility with EU law had to be assessed against the 2005 and 2012 SGEI Decisions. The European Commission decided that the period of entrustment of the SGEI was 10 years which satisfied the limit of the safe-harbour period set out in the 2012 Decision. The European Commission found the SGEI to be legitimate because it provided a universal emergency healthcare service to fill gaps where private hospitals might not offer such a service. The act of entrustment defined precisely the geographic area and the contents of the PSO and excluded purely commercial activities which are also to be found in hospitals (such as a cafeteria or services not linked to public health) and other health services (for example, elective cosmetic surgery). The compensation mechanism defined a limit for the PSC as the amount of the incurred net cost for providing the PSO. But there is no evidence in the Decision as to whether and how the parameters of compensation were defined in advance.

11 The Evolution of SGEI

Modernisation has allowed for the *evolution* of SGEI. A European Commission Decision⁸³ addressed the question of whether there was economic activity attracting the State Aid rules when the Netherlands introduced an electronic procurement platform (TenderNed) to implement the new Directives on Public Procurement.⁸⁴ The platform was developed in-house as part of the activities of the Ministry of Economic Affairs, Agriculture and Innovation. The services offered by TenderNed were free. The European Commission received complaints from competitors who provided competing e-procurement platforms in the Netherlands, claiming that unlawful State aid was used to create TenderNed.

A first question to address was whether the activity fell within the definition of the exercise of public powers or was it an economic activity? The European

⁸³SA 34646.

⁸⁴Directive 2014/24/EU of the European Parliament and of the Council on public procurement and repealing Directive 2004/18/EC (OJ L 94, 28 March 2014, p. 65) 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 [2004] OJ L 134/114.

Commission explains that the issue of whether a market exists may depend upon the way certain services are organised; certain services may be classified in different ways in different Member States.

The European Commission then sets out the situation when a Member State is exercising public power, or when the authorities emanating from the State act in their capacity as public authorities, or if the activities carried out are connected to the functions of the State through their nature, aim, and the way in which they are regulated. In this situation, the State aid rules of Article 107 TFEU will not apply.

The European Commission pointed out that under the Procurement Directives of 2014, the Member States are obliged to ensure that contracting authorities and economic operators are offered, free of charge, guidance and information on the interpretation and application of EU public procurement law, alongside supporting contracting authorities in relation to planning and carrying out procurement procedures. The Netherlands had chosen to meet that obligation through the creation of the TenderNed platform.

The European Commission found that the activities of TenderNed were not economic activities. Instead, they constituted the means by which contracting authorities and special sector entities fulfil their statutory obligations under the national and EU procurement rules, as well as the means by which the Netherlands fulfils its obligations under EU law. Thus, the contracting authorities and special sector entities are acting in their capacity of public authorities when complying with the EU and national rules. TenderNed could, therefore, be considered as an extension of these activities and was obliged to act in a similar capacity when it allowed the contracting authorities to ensure that they met their national and EU obligations. To substantiate this argument, the European Commission relied upon the ruling of the CJEU in *Compass v Austria*⁸⁵ that the activity of a public authority consisting ‘in the storing, in a database, of information which undertakings are obliged to report under *statutory obligations* (emphasis added), does not constitute an economic activity’.

The complainants made the point that the market already provided services offered by TenderNed, and this would negate the argument that the activity was not an economic activity. The European Commission responded by stating:

... the State does not forego the right to carry out an activity that it deems necessary to ensure its public bodies comply with their statutory obligations by acting at a point in time when private operators—perhaps due to lack of prior action by the State—have already taken the initiative to offer services to the same end. Ensuring public authorities comply with their statutory obligations by channelling public procurement may be an economic activity for the complainants. It is not, however, an inherent economic activity, but rather a service of general interest, which can be commercially exploited only so long as the State fails to offer that service itself.⁸⁶

Thus, the European Commission underlines the discretion of the Member State to choose *how* to implement obligations imposed by EU law. Even where a market

⁸⁵ECLI:EU:C:2012:449, para. 51.

⁸⁶Para. 68 of Commission Decision SA.34646.

exists, the fact that the State is exercising its *official authority* will result in the activity being categorised as a non-economic activity.

The complainants challenged the European Commission Decision before the General Court and in a ruling of 28 September 2017⁸⁷ the GC explored the concept of the activities which fall within the scope of state prerogatives. The GC concluded that TenderNed's role consisting in providing a noticeboard, in order to allow the publication of the tender notices and decisions awarding public contracts that the contracting authorities are required to communicate in accordance with their statutory obligations, was not an economic activity.

12 Infrastructure Projects

The allocation of funding to support infrastructure projects, particularly regional airports, creates particular tensions between the Member States and the European Commission. Such projects have a commercial basis, but funding is often required to encourage airlines to develop new air routes that will benefit regional and social cohesion. Thus, national and regional governments support large infrastructure projects in the expectation that they will contribute to the development of the local economy or revitalise old industrial regions. One defence of such projects is that they constitute Service of General Economic Interest (SGEI).

In the European Commission Decision concerning aid granted to the operating of Nîmes Airport, it was decided that regional promotion of economic growth should not be justified through measures that give an unfair advantage only to certain undertakings.⁸⁸ Initially the operation of the airport was entrusted to the Nîmes Chamber of Commerce and Industry [CCI], which was a public administrative body carrying out public policy functions. Veolia Transport Aéroport de Nîmes [VTAN] was responsible for the operation of shops and restaurants within the terminal. Airport Marketing Services [AMS] was a wholly-owned subsidiary of Ryanair whose purpose was to promote the airport.

The measures investigated by the European Commission included funding of the public tasks of customs and immigration posts, security, investment and operating subsidies to the airport operator, an agreement between CCI and Ryanair, an agreement between CCI and AMS and various agreements between VTAN and Ryanair. The agreements were selective and the aid affected cross-border trade. The main issues were whether State resources were used, whether the airport operator, Ryanair, VTAN or AMS, obtained an advantage and whether the operations of the airport could be classified as a SGEI.

The European Commission established that Ryanair and AMS received aid because the agreements signed with the airport were not compliant with the Market

⁸⁷ ECLI:EU:T:2017:675.

⁸⁸ *Aéroport de Nîmes, Ryanair*, SA 2016/633, OJ L113, 27 April 2016.

Economic Investor Principle.⁸⁹ France justified the investment and operating subsidies it granted to the airport by claiming that some of the subsidies covered sovereign tasks⁹⁰ and other subsidies compensated for the extra costs of the provision of SGEI. It was argued that the services offered by the airport contributed to the economic development of the region; the PSO imposed on the airport forced it to expand its activities beyond the level that was profitable to a private investor. The European Commission concluded that this argument was vitiated by a manifest error.⁹¹ France had committed a manifest error of assessment by defining the overall management of the airport as an SGEI and failed to identify the specific content and duration of the PSO. According to the European Commission it is irrelevant that an activity has a positive effect on the economy: a SGEI must go beyond making a positive economic contribution. Thus the French government should have adduced evidence to show how the airport reduced the isolation of the region.⁹²

The European Commission also found that the other *Altmark* criteria were not satisfied: in particular the *ex ante* parameters of compensation were not defined in any act of entrustment; subsidies to the airport were ad hoc and not calculated according to a pre-determined formula; the compensation of VTAN was calculated on the basis of a flat rate, which did not qualify as a parameter of compensation⁹³; and CCI was not chosen via a competitive procedure, but through a negotiated procedure.⁹⁴ The terms of the selection procedure were too broad and left the relevant award authority with room for manoeuvre in the choice of service provider. This was particularly the case with the criterion entitled ‘commercial development policy’, which could not be correlated to a quality criterion for an SGEI.⁹⁵

The European Commission found that the investment and operating subsidies to the airport and the flat-rate compensation of VTAN were State Aid. *However*, the aid was compatible with the internal market because it contributed to an objective of common interest, it addressed a market failure, it was an appropriate instrument, it was necessary and proportionate and did not distort competition to an undue extent.

There are two other Decisions relating to regional airports where the concept of a PSO was the important factor in granting State aid. The first concerns Kalmar Oland Airport, a small airport in Sweden which was entrusted with a narrow PSO to

⁸⁹Cf: Case T-375/15 *German Wings and Zweibrücken Airport*, OJ C 195, 19.6.2017, p. 19, 27 April 2017. This case concerned the application of the Private Market Economy test. Also case number SA.38105 where the European Commission concluded that public support granted by Belgium to three airlines flying from Brussels Airport, Zaventem, gave them an unfair advantage over other airlines, in breach of EU state aid rules.

⁹⁰Paras. 565–566, 569.

⁹¹Para. 581.

⁹²Para. 583.

⁹³Thus, France committed a manifest error of assessment by defining the overall management of the airport as an SGEI [para 591] and France failed to specify the content and duration of the PSO.

⁹⁴The European Commission considered a negotiated procedure to be in conformity with the 4th *Altmark* criterion only in exceptional circumstances.

⁹⁵Para. 604.

service airlines. The PSO did not cover commercial activities such as airport car parking or shopping services. The European Commission found that the airport was an undertaking and that the PSC granted did not satisfy the 4th *Altmark* criterion. But there was no illegal State aid because the PSC complied with the SGEI Framework Decision 2012/21. The airport was wholly owned by the public authority which entrusted the PSO and therefore the public procurement rules did not apply.⁹⁶

More recently the European Commission found that PSC granted for 5 years to the Highlands and Islands Airports Limited (HIAL), a company wholly owned by the Scottish government, for the operation of Inverness airport in Scotland was compatible with the State aid rules.⁹⁷ It was accepted that the public funding will contribute to the area's economic and social development, without unduly distorting competition in the Single Market. The PSC allows for the provision of a genuine SGEI; the airport provides air access to the remote Highlands of Scotland and is an access point for some of Scotland's most remote islands, namely the Shetland and Orkney Islands and the Western Isles.

13 A New Form of SGEI: Security of Supply in Energy

In a secretive and highly political Decision the European Commission has developed a new concept of a SGEI: provision of an energy source with the aim of diversification of supplies to ensure security of supply of energy. Lithuania proposed to build a terminal to import liquefied natural gas to reduce its absolute dependency on Russian gas supplied by Gazprom. The operator of the terminal was a 72% state-owned undertaking, appointed without a selective procedure. It was given a guarantee to cover loans from the European Investment Bank and other creditors, and operating aid. The operating aid was funded by a levy on the users of the terminal and final gas consumers.

The European Commission⁹⁸ found that both the guarantee and the revenue from the levy constituted State aid but it approved both for being compatible with the internal market on the grounds that the guarantee was necessary to bridge a funding gap, while the operating aid was necessary to cover the extra costs of PSO imposed on the terminal operator. Lithuania designated the operation of the terminal as a SGEI.

⁹⁶Kalmar airport was an in-house operator and the Case C-107/98 *Teckal* (ECLI:EU:C:1999:562) applied.

⁹⁷SA.45692.

⁹⁸Decision SA.36740. The Decision was adopted in November 2013, but not published until 4 May 2016, http://ec.europa.eu/competition/state_aid/cases/250416/250416_1542635_190_2.pdf.

The European Commission assessed if the conditions in the 2012 Framework were met.⁹⁹ It accepted that Lithuania had conducted a public consultation on the terminal. It also found that the PSO was properly entrusted and the obligations of the terminal operator, as well as the method of compensation, were accurately defined. However, the duration of entrustment was unusually long: 55 years. The European Commission accepted that this period of time corresponded objectively to the period of depreciation or amortisation of the pipeline connecting the terminal to the gas network. The 2012 Framework stipulates that the minimum period of entrustment is the period required for depreciation.¹⁰⁰ The minimum period required is the period in which an asset is fully re-paid, even if it has a longer useful life. The issue of the direct assignment of the tasks to the terminal operator, a majority state-owned undertaking, without a public procurement procedure or competitive selection was tricky. Lithuania argued that the public procurement Directive 2004/18¹⁰¹ and internal market rules did not apply since Directive 2004/18 excluded contracts for the ‘protection of the essential interests’ of Member States, while Articles 52 and 62 TFEU allowed for restrictions on the freedom to provide services on grounds of public security. The European Commission accepted the public interest defence, agreeing that a different company could have developed ties with Gazprom which could influence the market behaviour of that other company.¹⁰²

The European Commission examined the amount and method of compensation. According to the 2012 Framework, the compensation can be granted *ex ante* on the basis of expected costs and revenues, or *ex post*, on the basis of actual costs and revenue, or a combination of the two.¹⁰³ The net costs must be calculated using the net avoided cost methodology. In this case, the whole terminal could not be constructed without State aid. Therefore, all costs could be avoided. The parameters of compensation were determined in advance by the methodology for setting the gas levy and for calculating the subsidy that was necessary to enable the terminal operator to cover its large fixed costs, operating expenses and earn a reasonable return.

With regard to the reasonable profit that the SGEI is entitled to accrue, the 2012 Framework defines this as a safe harbour: the relevant swap rate plus 1% (the risk-free rate of profit).¹⁰⁴ If the provision of the SGEI is subject to commercial risk or contractual risk [because the amount of compensation is fixed or gradually reduced], the rate of profit may be raised but may not exceed a rate of return on capital that

⁹⁹Communication from the Commission, European Union framework for State aid in the form of public service compensation (2011), OJ C 8, 11.1.2012.

¹⁰⁰Communication from the Commission, European Union framework for State aid in the form of public service compensation (2011), OJ C 8, 11.1.2012, pp. 15–22, Para 2.4, 17.

¹⁰¹OJ L 134, 30.4.2004, pp. 114–240.

¹⁰²Para. 232.

¹⁰³Para. 2.8 Amount of Compensation, 21–31.

¹⁰⁴Paras. 33–38.

corresponds to the level of assumed risk. The actual sums involved are redacted from the published Decision.

The European Commission examined whether the terminal operator was obliged to improve its efficiency, as required by the 2012 Framework. It noted that the national regulator imposed upper limits on the compensation to be provided to certain expenses. Higher costs could not be compensated and lower costs could be compensated only up to their actual level. The European Commission accepted that the annual check by the national regulator complied with the requirement in the 2012 Framework for establishment of mechanisms to prevent overcompensation. However, this is more stringent than the requirement in the Framework which stipulates that any overcompensation is corrected at the end of the period of entrustment, which in this case would be 55 years into the future.

Another energy security case concerned a publicly funded project in Malta, the Delimara Power Plant, designed to improve energy efficiency, alongside security of supply. A contract for construction, supply of natural gas and electricity generation was awarded through a competitive bidding process¹⁰⁵ to EGM by the state-controlled electricity generator and distributor, Enemalta. Enemalta held a pso, and therefore the effect of the contract was to delegate part of the pso to EGM. A guaranteed revenue was part of the contract: Enemalta committed to buy the electricity produced by EGM. The European Commission found that the 4th *Altmark* criterion was not satisfied. The outcome of the tender was influenced by the security of supply element which was added later to the tender. Thus the tender did not satisfy the criterion of “least cost to the community”. The European Commission also found that the government of Malta had not provided any information that the level of compensation was calculated according to the costs of a typical well-run undertaking.

The European Commission did find that the process satisfied the 2012 Decision.¹⁰⁶ Security of supply could be a SGEI, but only if the process of creating and managing the SGEI complied with EU law. Investment in a large-scale SGEI would not be a SGEI since the market would normally satisfy this demand. Here the market was small and there was a gap in the market. There was an official act of entrustment and the precise conditions of the PSO and method of calculation were established. The compensation for the PSO was to be found in the payment for the supply of energy. The 2012 Decision allows for the entrustment of a PSO to go above the 10 year period when it is necessary, for the economic life of the investment. The period of entrustment here was 18 years and this was shorter than the economic life of the power plant.

¹⁰⁵ 18 undertakings were involved in the bidding process and the open nature of the tender was one factor taken into consideration by the European Commission.

¹⁰⁶ Commission Decision of 20 December on the application of Article 106(2) of the Treaty on the Functioning of the European Union to State aid in the form of public service compensation granted to certain undertakings entrusted with the operation of services of general economic interest, OJ L7, 11.01.2012, pp. 3–10.

The European Commission accepted that the net avoidable cost methodology could not be used to calculate the PSC because all of EGM activity was covered by the PSO. The alternative cost allocation methodology allowed for all costs and revenues to be eligible and the compensation was the difference between costs and revenues. The PSC was the same as the price for the delivery of electricity and gas. Thus the European Commission found that there was no over-compensation: the expected rate of return did not exceed the benchmark rate. Overcompensation could be avoided by setting compensation in advance in the form of the level of prices that would anticipate efficiency created by EGM. The European Commission found that there were efficiency incentives in the upfront definition of the compensation which anticipated and incorporated the efficiency gains that EGM was expected to achieve over the life of the project.

14 Conclusion

SGEI in the European Union are under scrutiny as a result of fiscal and economic pressures to curb public spending and to ensure that public funds are used efficiently. This chapter reveals how the State aid and procurement rules are being used by the European Commission, and by competitors, as a check on the way public resources are allocated. This, combined with soft law communications on the nature of public services, has led to the Europeanisation of SGEI providing a discourse on financial and efficiency aspects of public services, at the expense of quality and values.

Altmark continues to shape the discipline of the provision of SGEI. For a Member State to calculate the amount of financing a SGEI should legally obtain it must be certain that it has correctly defined a SGEI. This is crucial in order to define the eligible costs of providing the SGEI. From European Commission practice and the case law of the European Courts it would appear that Member States are now tightly restrained in the discretion they can exercise in identifying a SGEI. There must be an entrustment of the SGEI in a formal manner: the SGEI must be properly defined. But services classified as a SGEI can only be those services which are not provided, or satisfactorily provided, by the market. This is a complex question, involving an analysis not only of the market failure but also what is available in terms of quality and affordable price. The Member States must define the parameters of compensation in advance and ensure that SGEI providers are not over-compensated. These factors are now defined more clearly in the Almunia Package.

Rather than clarifying and simplifying for the Member States the manner in which they can operate SGEI, the modern era has encouraged more litigation on the way Member States choose to finance SGEI. The greater commercialisation of SGEI, as a result of modernisation and recalibration of the national welfare state, offers opportunities for competitors to challenge the Member States' choice of SGEI, with the litigation taking on a narrow focus on the financing aspect. The recent amendment to the GBER could exacerbate the number of challenges brought (especially at the national level) as Member States attempt to fund public projects through a *de minimis* route rather than through the more technical and complex SGEI routes.

National judges will require more training in State aid law.¹⁰⁷ The European Commission has prioritised this area in its funding programme for the training of national judges in EU competition law.¹⁰⁸ In the last year we have witnessed an example where an Italian court awarded public service compensation for a public service obligation after using an expert to calculate the PSC. Italy was then obliged to notify the PSC to the European Commission. Subsequently the European Commission found this to be an illegal State aid. Part of the PSC was provided before the notification, and the European Commission classified it as non-notified State aid. After an initial exchange of information with Italy, the European Commission proceeded to open the formal investigation procedure, finding the State aid to be incompatible with EU law and ordering recovery.

The European Commission and the European Courts insist that each case should turn on its own facts, but if the Member States want clarity and confidence in making national policy there is the necessity for greater detail and explanation of the methodology employed in the European Commission practice. In new cases where the concept of a SGEI evolves, for example in recognising security of supply from an alternative supplier in Lithuania, engagement with the European Commission may be necessary. But this chapter reveals that there are a number of recurring legal questions and definitions that require greater precision. In particular as governments parcel out the provision of public services, for example, in education and healthcare to non-State suppliers, alongside the privatisation of other traditional public duties, such as the protection of the environment, the issue of defining non-economic activity through the amount of concurrent commercial ancillary services permitted is an important question which the European Courts have not engaged with beyond broad generalised principles. Similarly where activities are recognisably commercial but also crucial (for example, universal network coverage in the roll-out of broadband or the switch from analogue to digital broadcasting) there is an obvious need from the recurring cases for greater clarity on how far commercially viable services can be bundled, with services that are not commercially viable, with the State subsidising the alleged gaps where there is no perceived commercial interest.

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¹⁰⁷ See the recommendations in European Commission, Study on judges' training needs in the field of European competition law, Final Report, January 2016, <http://ec.europa.eu/competition/publications/reports/kd0416407enn-esen.pdf>.

¹⁰⁸ See http://ec.europa.eu/competition/calls/proposals_closed.html. See Szyszczak (2017a, b).

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Infrastructure Financing and State Aid Control: The Potential for a Virtuous Relationship

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1 Introduction

For a long time, the public funding of infrastructure in the European Union was not an issue for the control of State aid. The shared view was that infrastructure financing pertained to the domain of general measures of economic policy and did not fall under the rules aimed at preventing distortions of competition between undertakings in the common market.¹ In 1995, in the XXV Report on competition policy, the European Commission still argued that in principle, as long as access and usage remained public and general, the use of public funds to finance investment in infrastructure would not constitute State aid and, at the same time, would normally be regarded as being in the public interest.² Basically, the construction and non-discriminatory operation of infrastructure were not considered economic activities pursuant to internal market and competition law, that is, activities involving the offer of goods or services on a market.³ Thus, according to the traditional view, the use of public resources to support the development of infrastructure neither involved undertakings nor entailed potential distortions of competition between undertakings.

¹See, for instance, Case C 225/91, *Matra v. Commission* [1993] ECR I-3203.

²Commission ‘XXVth Report on Competition Policy 1995’, pt. 175.

³On the notion of economic activity, cf. Case 118/85 *Commission v Italy* [1987] ECR 2599, para. 7; Case C-35/96 *Commission v Italy* [1998] para. 36; Joined Cases C-180/98 to C-184/98 *Pavlov and Others* [2000] ECR I-6451, para. 75.

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Things began to change with the liberalization of air transport in the early 1990s. The increasing competitive pressure exercised by low-cost companies on traditional carriers raised new challenges in the airport sector; private resources became increasingly involved in the financing of airport infrastructure, indicating that it was no longer possible to consider the sector alien to economic activity and competition.⁴

Therefore, the European Commission started applying the rules on State aid to airport financing, initially with reference to the operation and subsequently also to the construction of airport infrastructure.⁵

The Union Courts supported the approach.

In 2000, in the *Aéroports de Paris* judgment, later confirmed by the Court of Justice, the General Court acknowledged that the operation of an airport providing services to air carriers and other undertakings is an economic activity and, as such, is subject to scrutiny under State aid control.⁶

In 2011, in *Leipzig Halle*, the General Court went a step further, arguing that, on the basis of the same principles, when an airport infrastructure is exploited for commercial use, the construction of that infrastructure is also an economic activity.⁷ In 2012 the Court of Justice upheld the interpretation given by the General Court in *Leipzig Halle*, with some refinements.⁸ The Court of Justice acknowledged that after the *Aéroports de Paris* judgment of 2000 it cannot be presumed that State aid control does not apply to airports; however, the fact that an infrastructure may have a commercial use does not automatically mean that its construction is also an economic activity: the assessment of the relation between the two must take into account the specific circumstances of each case. In *Leipzig Halle*, for instance, the fact that the airport was clearly competing with other regional airports to become DHL's European hub for air freight and the fees paid for commercial use would have been the main source of income for the operator was considered sufficient to prove that the construction of additional flight capacity could be considered an economic activity.⁹

The Commission took the case law of the Court of Justice in *Aéroports de Paris* and *Leipzig Halle* as a basis for developing a systematic approach to infrastructure

⁴For a brief historical overview of developments in the aviation sector in the 1990s, cf. the Guidelines on financing of airports and start-up aid to airlines departing from regional airports in the EU, adopted by European Commission in 2005 ("2005 Aviation Guidelines", 2005/C 312/01).

⁵*Aéroports de Paris* [1998] OJ L 230/10; *Ryanair in connection with its establishment at Charleroi* [2004] OJ L137/1; *Promotion of the Piedmont airport system* [2004] OJ C 67/12; *Measures by Germany to assist DHL and Leipzig Halle Airport* [2008] OJ L346/1. On the evolution of the approach of the Commission, cf. Geyger (2016), pp. 539–555.

⁶Case T-128/98 *Aéroports de Paris v Commission* [1998] ECR II-3929, confirmed by C 82/01 P *Aéroports de Paris v. Commission* [2000] ECR I-9297.

⁷Joined Cases T-443/08 & T-455/08, *Freistaat Sachsen et al. v. Commission* ("Leipzig Halle") [2011] ECR II-1311.

⁸Case C-288/11 P *Mitteldeutsche Flughafen AG and Flughafen Leipzig Halle v. Commission* ("Leipzig Halle") [2012], ECLI:EU:C:2012:821.

⁹*Ibid.*, paras. 40–44.

financing under State aid rules, with an attitude which in some respects recalls the approach followed after the *Altmark* judgment of 2003 for the application of State aid rules to services of general economic interest.¹⁰ In the Commission's view, liberalization, privatization, market integration and technological progress were increasingly leading to a commercial exploitation of infrastructures, not only in airports but also in several other sectors. *Leipzig Halle* could thus be seen as a turning point indicating that, depending on the nature and purpose of the infrastructure, the way in which it is financed and whether it competes with other infrastructures, infrastructure financing may well fall within the scope of application of State aid rules. Accordingly, the principles emerging from the *Leipzig Halle* judgment should be applied not only with reference to airport infrastructure, but to any kind of infrastructure intended to be exploited for commercial use.

This new vision had to be properly communicated to the Member States. In the appeal against the Commission decision in *Leipzig Halle*, the German authorities had complained that the 1994 Commission Guidelines on the application of State aid rules in the air transport sector, which were in force at the time when the enlargement of the Leipzig Airport was decided, still indicated that "the 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 aid".¹¹ The Union Courts rejected this argument, arguing that the Commission Guidelines had been superseded by the case law of the General Court in *Aéroports de Paris*. However, taking into account its institutional duty to foster the correct application of the Treaty, in 2011 the European Commission sent a notice to DG Regio explaining the reasons for and the implications of these developments in State aid policy.¹² Moreover, in 2012, in the wake of *Leipzig Halle*, the Commission published the first version of its Analytical Grids on the application of State aid rules to infrastructure financing, in order to take into account the development of the Union Courts' case law; in this document, the Commission outlined its approach to State aid control of infrastructure financing in several areas, including airports, broadband, culture infrastructures, ports, R&D&I and water services.

Since then, by means of a number of acts of soft law and regulations, including in particular the General Block Exemption Regulation (GBER) of 2014, revised in

¹⁰C-280/00 *Altmark Trans* [2003] ECR I-7747.

¹¹Community guidelines on the application of Articles 92 and 93 of the EC Treaty and Article 61 of the EEA Agreement to State aids in the aviation sector, OJ C 350 5 ("1994 Aviation Guidelines").

¹²See http://www.esfondi.lv/upload/00-vadlinijas/note_on_state_aid_for_infrastructure_projects.pdf.

2017¹³ and the Notice on the Notion of State aid of July 2016 (NoA Notice),¹⁴ the Commission has gradually elaborated a package of rules and guidelines on the public funding of infrastructure, comparable to the Almunia package for SGEI. The Analytical Grids were updated in 2015, 2016 and lately in 2017.¹⁵

The assessment of the approach of the Commission to infrastructure financing must take into account the major change in the economic environment which resulted from the global economic and financial crisis. Compared to 2007, investments in the EU have dropped by around 15% (30% in the peripheral countries of the Eurozone).¹⁶ Not only does weak investment slow economic recovery; in the longer term, the negative impact on the capital stock also “holds back Europe’s growth potential, productivity, employment levels and job creation”.¹⁷ The reversal of this downward trend thus became one of the top priorities of the Juncker Commission, whose Investment Plan for Europe aims to remove obstacles to investment by strengthening the single market, providing technical assistance to investment projects and making smarter use of new and existing financial resources. Boosting investment in infrastructure, in particular, is one of the pillars of the EU strategy aimed at re-launching economic growth and competitiveness.

These developments raise the issue of how to reconcile the objective of spurring investment (“facilitating access to public support for investment”) with a stricter control of public funding of infrastructure under State aid rules, in the light of *Leipzig Halle*. The State aid modernization (SAM) initiative, which pursues the general goal of supporting the Europe 2020 strategy for smart, sustainable and inclusive economic growth, is meant, among other things, to respond to this kind of challenge.

In this chapter we analyse how the rules on State aid are currently being applied to infrastructure financing. We first consider the variables which have to be taken into account in order to establish whether in a specific case the public financing of an infrastructure can be considered State aid falling within the scope of Article 107 (1) TFEU (Sect. 2). Then, we discuss the relationship between the substantive principles of State aid modernization and the strategy aimed at steering a more

¹³Commission Regulation 651/2014 of 17 June 2014 declaring certain categories of aid compatible with the internal market in application of Articles 107 and 108 of the Treaty [2014] OJ L 187/1; Commission Regulation 2017/1084 of 14 June 2017 amending Regulation (EU) no. 651/2014 as regards aid for port and airport infrastructure, notification thresholds for aid for culture and heritage conservation and for aid for sports and multifunctional recreational infrastructures, and regional operating aid schemes for outermost regions and amending Regulation (EU) no. 702/2014 as regards the calculation of eligible costs [2014] OJ L 193/1.

¹⁴Commission, ‘Notice on the notion of State aid as referred to in Article 107(1) TFEU’ (Communication) [2016] C 262/1.

¹⁵Commission, Staff Working Document, ‘Analytical Grids on state aid to infrastructure 2016–2017’. (Analytical Grids), http://ec.europa.eu/competition/state_aid/modernisation/notice_aid_en.html.

¹⁶Marengo (2015).

¹⁷See European Commission (2015).

effective use of scarce economic resources to re-launch investment and growth in the EU (Sect. 3). In Sect. 4 we consider the criteria used by the Commission to assess the compatibility of State aid to infrastructure projects, taking into account the rules of the SGEI package, the General Block Exemption Regulation, the different Guidelines published by the Commission since 2012 and the Analytical Grids on State aid to infrastructure 2016–2017. Finally, we discuss some of the challenges that the Commission and national authorities face in this area.

2 Assessing Whether the Public Funding of an Infrastructure Is State Aid

2.1 *Commission Guidance on the Notion of Aid*

In the NoA Notice, the Commission provides specific guidance on when the public funding of infrastructure is State aid for the purposes of Article 107(1) TFEU. Such guidance had been called for by the Member States; the Commission meets their request, taking into account “the strategic importance of public funding of infrastructure, not least for the promotion of growth, and the questions which it often raises”.¹⁸ Further indications are contained in the Analytical Grids, although they are only a Commission’s Staff Working Document and not a formal communication by the European Commission. The Grids, for instance, make reference to the commitment by the Commission not to challenge, under State aid rules, public measures for infrastructure financing definitively adopted before the *Aéroports de Paris* judgment of 2000.

According to the general principles, the constituent elements of the notion of State aid are the existence of a beneficiary undertaking, the imputability of the measure to the State and its financing through State resources, the granting of an advantage to the beneficiary undertaking, the selectivity of the measure and its negative effects on competition and trade between Member States. A specific feature of infrastructure financing is that projects often involve several categories of actors: State aids may create distortions at different levels of the value chain, since they may benefit the construction, the operation and/or the use of the infrastructure. Therefore, with reference to the applicability of Article 107(1), the Commission distinguishes between aid to the owner/developer of the infrastructure, aid to the operator who makes direct use of the infrastructure to provide services to end users and, finally, aid to end users. These actors may incidentally, but not necessarily, belong to the same, vertically integrated, undertaking. All three levels have to be considered in order to ascertain the compatibility of public funding of infrastructures with State aid rules.

¹⁸NoA Notice, pt. 3 and 199.

2.2 *National Versus EU Public Resources*

A relevant issue, in particular with reference to the Investment Plan for Europe, is whether projects funded by EU resources fall within the scope of State aid control. The general rule is that State aid rules remain applicable, even if the source of funds is not the Member State, when the authorities of the Member State have some discretion in granting such financial support and control over its destination.¹⁹ By contrast, resources awarded directly by the Union, the European Investment Bank or the European Investment Fund with no discretion on the part of national authorities are not considered State resources for the purposes of Article 107(1).²⁰ In the Analytical Grids the Commission specifies that the European Fund for Strategic Investment (EFSI) financing “is not State aid within the meaning of the EU Treaties, and EFSI financing will not have to be approved by the European Commission under EU State aid rules”. Only when projects supported by EFSI also benefit from financial support (co-financing) by Member States (ESI funds and national co-financing) are State aid rules applicable.²¹

2.3 *Assessment of Whether the Development/Owner Is Engaged in an Economic Activity*

The assessment of whether the developer/owner of an infrastructure is an undertaking for the purposes of Article 107(1) depends on whether the construction is indissociably linked to an economic activity. The funding of an infrastructure which is not commercially exploited is excluded from the application of State rules. This holds, for instance, for the construction of roads, bridges, tunnels and inland waterways made available for free public use with open and non-discriminatory access.

The economic nature of the activity is also excluded when the infrastructure is used for activities that the State normally performs in the exercise of its public powers, that is, that fall in the public remit. The typical examples include military facilities, air traffic control, lighthouses, police and customs. In some cases, the borderline between economic and non-economic activities may be uncertain: some activities traditionally considered to fall within the public remit may become

¹⁹NoA Notice, pt. 60.

²⁰This is the case, for instance, for funding awarded in direct management under the Horizon 2020 framework programme or for Trans-European Transport Network (TEN-T) funds.

²¹Analytical Grids 2016–2017, paragraphs 5 to 8; Commission, ‘Working together for jobs and growth: the role of National Promotional Banks (NPBs) in supporting the Investment Plan for Europe’ (Communication) COM (2015) 0361 final; Commission’s Factsheet on The Investment Plan for Europe: questions and answers, http://europa.eu/rapid/press-release_MEMO-15-5419_en.htm.

commercial activities as a consequence of changes in institutional choices or market conditions.²² The notion of economic activity relevant for State aid control accordingly has a dynamic nature which must be verified on a case-by-case basis. For infrastructure funding, this case-by-case assessment raises significant challenges, because of the strategic role of investment in infrastructure for economic development.

The case law indicates how to proceed when an infrastructure originally used for non-economic activities is later converted to economic use: only the costs incurred for the conversion will be considered in the assessment under State aid rules.²³ This case law suggests that the mere possibility of an economic use in the future should not be sufficient to lead to the application of State aid rules. On the other hand, there may be some uncertainty concerning the precise moment at which the economic or non-economic use of an infrastructure has to be ascertained.²⁴

When an infrastructure is used for both non-economic and economic activities, only the public funding of the cost pertaining to the economic activities is relevant under the State aid rules.²⁵ In these circumstances, Member States should prevent cross-subsidization; the Commission suggests limiting public funding to the net cost of the non-economic activities, identified by means of a clear separation of accounts.

State aid rules are not applied when the economic use of the infrastructure remains purely ancillary to its non-economic use (i.e. is directly related and necessary for the operation of the infrastructure or intrinsically linked to its main non-economic use—notably, when the economic activities do not require additional input such as material, equipment, labour or fixed capital), provided that the ancillary activity remains limited in scope compared to the capacity of the infrastructure.²⁶ In the NoA Notice, the Commission argues that this requirement is met if the capacity allocated each year to the allegedly ancillary economic activity does not exceed 20% of the infrastructure's overall annual capacity.²⁷ The example that the Commission usually refers to is that of research organizations occasionally renting out their equipment and laboratories to industrial partners.

²²NoA Notice, pt. 7–18, in particular point 13 (“what is not an economic activity today may become one in the future, and vice versa”).

²³*Tampere-Pirkkala Airport* [2013] OJ L 309/27; see also NoA Notice, point 204. For a critical view, see Nicolaides (2016).

²⁴On these issues, see also Dodeller (2015), pp. 1–13.

²⁵*Germany – Financing of infrastructure projects at Leipzig/Halle airport (2)* [2015] OJ L 232/1. For a comment, Nicolaides (2015).

²⁶See, for instance, Case T-347/09, *Germany v. Commission*, ECLI:EU:T:2013:418.

²⁷NoA Notice, fn. 305.

2.4 *Selectivity and Economic Advantage*

A funding measure which benefits one or more identified undertakings can easily be considered a selective measure. Whether such a measure also involves an economic advantage depends on whether it respects the market economy operator test (MEO test): State aid is not involved if the State acted under the same terms and conditions as a commercial investor when providing the necessary funding.²⁸

The Commission suggests that this can be demonstrated “by significant *pari passu* co-investments of commercial operators on the same terms and conditions, and/or by an *ex ante* sound business plan (preferably validated by external experts)”, showing that the investment provides an adequate rate of return for the investors. The rate of return should be in line with the normal market rate of return that would be expected by commercial operators on comparable projects, taking into account all relevant circumstances.

In the NoA Notice, the Commission stresses that for the developer/owner of the infrastructure, an advantage cannot be excluded by a tender: a tender only minimizes the amount of the aid.²⁹

2.5 *Distortion of Competition and Effect on Trade*

The application of State aid rules to the public funding of infrastructures is relatively new and may be perceived by the authorities of Member States as an undue interference in the domain of national public policies. Therefore, both in the Analytical Grids and in the NoA Notice, the Commission takes special care to indicate the conditions which exclude the application of Article 107 because the measure is not liable to have an impact on competition or trade.

For local infrastructures, what matters is whether the infrastructure predominantly serves local users (i.e. does not attract demand from other Member States) and whether cross-border investment is unlikely to be affected more than marginally. The Commission stresses that this is normally the case for customary amenities such as restaurants, shops, paid parking facilities or infrastructures which are almost exclusively used for non-economic activity, since those amenities are unlikely to attract customers from other Member States and to have more than a marginal effect on cross-border establishment or investment.

Moreover, if aid measures respect the conditions and the thresholds set out in the *de minimis* Regulation no. 1407/2013 (in particular, no more than €200,000 is

²⁸On the MEO test, see NoA Notice, pt. 73–116.

²⁹NoA Notice, fn. 329.

granted to a single undertaking over a period of 3 years), the absence of distortions of competition and effect on trade is presumed.³⁰

A different situation which may lead to exclude an effect on trade or an anticompetitive impact is the case in which the infrastructure neither faces direct competition from other infrastructures of the same kind (e.g. other ports), nor from other infrastructures of a different kind offering substitutable services, nor from other services directly (for instance, the services offered by a commercial ferry operator can be in competition with a toll bridge or a tunnel). In the NoA Notice, the Commission argues that this is likely to be the case for comprehensive network infrastructures that are natural monopolies. This insight had already been anticipated in the letter by DG Comp to DG Regio in 2011 where the Commission stressed that, in the presence of specific conditions, public financing of railway infrastructure remained outside the scope of the application of State aid rules.³¹

In particular, in the NoA Notice (point 211) the Commission indicates that it is normally willing to consider that an effect on trade or a distortion of competition is absent (and therefore State aid rules are not applicable) when three cumulative conditions are met:

1. the infrastructure typically faces no direct competition;
2. private financing is insignificant in the sector and Member State concerned (thus excluding a crowding-out effect);
3. the infrastructure is not designed to selectively favour a specific undertaking or sector, but provides benefits for society at large.³²

Member States must ensure that the funding provided in the abovementioned situations cannot be used to cross-subsidize or indirectly subsidize other economic activities, including the operation of the infrastructure (point 212). This condition can be met either by providing that the infrastructure owner does not engage in any other economic activity or, if this is not the case, that it keeps separate accounts, allocating costs and revenues in an appropriate way and ensuring that any public funding does not benefit other activities.

Summing up, as to owners/developers of the infrastructure, public funding is deemed to fulfil the requirements of Article 107(1) whenever it is not possible to demonstrate either that the construction (or enlargement or upgrade) of the infrastructure is not an economic activity, or that public funding respects the MEO conditions, or that public support does not entail a distortion of competition or an effect on trade. It is irrelevant whether the undertaking also operates the infrastructure or makes it available to a third-party operator which in turn provides services to end users.

³⁰Commission Regulation (EU) no. 1407/2013 of 18 December 2013 on the application of Articles 107 and 108 TFEU to *de minimis* aid [2013] OJ L352/1.

³¹See http://www.esfondi.lv/upload/00-vadlinijas/note_on_state_aid_for_infrastructure_projects.pdf.

³²For a comment, see Galletti (2016).

2.6 *Assessment of Whether Public Financing of the Infrastructure Entails State Aid at the Level of Operators or End Users*

The operators of an aided infrastructure may, in turn, receive State aid if the conditions at which they use the infrastructure entail an advantage compared to the conditions they would have obtained (in particular, the price they would have paid) under normal market conditions. At the level of operators, the issue is therefore how to exclude the advantage, that is, to prove compliance with the MEO principle.

Moreover, whenever the operator of the infrastructure has either received a State aid or its resources constitute State resources, it is also necessary to ascertain whether the undertakings which make use of the infrastructure (end users) receive an economic advantage, that is, benefit from conditions more favourable than normal market conditions.

Both for operators and end users, the Commission suggests that an advantage can be excluded if all the relevant conditions have been set out through a tender that meets a number of conditions. The concession to operate the infrastructure must be assigned for a positive price; the procedure must be transparent and sufficiently well-publicized, based on non-discriminatory treatment of all bidders at all stages of the procedure and on objective selection and award criteria.³³ The Commission requires an effectively competitive tendering procedure which leaves the successful bidder with a normal return, not more. For tenders which place significant weight on the price component it may be easier to demonstrate the likelihood of achieving a competitive outcome.

In the absence of a tender meeting the relevant conditions, it may be possible to prove that the transaction is in line with market conditions by means of benchmarking, that is, a comparison with the terms and conditions under which the use of comparable infrastructure is granted by comparable private operators in comparable situations. However, a meaningful benchmarking exercise is not always feasible due to the lack of meaningful comparators/terms of references.

Finally, the MEO test can be satisfied on the basis of a “generally accepted, standard assessment methodology”. In particular, for open infrastructures not dedicated to any specific user, the Commission indicates that it may be sufficient to show that users incrementally contribute, from an *ex ante* viewpoint, to the profitability of the project/operator. In order to meet this requirement the operator can establish commercial arrangements with individual users that allow the covering of all expected incremental costs stemming from such arrangements, net of incremental revenues, “including a reasonable profit margin on the basis of a sound medium-term prospect”.³⁴

³³NoA Notice, pt. 90–96.

³⁴NoA Notice, pt. 228.

Importantly, the circumstance that the fees paid by users may not cover all the costs incurred in the construction of the infrastructure is not seen as entailing, as such, an economic advantage for users. Indeed, if users were able to pay the full costs of the infrastructure, it would not be necessary to support it by means of State aid.

2.7 *Excluding the Application of Article 107(1) for SGEI*

In principle, when the deployment and operation of an infrastructure aims at discharging a public service obligation, it can qualify as a service of general economic interest (SGEI).

When this is the case, if the four cumulative conditions set forth by the Court of Justice in the *Altmark* judgment are met, compensation of the costs incurred to provide the SGEI does not confer an advantage and therefore the existence of State aid can be excluded.³⁵ In particular, the *Altmark* case law requires that:

1. the project is necessary to provide a service that can be considered a genuine SGEI for which public service obligations have been clearly defined in advance;
2. the parameters on the basis of which the compensation is calculated have been established in advance in an objective and transparent manner;
3. compensation is not granted beyond the net costs of providing the public service and a reasonable profit;
4. either the SGEI has been assigned through a public procurement procedure that ensures the provision of the service at the least cost for the community or the compensation does not exceed what an efficient competitor, well-run and adequately provided with means to meet the public service obligations, would require.

When it is not possible to exclude the existence of State aid because not all four *Altmark* requirements are met, it may still be possible to avoid the application of Article 107 if the amount of aid does not exceed €500,000 over 3 years, provided that the other conditions of the SGEI *de minimis* regulation are met: this regulation, like the general *de minimis* regulation, involves the presumption that the aid measure has no effect on trade or does not distort competition for the purposes of Article 107.³⁶

Thus, for those infrastructures which may qualify as SGEI, the possibility to satisfy the *Altmark* criteria and the higher thresholds of the SGEI *de minimis* regulation compared to the general *de minimis* regulation represent additional waivers which may be used to avoid the application of Article 107(1).

³⁵C-280/00, ECLI:EU:C:2003:415.

³⁶Commission Regulation 360/2012 of 25 April 2012 on the application of Articles 107 and 108 TFEU to *de minimis* aid granted to undertakings providing services of general economic interest [2012] OJ L 114/8.

3 Reconciling State Aid Control with the Investment Plan for Europe

One of the main features of State aid modernization is the adoption of a more economic approach, aimed at improving the criteria used by the Commission to tell apart good aid, which should be encouraged, and bad aid which should be prevented because of its adverse impact on competition. According to this approach, whenever public support is State aid pursuant to Article 107(1) TFEU, the assessment of its compatibility according to the provisions of Article 107(3) must ascertain whether the aid measure is targeted at solving a market failure or pursuing another well-defined objective of general interest and, then, verify whether aid is an appropriate policy instrument, necessary and proportionate to attain the objective while minimizing the distortions of competition brought about by the selective use of public resources.

These substantive principles of State aid modernization happen to broadly converge with the main prescriptions of the EU “industrial policy” strategy aimed at steering a more effective use of scarce economic resources to re-launch investment and growth.³⁷

The official documents and policy papers in this area indicate that fostering infrastructure deployment should make the most of non-financial policy instruments to create a legal and administrative environment which is more favourable to investment in infrastructure. The available instruments include administrative simplification, review of the fitness of the general legislative framework and sectoral regulation, enhancing competence and professionalism of public procurement entities, and improving the quality of projects.

Moreover, the new industrial policy focuses on the search for efficient instruments for infrastructure financing, minimizing the use of public resources and making the most of public private partnership (PPP). Spreading the information available to private investors on infrastructure projects and their potential profitability, priority setting and the higher leverage provided by the use of public guarantees compared to direct financial support are considered essential to maximize the positive impact of the use of EU and national public resources.

Thus, both the principles of State aid control and the indications of industrial policy suggest that public resources should be targeted at well-defined projects aimed at pursuing objectives of general interest and should be used, according to the subsidiarity principle, only when market forces are not sufficient to attain the objective, and conditional on public financing being the appropriate policy instrument. State aid should be avoided when it would crowd out private investment

³⁷See for instance Commission ‘Europe 2020 - strategy for smart, sustainable and inclusive growth’ (Communication) COM(2010) 2020 final, 3 March 2010; Commission ‘A growth package for integrated Europe infrastructures’ (Communication) COM(2011) 676, 19 October 2011; Commission ‘For a European Industrial Renaissance’ (Communication) COM(2014) 14 final, 22 January 2014; European Investment Bank (2015), Restoring EU competitiveness, www.eib.eu.

instead of incentivizing an increase in the overall level of investments and should not go beyond what is strictly necessary.³⁸

In this perspective, industrial policy aimed at boosting investment in infrastructure and State aid control do not necessarily entail a trade-off, but can be seen as two complementary policy tools which can be used in combination to make the most of the available economic resources. As the Commission puts it, “competition policy, in conjunction with industrial policy, is at the core of the new competitiveness policy framework in Europe”.³⁹

However, this result, based on a virtuous relationship, cannot be taken for granted but represents a goal which should be proactively pursued by both the Commission and the Member States. In a speech of December 2014, Commissioner Vestager indicated the main challenges to be met: as to Member States, “much state aid is still badly designed and hinders growth”; as to the Commission, “state aided infrastructure projects . . . is an area where there are significant concerns about the lack of clarity of our rules and the long times that our cases can take to process”.⁴⁰ Accordingly, in the application of State aid rules the Commission should contribute to establishing a more investment-friendly environment, eliminating all unjustified obstacles to good aid, whereas national authorities, on their part, should exercise some self-restraint and design their policies in support of infrastructure development in a way which ensures compatibility with competition rules.

4 Assessing the Compatibility of State Aid for Infrastructure Projects

4.1 *Compatible Aid: Substantive Criteria and Ex Post Versus Ex Ante Assessment*

When the public funding of infrastructure is State aid and the application of Article 107(1) cannot be excluded, it is for the Commission to assess whether State aid may be declared compatible with the Treaty pursuant to one of the criteria established by Article 107(3). In particular, the relevant criteria for infrastructure funding are whether aid facilitates the development of certain economic activities pursuant to Article 107(3)(c), or the development of certain economic areas pursuant to Article 107(3)(a) or Article 107(c), or whether it promotes the execution of an important

³⁸On the substantive principles of State aid modernization, see Pesaresi N. and Peduzzi R., State Aid Modernization, in this volume.

³⁹See http://ec.europa.eu/growth/industry/policy/index_en.htm.

⁴⁰Speech at the High Level Forum by Margrethe Vestager, Commissioner for Competition, 18 December 2014, available at www.ec.europa.eu/commission/2014-2019/vestager/announcements/speech-high-level-forum-member-states-margrethe-vestager-commissioner-competition-18-december-2014_en.

project of common European interest pursuant to Article 107(3)(b). For SGEI, the assessment can also be based on Article 106(2) TFEU whereby competition rules, including State aid rules, are applicable to SGEI providers only in so far as they do not hamper the provision of the mission of general interest entrusted to them.⁴¹

Article 108 TFEU establishes that all State aid measures should be notified to the European Commission, which has the exclusive competence, under control of the Court of Justice, to assess whether aid is compatible with the Treaty. However, the Commission is also empowered to exempt categories of aid measures from the notification obligation by means of decisions or block exemption regulations. The Commission makes use of these instruments when, on the basis of experience, it feels sufficiently confident that the aid measures satisfying certain conditions may be declared compatible. An essential feature of the modernization of State aid control is the attempt to reduce the administrative burden resulting from the notification obligation by means of an increase in the scope of block exemptions.

4.2 *Exemption for SGEI*

For the application of Article 106(2) TFEU, Commission Decision 2012/21/EC establishes that when the deployment and operation of an infrastructure qualifies as SGEI, aid measures which do not exceed specific quantitative thresholds and meet a number of conditions, aimed at avoiding overcompensation, are considered compatible with no need to notify the aid measure to the Commission.⁴² The 2012/21/EC decision provides specific thresholds for airports and ports (an average annual traffic not exceeding 200,000 and 300,000 passengers, respectively, in the 2 years preceding that in which the service of general economic interest was assigned).

4.3 *GBER*

As to the application of Article 107(3)(c), the new GBER 2014–2020 sets out the conditions under which, on the basis of the Commission's experience, several types of aid to infrastructure are presumed compatible with the Treaty. The GBER identifies the eligible beneficiaries, maximum aid intensities—that is, the maximum proportion of the eligible cost of a project that can benefit from State aid—as well as eligible expenses. Compared with the previous GBER, a wider range of measures are

⁴¹For public service obligations attaining to land transport, the legal basis for assessing compatibility is Article 93 TFEU.

⁴²Commission Decision of 20 December 2011 on the application of Article 106(2) of the Treaty on the Functioning of the European Union to State aid in the form of public service compensation granted to certain undertakings entrusted with the operation of services of general economic interest [2012] OJ L 7/3.

covered, with higher thresholds and larger aid intensities relating to a number of admissible costs.

In particular, the GBER contemplates specific exemptions for:

1. research infrastructures⁴³;
2. construction or upgrade of energy infrastructure in assisted areas⁴⁴;
3. sport and multifunctional recreational infrastructures⁴⁵;
4. broadband infrastructures⁴⁶;
5. local infrastructure, defined as “infrastructures that contribute at a local level to improving the business and consumer environment and modernising and developing the industrial base”.⁴⁷

The exemption from notification requires compliance with specific obligations to provide access to the infrastructure, which are particularly stringent and detailed for broadband.

Recently, with Regulation 2017/1084,⁴⁸ the Commission amended the GBER in order to add block exemptions for port and airport infrastructures, on the basis of the experience resulting from its decisional practice (the Commission has dealt with more than 30 cases concerning ports and more than 50 cases concerning airports). The scope of the block exemption now also covers investment and operating aids for regional airports,⁴⁹ aids to investment and dredging for maritime ports⁵⁰ and aids to investment and dredging for inland ports.⁵¹

4.4 The SGEI Framework

For aid measures which remain under the notification obligation because they do not fulfil the criteria for an exemption, when the deployment, enlargement or upgrading of the infrastructure can be considered an SGEI, in principle both Articles 107(3) and

⁴³Article 26.

⁴⁴Article 48.

⁴⁵Article 55.

⁴⁶Article 14(10) (Regional aid for broadband network development) and Article 52 (Aid for broadband infrastructures). The exemption pursuant to Article 52 is subject to a number of conditions, including a competitive and technologically neutral selection process, monitoring and claw-back mechanisms in the case of overcompensation. On aid for broadband networks, see Siragusa M. and Rizza G.C., Public policies for financing the deployment of broadband and very high-speed broadband networks and EU rules on State aid control, in this volume.

⁴⁷Article 56, which is not applicable to infrastructures covered by other provisions of the GBER.

⁴⁸Footnote 13.

⁴⁹Art. 56 a.

⁵⁰Art. 56 b.

⁵¹Art. 56 c.

106(2) can be used as a legal basis.⁵² The criteria for the application of Article 106 (2) are illustrated in a Commission communication (the SGEI framework).⁵³ However, since the SGEI framework contains stringent requirements aimed at excluding overcompensation, incentivizing an efficient provision of services and minimizing distortions of competition, when both Article 106(2) and Article 107(3) can be used, Article 107(3) usually plays a more relevant role.⁵⁴

4.5 The General Criteria for the Application of Article 107(3)

In the modernization of State aid, the Commission has made a significant effort to clarify and increase the consistency of the substantive criteria used when assessing the compatibility of aid measures pursuant to Article 107(3). Currently, the Commission's view is that any aid measure must respect seven general principles:

- i. it must be aimed at pursuing an objective of common interest;
- ii. it must bring about a material improvement that the market cannot deliver itself, for example remedying a market failure or addressing an equity or cohesion concern;
- iii. it must be an appropriate policy instrument to pursue the objective of common interest;
- iv. it must change the behaviour of the beneficiary (incentive effect);
- v. it must be limited to the minimum needed to induce the additional investment or activity;
- vi. negative effects on competition and trade must remain limited;
- vii. information about aid awards must be public and transparent.

This general approach is further specified in the sectoral guidelines on the application of Article 107(3)(c). Looking in particular at the assessment of aid to infrastructure projects, the Commission has issued notices on airports,⁵⁵ energy and

⁵²For SGEI in land transport and inland water transport, the assessment of whether State aid is compatible is made on the basis of Article 93 TFEU, and the criteria used in this assessment are illustrated in Regulation (EC) 1370/2007 of the European Parliament and the Council of 23 October 2007 on public passenger transport services by rail and by road and repealing Council Regulations (EEC) 1191/69 and 1107/70.

⁵³Commission 'European framework for state aid in the form of public service compensation' (Communication) OJ 2012, C 8/15.

⁵⁴In particular, according to the SGEI framework, the establishment of public service obligations should be preceded by a public consultation, efficiency-enhancing incentives should be provided and internal accounts should allow the assessment of the absence of overcompensation for each individual SGEI. Moreover, a specific assessment of the absence of overcompensation must be carried out every 3 years (every 2 years in the absence of a public tender procedure).

⁵⁵Commission 'Guidelines on State aid to airports and airlines' (Communication) [2014] OJ C 99/3.

environment,⁵⁶ broadband,⁵⁷ research, development and innovation,⁵⁸ which are broadly based on these general criteria.

4.6 Airports

For example, for airport infrastructures, the Commission argues that objectives of common interest include increasing the mobility of citizens and enhancing connectivity within the EU, reducing air traffic congestion in the main hubs, and fostering regional development.⁵⁹ The Commission stresses that the need for public support is linked to the size of the airport and, in order to ensure that State aid is an adequate instrument, invites Member States to elaborate national strategic plans so as to increase the coherence of public measures.⁶⁰ As to distortions of competition, the Commission in principle will not approve State aid in the presence of competing airports with unexploited capacity.⁶¹ The absence of a business plan is taken as an indication that the MEO test is not satisfied. In order to minimize distortions of competition, in the presence of physical constraints the Commission requires that access to the infrastructure be granted on the basis of objective criteria.

4.7 Energy

For the development of energy infrastructure, the Commission's starting point is that adequate energy infrastructure is a precondition for the functioning of the energy market in the EU. The existence of a market failure is presumed in some cases, while in others it should be verified on a case-by-case basis. For projects of common interest pursuant to Regulation EU 347/2013,⁶² smart grids and infrastructural investment in assisted areas, the Commission assumes that positive externalities and coordination problems are so relevant that it will not possible to cover all

⁵⁶Commission 'Guidelines on State aid for environmental protection and energy 2014–2020' (Communication) [2014] OJ C 200/1.

⁵⁷Commission 'EU Guidelines for the application of State aid rules in relation to the rapid deployment of broadband networks' (Communication) [2013] OJ C 25/1.

⁵⁸Commission 'Framework for State aid for research and development and innovation' (Communication) [2014] OJ C 198/1.

⁵⁹See for instance *SOGAS* [2014] OJ L 367/99.

⁶⁰On the importance of planning to ensure an effective use of public resources, see also European Court of Auditors (2014).

⁶¹See for instance *Gdynia-Kosakowo airport* [2014] OJ L 357/51.

⁶²Council Regulation (EU) 347/2013 of 17 April 2013 on guidelines for trans-European energy infrastructure and repealing Decision No 1364/2006/EC and amending Regulations (EC) No 713/2009, (EC) No 714/2009 and (EC) No 715/2009 [2013] OJ 115/39.

relevant costs through tariffs paid by users. By contrast, for projects which do not fall within the scope of the regulation or for further projects in the area of energy infrastructure, the need for public support must be assessed on a case-by-case basis. The Commission stresses that for non-regulated activities, a closer scrutiny of aid measures will be undertaken in order to minimize negative impacts on competition.

4.8 *Broadband*

For broadband infrastructures, measures aimed at pursuing the objectives of the EU digital agenda are considered of common interest. Public intervention can be justified by the existence of market failures and/or the objective of reducing social or regional disparities. In order to ensure that State aid is an adequate instrument and that public measures are coherent, the Commission encourages Member States to develop national strategic plans and envisages that national regulatory authorities support local authorities in the design of the conditions which must be met by aid beneficiaries. In order to ensure a net positive effect, the Commission requires Member States to focus, in all areas (irrespective of whether some broadband services are already on offer, i.e. in white, grey and also black areas), on those measures which ensure a step change, that is, a substantial improvement for consumers in terms of wider choice, better quality and more innovative services. For major aid schemes, approval of State aid is conditional on a limited duration and the commitment by the Member State to carry out an *ex post* evaluation of the impact of the aid scheme with respect to the objectives which were being pursued. Moreover, the Commission Guidelines require compliance with specific conditions, more stringent than the ones resulting from the EU sectoral regulation. If these conditions are not met, the Commission will carry out a more in-depth assessment and may not authorize the aid measure.⁶³ Taking into account the fact that the guidelines on broadband are a complex document, the Commission has published a complementary Handbook with the aim of illustrating its approach to local authorities in simpler terms.⁶⁴

4.9 *Regional Aid*

Looking at aid measures which may be declared compatible because they promote the economic development of the less advantaged regions of the EU, the revised

⁶³For an in-depth analysis of the assessment of aid in support of broadband, see Siragusa M. and Rizza G.C., in this volume.

⁶⁴<https://ec.europa.eu/digital-single-market/en/news/handbook-eu-broadband-state-aid>.

Guidelines on regional State aid for 2014–2020 include specific indications on the assessment of State aid to broadband and research infrastructure.⁶⁵ The Commission underlines that for regional aid schemes which are not included in a plan financed by Union funds, the Member State is required to show that the aid measure is part of a broader development plan.

4.10 Important Projects of Common European Interest

Finally, the Communication on important projects of common European interest (IPCEI) was issued by the Commission in 2014 to provide guidance on the criteria for the application of Article 107(3)(b) whereby aid to promote the execution of an IPCEI may be considered compatible with the common market.⁶⁶

So far, Article 107(3)(b) had been used by the Commission as the legal basis for the authorization of aid to transport infrastructure, such as for instance the Channel Tunnel Rail Link or the Øresund bridge connecting Denmark and Sweden.⁶⁷ Moreover, the Commission had made reference to this Treaty provision, which is closely related to industrial policy, only in the R&D&I framework of 2006 and in the guidelines of 2008 on environmental protection.

The IPCEI communication provides a systematic approach, with a cross-sectoral scope covering all projects directly linked to the objectives of the Europe 2020 strategy. Both qualitative and quantitative features of the project may matter in the assessment. When aid is considered compatible, it may cover up to 100% of eligible costs.⁶⁸ On the other hand, the Commission stresses that Article 107(3)(b) has to be considered an exceptional legal basis and that it has wide discretion in its application.⁶⁹ Therefore, it is still unclear whether Article 107(3)(b) is going to play a significant practical role.

In particular, in the IPCEI communication the Commission indicates a number of cumulative criteria which have to be met by a project of common European interest for the purposes of Article 107(3)(b). For instance, it is not sufficient that the project is expected to have a significant impact on one or more Union objectives and EU competitiveness and is co-financed by the beneficiary of the aid: it should also

⁶⁵Commission ‘Guidelines on regional State aid for 2014–2020’ (Communication) [2013] OJ C 209/1.

⁶⁶Commission, ‘Criteria for the analysis of the compatibility with the internal market of State aid to promote the execution of important projects of common European interest’ (Communication) [2014] OJ C 188/02. For an overview of the main aspects, cf. Sandberg (2016), pp. 57–72.

⁶⁷*Channel Tunnel Rail Link* [1999] OJ C 56/7 and [2002] OJ C 262/4; *Tax advantages for the construction and operation of the Øresund Fixed Link* [2014] OJ C 418/8.

⁶⁸Aid to an alleged IPCEI can also be found compatible under other State aid frameworks different from the IPCEI communication.

⁶⁹On the application of Article 107(3)(b) to IPCEI, see Joined Cases 62/87 & 72/87 *Glaverbel* [1988] ECR 1573, paras. 21–26.

involve more than one Member State and should have positive spillover effects, wider than the benefits resulting for the direct beneficiaries of the aid and the sector involved.

Moreover, the Commission will take a favourable approach where other optional conditions are met, including, for instance: whether the project has been designed so as to make it possible for all interested Member States to participate; whether the Commission or a delegate of the Commission are involved in the design and selection of the project and in its governance; whether the project entails important collaborative interactions between undertakings; whether the project is co-financed by a Union fund.

5 The Challenges for the Commission and for Member States

5.1 Implementing the Modernized Framework

The modernization initiative has the ambition to ensure that robust and consistent State aid rules fully support ‘good aid’ aimed at correcting market failures and directly linked to the Europe 2020 objectives. Block exemptions and acts of soft law have been largely revised, with an emphasis on prioritizing case-by-case assessment of aid measures with a significant impact. This evolution is expected to contribute to a more investment-friendly environment in the EU, based on a more effective use of public resources.

As a whole, in the modernization context, the GBER and the frameworks for State aid assessment published by the Commission suggest to Member States a model for public support of infrastructure deployment and development which involves public resources only when they are strictly necessary, does not crowd out private investment and has incentivizing effects. Moreover, in order to minimize distortions of competition the Commission requires that the aid measure is proportionate and that there are no less distortive alternatives, and it may make its approval conditional on specific requirements and corrective measures. The Commission may also require the Member State to carry out an *ex post* evaluation of the impact of aid measures.

The new regulatory framework has been completed with the publication of the NoA Notice and must now be enforced. Whether the initiative will be capable of bringing the envisaged benefits closely depends on how the Commission and national authorities will play their respective roles. Since many Member States in the European Union are still enmeshed in stagnating economic conditions, the different actors will hopefully be capable of meeting these challenges and thus effectively supporting investment in infrastructure, spurring growth and responding to citizens’ needs.

5.2 *Challenges for the Commission*

The Commission has to provide effective responses in a complex political environment, in which nationalism is regaining strength and, from time to time, the suspension of State aid control is invoked either as necessary to react to economic downturns and/or for the sake of industrial policy. The Commission, subject to the control of Union Courts, has a wide discretion in the application of Article 107. Currently, there are two main challenges which it needs to meet in order to foster a virtuous relationship with national authorities in this area.

The first one is maintaining a reasonable approach to the application of Article 107(1): this requires a careful case-by-case assessment of whether the conditions set out by the Court in *Leipzig Halle* for ascertaining whether the deployment or development of an infrastructure is an economic activity are met.

In this respect, it is also important that the Commission properly considers whether local measures are capable of having an impact on competition and trade in the application of Article 107(1). The *de minimis* regulation already provides an important “safe harbour” but, in the area of infrastructure, the amounts involved often exceed the threshold. In the NoA Notice, the Commission argues that “the definition of State aid does not require that the distortion of competition or effect on trade is significant or material” (point 189). However, there is not a perfect correspondence between this statement and the case law of the Court of Justice. In *Altmark*, the Court of Justice indicated that the fact that the amount of aid is low or the recipient undertaking is small will not, as such, rule out a distortion of competition or the threat thereof, provided that the threat is not merely hypothetical: even a small amount of aid or aid to a small undertaking may, depending on the circumstances of the case, be sufficient to entail a material distortion of competition and trade. However, this does not necessarily imply that the Commission is not allowed to exclude the application of Article 107(1) when the potential impact of a specific measure on competition and trade is absolutely negligible.

Secondly, the Commission should take care that, in the assessment of State aid pursuant to Article 107(3), the requirements and corrective measures aimed at ensuring that distortions of competition be kept at a minimum comply with the proportionality principle, in order to avoid the risk of over-regulation.

Whenever the design and selection of projects involves procedures which ensure that some requirements relevant for State aid control are met, the Commission in principle should be able to conclude its assessment on the basis of fast tracks. Following this approach, the Commission has already committed to assess Member State co-financing of EFSI projects as a matter of priority and give it fast-track treatment.⁷⁰

Finally, the Commission can help Member States to design infrastructure projects in line with the rules on State aid. To facilitate their tasks, for instance, it can foster a user-friendly methodology for *ex post* evaluation of aid measures which is not too

⁷⁰European Commission (2015).

burdensome and complicated for national and local authorities, while ensuring homogeneous criteria in order to create a coherent and thus reliable environment for Member States' initiatives. A working group with the national authorities on State aid and infrastructure has already been created. The Commission may also provide assistance, especially at the local level, by means of simplified guidance documents such as the Analytical Grids or the Handbook on broadband infrastructure.

5.3 Challenges for National Authorities

A major challenge for Member States is ensuring close coordination and proper training at all levels of government. At the same time, the need to ensure compliance with State aid rules may increase the effectiveness of national policies. Since the requirements for compatibility with State aid rules broadly coincide with the requirements of an industrial policy aiming to ensure an effective use of economic resources, they can be viewed by Member States more as opportunities than merely as constraints.

For instance, basing infrastructure development on broad national strategies, as suggested by the Commission for airports and broadband, fosters the coherence of public measures and leads to priority setting. The relevance given by the Commission to the existence of reliable business plans encourages national authorities to carry out an *ex ante* assessment of the economic sustainability of projects supported by public resources. The *ex post* assessment of whether State aid measures have attained the objectives of common interest which were being pursued may provide valuable indications to national authorities on how to improve their industrial policies. Discussion, within the State aid network, of experiences and methodologies with the Commission and other national authorities can provide useful insights.

5.4 Specific Challenges for National Regulatory Authorities

National regulatory authorities can play an important role in the design of national policies for infrastructure development and in ensuring compliance with State aid rules. Firstly, regulation affects the profitability of private investment and therefore may have an impact on whether public support is needed or whether market forces are sufficient to pursue a specific public policy objective. Therefore, if the regulatory framework is unclear or unstable, it becomes very difficult to ascertain whether public aid is necessary and proportionate. Secondly, in sectors where effective procompetitive access regulation and accounting separation rules already exist, it may be easier to prove that there will not be distortions of competition in the use of an infrastructure financed by public resources. Moreover, regulatory authorities can provide technical support in the design of procompetitive tenders, in benchmarking

exercises aiming to assess whether the MEO test is satisfied, in the elaboration of major State aid schemes in regulated sectors, as well as in the *ex post* evaluation of the impact of aid measures. This suggests that, as far as policies for the development of infrastructures are concerned, regulatory authorities should be properly involved in the governance of the system at the national level.

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Tasks for National Authorities in the Modernization Era: A Case Study— Italy

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1 Introductory Remarks

According to the State Aid Modernisation Communication,¹ competition policy includes State aid control to ensure that the functioning of the internal market is not distorted by any anticompetitive Member State behaviour favouring some actors to the detriment of others. It means, *ex multis*, that the Commission will prioritize and more closely scrutinize the aid that has a significant impact on the internal market on one hand, and on the other entails a simplification of rules for the analysis of cases of a more local nature that have little effect on trade. According to the Commission, this outcome can be achieved through increased responsibility for Member States in *ex ante* control as well as enhanced *ex post* monitoring by the European Commission to ensure adequate compliance. The declared objective of State aid modernization is trenchant Commission scrutiny through the sound use of public resources.

In other words, the Commission will proactively guide Member States to conceive schemes that are well designed and which contribute to achieving the desired results of the State aid modernization, giving responsibility for the *ex ante* control of aid granting to Member States and concentrating its efforts on big and important cases that require profound analysis, such as the ones on tax rulings or other significant areas.

¹Communication from the Commission, EU State Aid Modernisation (SAM), COM/2012/0209 final.

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As is well known, the Treaty rules on State aid, or more clearly on competition between Member States, potentially involve each national legislative body's activities. In that sense, nationally structured economic policies (e.g. industrial or labour markets) have been regulated by the Commission in a very incisive manner since its origins. By contrast, new aid procedures such as tax incentives or arising public procurement models necessitate reformed control for better scrutiny.

This notwithstanding, in the European Union's institutional architecture regarding State aid matters, neither an independent and impartial authority, composed exclusively of experts and technicians, nor a networking system between national authorities, as occurs in the case of antitrust, has been provided. As a consequence, the contribution of Member States to the European governance of State aid is enshrined in tasks for national authorities to be applied under the Treaties (and the related soft law) umbrella.

Hence, it is very important and must be borne in mind that the use of the term 'authority'² in the discussion that follows will be used independently to refer both to administrations (e.g. granting authorities) and to national bodies with State aid tasks (e.g. coordination bodies).³

When the Lisbon Treaty came into force, the new set of rules created a dichotomy. On the one hand, more recent EU Member States (e.g. Poland, Croatia, Latvia) were required to establish national State aid monitoring offices or authorities before accession, to ensure effective governance of the system at a national level and maintain close contact with the Commission. On the other hand, founding Member States have not been obliged to change their monitoring system.

Italy, as a member of the latter group, has gradually adapted its system to the State aid legal framework. Currently (and at the time of the Lisbon Treaty) it has not established an independent authority for State aid, but has progressively improved its tools through legislative innovation. In particular, this role was implemented with Law 234/2012, in which the role of the Department for European Policies (hereinafter DPE) as the general Italian coordinator in State aid matters was defined among other things.

Due to increased national awareness of how aid responds to functional needs in a country's economic life, and that therefore it is preferable to avoid the impasse created by a possible declaration of incompatibility (and even worse of illegality), the new legislative model was divided into three macro tasks in order to render aid assessable (with respect to the appropriate competencies) for the whole Italian

²On the Commission's approach, i.e. the *réglementation*, to itself regulating the internal market or the separate parts of it (e.g. energy, communication, banking, etc.) by establishing central coordinating authorities or bodies, see Bilancia (2012), p. 5. On the differences with agencies and the bipartition between executive and regulatory agencies, see V. Salvatore, *Le Agenzie tra Unione Europea e Stati Membri. Oltre la Sussidiarietà*, in Salvatore (2011), p. 17 et seqq. Moreover, on the history of Italian Administrative Independent Authorities see Sanino (2015).

³The EU Commission's documents also include the national courts among authorities (e.g. http://ec.europa.eu/competition/consultations/2014_state_aid_notion/draft_guidance_en.pdf). In this contribution, national courts will be expressly referred to as 'courts'.

administration. The first of these tasks is *compliance*, which represents the most challenging task based on multilevel coordination and monitoring, otherwise referred as a complex coordination activity. The second is *transparency*, bringing together both a rationalization of the public workload and a simplification of the aid-granting system. The third involves multilevel *networking* activities, both internal and external. In the Modernisation of State aid the Commission has launched a renewed partnership with the Member States on the implementation of the reform program.

The aim of this chapter is to highlight the competencies of and the challenges for national authorities as well as the coordinating tasks for a *sui generis* administrative body that is the DPE, which emerges, albeit without policy powers, as the *trait d'union* between the national position and the European Commission.

This role has recently been highlighted in the conclusion of the Common Understanding with the European Commission, which contains common principles of the coordination of State aid.

This chapter is organized as follows: the first part will emphasize the machinery of State aid in Italy from the public perspective. This is the environment in which the role of the coordinator emerges. The central part of the chapter will analyse the tasks proper to each body and the way the national bodies are embedded into the awkward legal order. In the conclusion, further criticisms and suggestions are made.

2 Organization and Process in the Application of State Aid Rules in Italy

Under the new set of State aid rules, State Aid Modernisation,⁴ granting authorities enjoy much wider discretion in designing and implementing aid measures; in other words, they are entrusted with monitoring the entire process of aid: both *ex ante* and *ex post* phases. At the same time, the Commission must fully play its role as guardian of fair competition within the internal market, acting somewhat similarly to the *panopticon* control authority.

As implemented, the reformed State aid rules strike a perfect balance between wider scope for the Member States on the one hand and proper compliance with the rules limiting distortions of competition on the other. Despite the fact that this means an increase of responsibilities for the granting authorities, Italy lacks a supervising coordinator strictly connected with the Commission.

In this regard, the Italian institutional architecture needs to be made clear. It can be defined as a *quasi-federal*⁵ State, which has a decentralized system for granting

⁴Communication from the Commission, EU State Aid Modernisation (SAM), COM/2012/0209 final.

⁵As defined in the Common Understanding: “The legislative and administrative power is exercised by the State and the regions in accordance with their respective fields of competence,

and organizing State aids. The legislative and administrative powers are exercised by the State and the regions in accordance with their respective fields of competence, which are set out in the Constitution.⁶

Therefore, economic decisions on the allocation of public resources can respond to assessments related to the territory where such choices are made. Such measures are part of the economic public (and central) policies set out in Articles 119 and 120 TFEU in the sense that they represent exclusively a programmatic parameter and not an evaluation of competition in the light of legitimacy.⁷ In State aid circumstances, public expenditures can be interpreted only with reference to the competition and not to economic policy. In other words, a broader decentralized competence means a tighter control in light of Articles 106 and 107 that currently only granting authorities can provide.

Moreover, according to an EU law perspective, local and central granting authorities are included in the EU State Aid regime part of the *acquis communautaire*. The aim is alignment between Member States' control. For instance, Croatia agreed to apply the European State aid rules in the making of its State aid policy through the "Stabilization and Association Agreement between the Republic of Croatia and the European Communities and their Member States" signed in 2001,⁸ which contained the provision to harmonize its legal order with the European one.

With respect to the *quasi-federal* Italian system and according to the EU State aid (law) regime, such aid control can be operated only through the second-level scrutiny of a State aid central authority, which Italy has never established.⁹ It makes sense because a granting authority cannot—apparently—assess its own use of public resources under the State aid law regime. As a consequence, the lack has deprived the MS of a central body responsible for the oversight and control in State aid matters generating a *de facto* decentralized order.

On the opposite side of the State aid architecture,¹⁰ in antitrust procedures the question of central authorities was resolved at the end of the 1980s and updated to

constitutionally provided. It is, therefore, a quasi-federal system, under which the economic decisions on the allocation of public resources can respond to assessments related to the territory where such choices are made".

⁶Article 117 provides the subdivision of legislative competences and Article 119 the financial autonomy.

⁷Case C-451/03, *Servizi Ausiliari Dottori Commercialisti* [2006] ECR I-0294, para. 20.

⁸"Croatia shall establish an operationally independent authority which is entrusted with the powers necessary for the full application of paragraph 1(iii) of this Article [the notion of aid as enshrined in article 107 TFEU] within one year from the date of entry into force of this Agreement. This authority shall have, inter alia, the powers to authorise State aid schemes and individual aid grants in conformity with paragraph 2 of this Article, as well as the powers to order the recovery of State aid that has been unlawfully granted." Official Journal L 26, 28/01/2005, p. 3.

⁹It is debatable whether a State aid central authority would be able to apply national legislation, as happens in antitrust matters. For instance, see Case C-198/01, *Consorzio Industrie Fiammiferi (CIF) v Autorità Garante della Concorrenza e del Mercato* [2003] ECR I-08055.

¹⁰It is possible to identify three forms of EU networked administrative governance: EU Agencies that rely on contribution from national authorities, institutionalised networks of national authorities

the current level in the early 2000s by Regulation 1/2003, which established the current network of central antitrust authorities (European Competition Network) and renewed forms of cooperation between parties.¹¹

The Italian Competition Authority (*Autorità Garante della Concorrenza e del Mercato*—AGCM),¹² part of the network, was established by Law 287/1990 and today represents an independent institution able to make its decisions grounded in law without any interference from the government or political institutions. The AGCM has only advocacy and advisory powers regarding State aid matters.

Article 21 *bis* L. 287/1990¹³ empowers the AGCM to appeal before courts, that is *locus standi*, general administrative acts, regulations and every kind of public administration measure which violates rules protecting competition.¹⁴

Article 22 L. 287/1990¹⁵ paves the way for the advisory powers. The AGCM, when requested, can give its opinion to the Presidency of Council of Ministers on legislative proposals or regulations that could have effects on competition.

and the open method of coordination. Saurer (2012), p. 619. Currently State aid authorities are part of the first group, insofar as a unique EU institution, i.e. the Commission, carries out the task itself. Moreover, the national authority involved with the contribution is not specified, creating, as a consequence, an administrative vacuum. In that sense EU State aid is a supranational policy.

¹¹A recent example of such a difference between antitrust and State aid authorities is the last Commission public consultation entitled “Empowering the national competition authorities to be more effective enforcers” (http://ec.europa.eu/competition/consultations/2015_effective_enforcers/index_en.html). It is stated that the NCAs play a key role in enforcing the EU antitrust rules alongside the Commission. That role is not yet provided—or imagined to be empowered—for SAAs.

¹²For a report on the first 20 years of activity, see Bedogni and Barucci (2010).

¹³Article 21-bis. Poteri dell’Autorità garante della concorrenza e del mercato sugli atti amministrativi che determinano distorsioni della concorrenza. L’Autorità garante della concorrenza e del mercato è legittimata ad agire in giudizio contro gli atti amministrativi generali, i regolamenti ed i provvedimenti di qualsiasi amministrazione pubblica che violino le norme a tutela della concorrenza e del mercato. L’Autorità garante della concorrenza e del mercato, se ritiene che una pubblica amministrazione abbia emanato un atto in violazione delle norme a tutela della concorrenza e del mercato, emette, entro sessanta giorni, un parere motivato, nel quale indica gli specifici profili delle violazioni riscontrate. Se la pubblica amministrazione non si conforma nei sessanta giorni successivi alla comunicazione del parere, l’Autorità può presentare, tramite l’Avvocatura dello Stato, il ricorso, entro i successivi trenta giorni.

¹⁴There is interesting discussion about the legal standing power of the AGCM: whether it represents a special *locus standi*, because decoupled from a proper ownership of legal qualified position; or, conversely, whether the competition compliance is a particular form of legitimate interest, a sort of widespread interest, i.e. the community interest, which AGCM carries out. On this point see Sanino (2015), p. 268 et seqq. Although there is no express reference to State aid matters, the author spoke about competition safeguarding as a legal interest in *re ipsa* and the functioning of internal market. It seems reasonable to consider State aid part of it.

¹⁵Article 22 Attività consultiva. L’Autorità può esprimere pareri sulle iniziative legislative o regolamentari e sui problemi riguardanti la concorrenza ed il mercato quando lo ritenga opportuno, o su richiesta di amministrazioni ed enti pubblici interessati. Il Presidente del Consiglio dei Ministri può chiedere il parere dell’Autorità sulle iniziative legislative o regolamentari che abbiano direttamente per effetto:

All the above being said, and following the above-mentioned Lisbon innovation,¹⁶ the responsibility for State aid compliance, for the Member States, can be determined exclusively through legislative innovation.

In that sense, Italy, as part of the EU, has adapted its legal framework in a State-aid-oriented way, making sound use of its legal tools.

The government, indeed, in collaboration with Parliament adopted the national Law 234/2012, which contains the formal legislative tools used to adapt its legal system to the EU legal architecture.¹⁷ The Law is entitled “Norme generali sulla partecipazione dell’Italia alla formazione e all’attuazione della normativa e delle politiche dell’Unione Europea” and represents the general framework for legislative and administrative action on Italy’s participation in the formation of European legislation and policies, as well as legislative and administrative tools to adapt the Italian law system to the European one.¹⁸

In particular, the provision regarding State aid matters was enshrined within Law 234/2012, Chapter VIII.¹⁹ It includes and makes clear the role of the Italian government as a privileged institutional player in the relationship with the European Commission concerning aid. Moreover, Chapter VIII provides rules about coordination within the Prime Minister’s Office both for notified and non-notified aid and the responsibility of each body that grants aid.

The general system is organized into three macro areas:

- i) the coordination of MS position on State aid matters as part of the European Union;
- ii) possible intervention in new legislative proposals that can provide new forms of aid;
- iii) possible intervention in measures taken at a different level than the national Parliament.

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- a) di sottoporre l’esercizio di una attività o l’accesso ad un mercato a restrizioni quantitative;
 - b) di stabilire diritti esclusivi in certe aree;
 - c) di imporre pratiche generalizzate in materia di prezzi e di condizioni di vendita.

¹⁶The Lisbon Reform has not amended the core provisions of the Treaty on the Functioning of the European Union regarding State aid but has changed the numbering. For more information see http://ec.europa.eu/competition/state_aid/legislation/compilation/a_01_03_11_en.pdf.

¹⁷The new act provides, repealing Law 11 of 2005, the general basis for the involvement of Parliament, government, regions and other institutional actors forming the Italian position in the arrangement phase of EU acts and policies and the fulfilment of obligations of the EU legal order. On the participation of Italy in the EU integration process, see Adam and Tizzano (2014), p. 503 et seqq.

¹⁸The specific tools to adapt the Italian law system to the European one are set out in two annual laws: “European Law” and “European Delegation Law”. The purpose of the “European Law” is to adapt national legislation and national specific rules to changes in European law, such as new specific provisions possibly deriving from European Court judicaries, while the purpose of the “European Delegation Law” is to adopt criteria for the transposition of directives adopted at EU level.

¹⁹The norm provides dispositions about aids to firms using public resources.

The first area consists of the coordination of the Italian position on State aid. This position is represented towards the European Union by the President of the Council of Ministers or the Minister for European Affairs, who operates in connection with the Ministry of Foreign Affairs. The second one consists of the control of legislative proposals in order to ensure their compliance with State aid rules. Thus, any legislative proposal and government initiative (issued at central or local level) is assessed firstly by the distinct bodies in the different administrations when competent, secondly by sectoral Ministries and the Department of the European Policies and, at the parliamentary level, by the House and Senate Committees XIV “European Policies”. The Ministries and local authorities may consult the DPE established at the Presidency of the Council of Ministers in order to obtain a State aid assessment of their initiatives.

The third area, reviewing already existing measures, is particularly important when new regulatory provisions (guidelines, block exemptions, etc.) are introduced by the Commission. After the entry into force of new European regulatory provisions, Italian granting authorities assess all the existing schemes and if necessary make the modifications required to comply with the new rules. Ministries and local authorities are responsible themselves for making sure that their aid schemes are in compliance with new and existing rules. The DPE assists the granting authorities to adopt the appropriate measures and promotes the networking of information between the contact points within the same granting authorities.

Finally, there is the system ensuring that the possible presence of State aid is assessed and detected for measures taken at a level other than the Parliament (e.g. other Ministries and regional and local authorities). As in the two previous cases, the granting authorities may ask for an assessment not only from sectoral Ministries, but even from the DPE.²⁰ The latter, in order to express an opinion on the compliance of procedures adopted, can make a non-mandatory assessment in response to received requests, as well as on the compatibility of regional laws within the constitutional law framework, from a State aid perspective.

At the same time, in the case of notified measures, there is a “*pre-validazione*” time at which the DPE can give the notification a green light, although granting authorities themselves remain responsible for the notification and the measure.²¹

In conclusion, the Italian model of State aid compliance evaluation has a binary system. On the one hand the granting authorities hold great responsibility; it is they that have the last word on the decision and are solely responsible for the aid. On the other hand, there is the DPE. Its role emerges in the abovementioned Italian system

²⁰According to the amendment introduced by Law 122 of 7 July 2016, to Article 45 of Law 234/2012, central and territorial administrations which intend to grant State aid subject to prior notification under Article 108(3) of the Treaty on the Functioning of the European Union prepare the notification in accordance with the procedures prescribed by European legislation and transmit it to the Presidency of the Council of Ministers—Department for European Policies through the electronic notification system. The European Policy Department carries out an examination of the completeness of the documentation contained in the notification.

²¹For further information on the “*pre-validazione*”, please see the following pages.

of aid. While it is not an authority *strictu sensu*, given the lack of a designated central authority, the DPE assumes *ipso facto* the role of an authority in State aid matters.

3 Law 234/2012 and the Coordinating Role of State Aid Matters

Law 234/2012 expressly empowers the Presidency of Council of Ministers (herein-after PCM), as the *primus inter pares* in the executive, to be the national representative, that is the agent,²² before the Commission.

Every kind of cooperation in State aid matters, in the absence of a central authority or a form of structured cooperation, must take place in the pattern of bilateral relations between Member State and European Commission.

Therefore, taking account of the abovementioned *quasi-federal* system, the PCM represents—in a wider sense—the general coordination body for Italy as part of the EU. Narrowly, it means that within the Presidency of Council of Ministers the DPE is the body entrusted with coordinating—in respect to competencies—the administrative *quasi-federal* structure in the State aid sector.

Hence, the DPE is the body responsible for coordinating State aid policies and supporting granting authorities in compliance with Italy's obligations as part of the EU. This is a complex coordination activity. In greater detail, the task of coordinating and supporting national, regional and local administration involved in the State aid sector takes place through expressing opinions (both on legal and on policy matters), which are not formally mandatory, or through giving advice when expressly requested. Moreover, although the coordination bodies have no right to veto the decisions taken by the Council of Ministers or at parliamentary level, the DPE's recommendations are generally followed.

As stated above, the major legal innovation was implemented by Law 234/2012. The competencies of the DPE are expressly provided for in Law 234/2012, and the most important are as follows:

- Communication to Parliament about formal investigation procedures and the state of recoveries.
- Definition of the Italian position towards the EU, following coordination with interested Ministries and regions on draft European acts in State aid matters (e.g. guidelines, communications, regulations).
- Activities of monitoring, drafting and informing all the administrations, Ministries and regions about draft acts in order to fulfil State aid rules on economic

²²According to the agency theory, the government (in this case of Italy) plays the most important role in Public Expenditure Management (PEM) relations. On one hand, the local granting authorities have considerable autonomy in expenditure decisions; on the other hand, the elected central government takes part in the bilateral dialogue with the Commission for every kind of formal and informal appointment (see below under 'networking').

public services, that is, the Service of General Economic Interest (SGEI), acting as a second-level coordinator without any capacity to interfere with decisions but only to bring actors together.

- Monitoring and coordination, when necessary, of open investigation procedures of the EU Commission and procedures of recovering illegal and incompatible aids.
- Advisory role in State aid matters, even though this is not set out in law.

In the undertaking of complex coordination activities and the representation of Italy to the Commission, it is possible to identify three areas of intervention: the first one is compliance, the second transparency and the third networking. Discussing these characteristics will make clearer the task of a *sui generis* body such as the DPE or, in other words, a national authority.

4 Compliance

The very first rule regarding compliance with State aid provisions is Article 107 (1) TFEU.²³ It entails a first critical analysis of the measure and a number of sensitive activities.

It must be borne in mind that compliance, in accordance with State aid preventive tasks, can have two different meanings: on one hand, compliance *strictu sensu* which means an assessment of aid measures in cases with the biggest impact for the internal market. It is based on Treaty provisions, Articles 107(2) and 107(3),²⁴ and requires

²³ Article 107(1) Consolidated version of the Treaty on the Functioning of the European Union OJ C 326, 26.10.2012, pp. 47–390: “Any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the internal market.”

²⁴ Article 107(2) and (3) Consolidated version of the Treaty on the Functioning of the European Union OJ C 326, 26.10.2012, pp. 47–390. “The following shall be compatible with the internal market: (a) aid having a social character, granted to individual consumers, provided that such aid is granted without discrimination related to the origin of the products concerned; (b) aid to make good the damage caused by natural disasters or exceptional occurrences; (c) aid granted to the economy of certain areas of the Federal Republic of Germany affected by the division of Germany, in so far as such aid is required in order to compensate for the economic disadvantages caused by that division. Five years after the entry into force of the Treaty of Lisbon, the Council, acting on a proposal from the Commission, may adopt a decision repealing this point. 3. The following may be considered to be compatible with the internal market: (a) aid to promote the economic development of areas where the standard of living is abnormally low or where there is serious underemployment, and of the regions referred to in Article 349, in view of their structural, economic and social situation; (b) aid to promote the execution of an important project of common European interest or to remedy a serious disturbance in the economy of a Member State; (c) aid to facilitate the development of certain economic activities or of certain economic areas, where such aid does not adversely affect trading conditions to an extent contrary to the common interest; (d) aid to promote culture and heritage conservation where such aid does not affect trading conditions and competition in the Union to an

an assessment as well as an act directed at the Commission, that is, the notification.²⁵

On the other hand, there is compliance *lato sensu*, which covers all the activities that a MS must undertake to comply with secondary law (General Block Exemption and *de minimis* most of all). In the present article, this form of compliance will for convenience always be presented as ‘compliance’. It represents the overlap of the Block Exemption and State aid matters. Although on one hand the scrutiny for compatibility with Articles 107(2) and 107(3) TFEU is assessed in both cases with a margin of discretion, on the other hand the accordance with regulations leaves practically no scope for such an assessment.

In order to assess whether a public measure meets the four aid conditions (State resources, advantage, selectivity, distortion of competition), an awareness of what a potentially harmful measure may be is necessary. For this reason, the DPE competencies connected to compliance obligations for granting authorities are of various orders: the first concerns training, that is, the development of a State aid culture within the civil service. The second concerns *ex ante* control, the most inspiring rationale behind the State aid modernization. Third is the strict State Aid Modernization (SAM) phase in which the DPE, as a decentralized body separate from the EU Commission, monitors, without any power of intervention, the compliance with the formal conditions to a compatible/exempted/*de minimis* aid.

4.1 Training

Italy has always encouraged training civil servants with the aim of improving their knowledge in State aid matters. As already mentioned above, the Italian system for granting and managing State aid is decentralized. Each regional or local administration has the authority to grant State aid. For this reason, it needs sophisticated knowledge of and competencies related to the European framework.

Several training initiatives have already taken place and others are being planned both at central and local level, involving officials. Moreover, developments for the DPE are increasing: workshops at central and regional level for the dissemination of necessary knowledge on the functioning of the new national SA registry, and training cycles targeted at individuals and administrations.

In the context of SAM and the related training upgrade, since 2014 the DPE has coordinated a series of specific training events on State aid.

extent that is contrary to the common interest; (e) such other categories of aid as may be specified by decision of the Council on a proposal from the Commission.”

²⁵According to Joined Cases 261/01 and C-262/01, *Van Calster and Cleeren* [2003] Report not available, paras. 49–52, the Member State is required to notify not only planned aid in the narrow sense, but also the method of financing the aid inasmuch as that method is an integral part of the planned measure (e.g. taxes or tax avoidance). In the context of aid schemes, the necessity of a coordinating body able to detect the possible presence of aid in the *ex ante* phase emerges.

In 2014 (in cooperation with the European Commission) and in 2015 (also in cooperation with the Ministries of Economic Development, Agriculture and Fisheries and the *Agenzia per la coesione territoriale*), a series of training events on this subject were carried out in various cities, such as Cagliari, Rome, Milan and Naples. The workshops were attended by a large number of State officials and public managers, representatives of central administrations and regional authorities.

At regional level, on 19 February 2015 the Standing Conference for relations between the State, regions and autonomous provinces adopted regional guidelines for the application of Regulation (EU) No 651/2014. More initiatives were organized on State aid to airports and infrastructures in spring 2017, and others were to take place that fall.

Recently, in 2016, in order to better address the aids and communication to the regions and the municipalities about the modernization of State aid, the DPE, in collaboration with Foromez, carried out another two cycles of training and information, attended by at least 2000 public officials.²⁶

Finally, in the second half of 2017, the DPE coordinated another training course, in cooperation with EIPA, with a series of workshops that took place in Rome and in the Regions.

Therefore, without any doubt, improved training has the positive effect of giving useful tools to granting authority officials, creating a class of “operators” able to detect the presence of aid, regardless of whether it is compatible or not, in public measures.

As already stated above, in the understanding of the Commission, the *ex ante* control for which the Member States are responsible entails a very strict surveillance of the *de minimis* measures and block-exempted schemes and cases.²⁷ In this context the DPE’s tasks are strictly linked to the activities of granting authorities.

Thus, a network of qualified representatives in the field of State aid has been created. Italian authorities have created a network of qualified representatives within each central and regional administration to manage the relations with coordination bodies.

This network is also called qualified representatives in the field of State aid. This means that Italian authorities have created a network of qualified representatives.

²⁶The aim of the course is to promote comprehension of the modernization process and rules for State aid control. The schedule is arranged as follows: notion of State aid; forms of aid; physiology and pathology of aids; State Aid Modernisation; SGEI; notification system.

²⁷State Aid Modernisation Communication, Recital 21: “Should the Commission decide to increase the size and scope of aid measures exempt from notification obligation, responsibilities of Member States for ensuring the correct enforcement of State aid rules would increase. With more measures exempt from the notification requirement, Member States will have to ensure the *ex ante* compliance with State aid rules of *de minimis* measures and block-exempted schemes and cases, in strict coordination with the Commission which will continue to exercise *ex post* control of such measures.”

The national contact points are designated by the central and regional administrations to allow general coordination pursuant to Articles 18 and 44 of the Law of 24 December 2012, no. 234.

Identifying the contact points is designed to make both formal and informal relationships easier in the context of general coordination of the central and regional administrations and to speed up the assessment of specific issues related to State aid.

The national contact points are qualified representatives who look after the dissemination and transmission of any document or information about State aid in the sectors involved.

4.2 Ex Ante Phase

The recent economic and financial crisis has highlighted the role of the Commission's State aid policy as a counterbalancing response. In fact, the aids have proved to be a useful remedy for market failures and to support the pursuit of common European interests. Within SAM, there are three general aims, strictly linked with each other:

- Foster growth in a strengthened, dynamic and competitive internal market
- Focus enforcement on cases with the biggest impact on the internal market
- Streamlined rules and faster decisions

The *ex ante* control, in other words, represents an assessment of the granting authorities based upon pre-defined criteria on the assumption that, if they comply with these assessment criteria, their positive effects will outweigh any negative effects.

To date, although the State aid modernization process enhances those pre-defined assessments, the notification remains the more critical evaluation for a national authority, as the counterpart of the abovementioned *strictu sensu* compliance.

Italy has anticipated the *ex ante* tendency. The number of notifications has declined substantially from 32 in 2000 to 21 in 2013,²⁸ and a high use of exemptions has been made: 204 in 2009,²⁹ the highest number in the EU in the first year of the General Block Exemption Regulation (GBER). This fact is largely explained by the decreasing use of aids in percentage of national GDP. While the EU average was 0.8% of GDP/MS, Italy's aid expenditure in 2014 was 0.34% of GDP as opposed to States such as Germany (1.36%), Poland (1.2%), and Latvia (2.08), the top three in those statistics.³⁰

²⁸State aid statistics (Status: 19 November 2013), Number of *notifications* submitted by Member States.

²⁹State aid statistics (Status: 19 November 2013), Statistics on *block-exempted measures*.

³⁰All the statistics are reported in the State Aid Scoreboard of DG COMP, http://ec.europa.eu/competition/state_aid/scoreboard/index_en.html.

Law 234/2012 has ‘crystallized’ the Italian trend, giving huge responsibilities to granting authorities in order to make sound use of their (limited) resources.

At the same time, as reported in footnote 24, regarding the notifications, Article 45 of Law 234/2012 has been amended to include a new part concerning the so-called “*pre-validazione*” (pre-validation). Under the new *pre-validazione* rules, the DPE is called upon to express an opinion whenever a public measure exceeding the exemption threshold has to be notified to the Commission. In this sense, the DPE’s work is an analysis from the formal point of view of the notification, unless there are situations of macroscopic divergence.

In other words, the DPE does not have the possibility of expressing a final opinion, that is, a legally mandatory scrutiny, but is only entrusted with “conditional power”. This task represents a functional link with the provision of Article 45 (2) L. 234/2012: “Regardless of the aid’s form, the information requested by the EU Commission concerning alleged unnotified State aid as literally mentioned by Article 108(3) TFEU, are provided by competent authorities, exclusively through the DPE.”

The two provisions combined (pre-validation and Article 45(2)) clearly explain the function of the DPE, which is situated precisely as a point of connection between national and local administrations (i.e. granting authorities) and the European Commission (i.e. the exclusive authority with powers of direction and control). Therefore, although the DPE has not been entrusted with a compliance task to decide or control the measures, it undertakes an important advisory assessment without conducting any compatibility review. Moreover, the DPE has a ‘fast track’ in relations with the Commission. This means that the DPE has to be very proactive to ensure compliance as a regulatory authority, or, nevertheless, must be relegated to the *ex post* evaluation as its real task of controlling State aid measures that do not fall within its competency and are not currently provided for in any law, neither Italian nor European.³¹

Besides, in parallel with the SAM objectives and *ex ante* control are the best practices or the more powerful abilities of a single administration to detect and stop any measure potentially harmful for competition.

In this regard, a Code of Best Practices for the conduct of State aid control procedures³² adopted in 2009 is currently operative. It includes:

- Pre-notification contacts
- Mutually agreed planning
- Decision-making process for preliminary examination and formal investigation
- Complaint handling

³¹One difference must be noted: in the present article, *ex post* evaluation concerns exclusively an *ex post* scrutiny of national aid measures in order to establish their compatibility, rather than an assessment of their positive or negative effects in the market. The question will be settled in next section.

³²Commission Notice on a *Best Practices Code on the conduct of State aid control proceedings* OJ C 136, 16.06.2009, pp. 13–20.

The last Procedural Regulation 1589/2015 provided a window of opportunity to update the Code and this happened on the 16th July 2018.

In any case, the DPE, in agreement with the Common Understanding Commission, proactively launched so-called distinct bodies.

Such bodies, within the central and regional granting authorities, have the task, *inter alia*, of contributing to the preparation of their decisions by assessing the proposed measures for the granting of public resources and their possible State aid nature.

In line with this greater development of the *ex ante* phase, with the aim of ensuring coherence within the Italian constitutional structure, the distinct bodies increase the responsibility and awareness of the granting authorities and ensure unity in the coordination of State aid at a national level.

4.3 *Strict SAM Phase*

In accordance with SAM, the granting authorities have to follow a consistent approach in establishing new aid, are encouraged to grant only aid which will make a genuine difference in enhancing economic growth, and strictly respect guideline provisions.

According to the SAM, the so-called *ex post* evaluation has to balance positive and negative effects, insofar as when positives outweigh the negatives it is possible to evaluate the aid granted as good, that is, with a stimulating effect on the internal market. However, the current *ex post* scrutiny is more about the legitimacy of the aid or, in other words, about a formal assessment of the compatibility of the measure.

Therefore, even if without any decision-making power the DPE is unable to make an *ex post* assessment, it can only be very consistent with the SAM's animus, applying a very refined approach: when there is a yellow light (in other words, a warning), the DPE only has the power to inform the granting authorities. For that reason, the *ex post* control may be defined as a "strict SAM" phase, in which the national body coordination can only express its concerns to the granting authorities, respecting, without formally applying, the rationale behind the SAM.

It can be argued that a shift in the compliance model as requested by the Commission has taken place: whereas the Commission asks for *lato sensu* compliance in the *ex ante* phase, the MS without a central State aid authority provides a complying sample *ex post* control, or, from another point of view, decentralizes the *ex ante* control, devolving it exclusively to the granting authorities.

In that sense granting authorities are always responsible for supervising decisions and rulings besides verifying the correct recovery of illegal and incompatible aids.

Only if necessary does the DPE, as the guardian of the strict SAM phase, assume a coordinating role in order to respond to the Commission's requests for information that involves more than one administration. In that circumstance, recovery cases are part of a broader monitoring assignment for the MS which concerns the Commission's Decisions and European Court of Justice Rulings.

Thus, according to Article 14(1) Law 234/2012³³ the President of the Council of Ministers or Minister for European Affairs provides the institutional information on ongoing cases of pre-litigation and litigation other than formal investigations of Italy every three months.

There are four categories of information tasks:

- ECJ rulings in which Italy is involved or that have relevance for the national legal system (Art. 14, lit. a);
- Preliminary rulings according to Article 267 TFEU (Art. 14, lit. b);
- Infringement proceedings against Italy according to Articles 258 and 260 TFEU, with summary information on the matter and state of play and on the nature of contested violations (Art. 14, lit. c);
- Formal Investigations in State aid matters, started by the EU Commission against Italy according to Article 108(2) TFEU (Art. 14, lit. d).

As part of the Presidency of Council of Ministers, the DPE monitors and coordinates with the involved administrations, with the aim of defining the Italian position towards the European Union—that is, the Commission—in both preliminary and formal investigations.

In cases in which the Commission concludes its investigation with a negative decision and a recovery order for incompatible aids and the MS does not appeal the decision, the process of recovery as provided by Article 48 Law 234/2012 begins:

- Within two months of the notification of a recovery decision, the competent Ministry enacts a decree which lists the recipients, established amounts and determined payment conditions and terms.
- The decree constitutes an enforceable order and allows the recovering administration to begin operations.
- If the recovery administrations are other than the State, the recovery order is enacted by the region, autonomous province or competent local authority, whereas the collection is performed by the competent collecting concessionaire/dealer.³⁴
- All the information on recovery requested by the Commission must be provided by the involved authorities exclusively through the DPE.

If the recipient firms enforce the recovery decision, the procedure pursuant to Articles 49 and 50 Law 234/2012 will take place. The administrative judge has

³³1. Il Presidente del Consiglio dei Ministri o il Ministro per gli affari europei, sulla base delle informazioni ricevute dalle amministrazioni competenti, trasmette ogni tre mesi alle Camere, alla Corte dei conti, alle regioni e alle province autonome un elenco, articolato per settore e materia [. . .]
2. Il Ministro dell'economia e delle finanze, di concerto con il Ministro per gli affari europei, trasmette ogni sei mesi alle Camere e alla Corte dei conti informazioni sulle eventuali conseguenze di carattere finanziario degli atti e delle procedure di cui al comma 1 [. . .].

³⁴When the granting authority is the State or a central administration, all the recovery procedures are undertaken by Equitalia SPA, regardless of the aid's form. By contrast, when the granting authority differs from the State, all recovery procedures are carried out by the concessionaire.

exclusive competence *ratione materiae* regarding acts and proceedings violating Article 108(3) TFEU last sentence, the only provision of State aid rules with direct effect.³⁵

The applicability of “abbreviated trial procedure” is established, as provided by Article 119(1) of the Italian administrative procedural code,³⁶ for the enforcement of Article 16 Regulation 1589/2015, regardless of the form of the aid or the nature of the recipient. The exclusive judicature in the administrative trial establishes a “concentration principle” that favours homogenous jurisprudence.

No later than 30 January every year, the competent administrations must collect all recovery rulings of the year just ended and send them to the DPE.

In case of failure to comply with recovery decisions, the DPE immediately begins to monitor the administrations involved. Wherever the Commission decides to take legal action before Union Courts, the litigation phase managed by the Minister for Foreign Affairs begins.

However, the granting administrations are responsible for the recovery phase. With the aim of better coordinating recovery, the DPE provides and updates the schedule containing all the national measures evaluated negatively by the Commission, that is, recovery decisions.³⁷

Therefore, in the absence of a central authority, it is possible to detect a second-level monitoring phase in the DPE. It emerges from the coordinating role given by the Italian legislation. Whereas the responsibility for the aid—if illegal or incompatible—falls to the national administrations, the DPE is the preferred interlocutor of the European Commission on the secondary but no less important *strict SAM* evaluation.

4.4 Transparency

As another declared aim, SAM offers a more transparent, coherent and growth-oriented framework, while allowing comparable levels of aid. Given that it is foreseen that more State aid measures will be granted on the basis of the General Block Exemption Regulation, Member States have to render the aid they grant more transparent.

³⁵There is an open debate on the *amicus curiae* claims by national judges to the Commission. On this point, see: Vecchietti and Liberati (2013), pp. 813–820.

³⁶Article 49 Law 234/2012: 1. All’articolo 119, comma 1, del codice del processo amministrativo, di cui all’allegato 1 del decreto legislativo 2 luglio 2010, n. 104, dopo la lettera m-quater) e’ aggiunta la seguente: “m-quinquies) gli atti e i provvedimenti adottati in esecuzione di una decisione di recupero di cui all’articolo 14 del regolamento (CE) n. 659/1999 del Consiglio, del 22 marzo 1999 [now Article 16 Council Regulation (EU) 1589/2015]”.

³⁷See <http://www.politicheeuropee.it/attivita/17327/recupero-aiuti-illegali>.

As a cornerstone of (SAM) initiatives,³⁸ in February 2014 the European Commission introduced new transparency requirements concerning State aid granted to undertakings by Member States. For each State aid award above €500,000, Member States will be required to publish the identity of the beneficiary, the amount and objective of the aid and the legal basis. More transparency means that granting incompatible aids will be prevented. On the one hand, Member States are to be assisted in identifying which public measures may contain State aid. On the other hand, it is the responsibility of the Commission to improve the quality and clarity of its decisions.

Joaquin Almunia, former Commissioner of Competition, said: “Transparency promotes accountability and more effective policies. Member States will have to set up a dedicated website so that citizens and stakeholders can see which companies have received State aid, how much and for what purpose. This will help promote the good use of taxpayers’ money.”³⁹

To achieve these goals, the DPE launched a huge campaign to improve national transparency, acting, as usual, as both coordinator and promoter:

- Publication of aids on the website. As set out in GBER 651/2014, by 1 July 2016 both authorized aid, with notification, as well as exemptions must be published on the website.
- *Deggendorf* obligation. Italy was the first MS to comply, for a general rule, with the obligation of not giving aids to firms undergoing the recovery procedure. This rule is now enshrined in Article 47 Law 234/12.⁴⁰
- National SA registry. The Italian Parliament has enacted a law⁴¹ that sets out the upgrading of the current BDA⁴² (database of incentives) into a registry which contains all information about aids in order to carry out the necessary control across the whole landscape of State aids, from *de minimis* to SGEI.

³⁸See IP/12/458.

³⁹See http://europa.eu/rapid/press-release_IP-14-588_en.htm.

⁴⁰In the *Deggendorf* judgment, the CFI confirmed that, in the assessment of new aid granted to the same beneficiary, the Commission may take any outstanding repayment into account, the Member State submitting a new notification to commit to suspending the new aid until all outstanding aid amounts have been recovered. Joined Cases T-244/93 and T-486/93. *TWD Deggendorf v Commission* [1995] ECR II-2265, para. 56.

⁴¹Article 11 of European Law 2014.

⁴²The BDA (Banca Dati Agevolazioni) was issued by the ministerial decree of 18 October 2001 and reviewed by Article 52 L. 234/2012. It concerns the preservation of information about aids to firms and the transmission to the Commission. In order to achieve this aim, the Minister of Economic Development (MISE) acquires all the information on granted State aids: a) recipient b) if it is a part of a scheme c) granting law or provision d) type and amount of incentives e) activities and aim behind the incentives f) withdrawn incentives g) expected and realized objectives.

The current State Aid Registry is provided for by Article 52 Law 234/2012 as amended.⁴³ It provides, *ex multis*, for the publication of the list of recipients of illegal aid; each granting authority's own *Deggendorf* list; and the publication of State aid schemes. According to paragraph 7, the fulfilment of the obligation to consult the Registry itself constitutes a legal condition for the effectiveness of the measures that provide for the granting and disbursement of the aid. In those circumstances, transparency prevails over the existence itself of the aid.⁴⁴

These lists are readily accessible to the administrations in the act of granting new aid and allow them to verify the position of the beneficiaries, ascertaining the obligation to recover, and, when necessary, block grants.

Aimed at verifying the accumulation of aids, central administrations have been asked to set up their own website where all measures at national and regional level are published.

In conclusion, the Italian transparency model will advance SAM. The State Aid Registry, along with *Deggendorf* obligation and the efforts of both central and local granting authorities, makes Italy a leading MS in State aid transparency rules that, above all, aimed to preventatively disclose recipients.

⁴³*Registro Nazionale degli Aiuti di Stato*. 1. Al fine di garantire il rispetto dei divieti di cumulo e degli obblighi di trasparenza e di pubblicità previsti dalla normativa europea e nazionale in materia di aiuti di Stato, i soggetti pubblici o privati che concedono ovvero gestiscono i predetti aiuti trasmettono le relative informazioni alla banca dati istituita presso il Ministero dello sviluppo economico ai sensi dell'articolo 14, comma 2, della legge 5 marzo 2001, n. 57, che assume la denominazione di "Registro nazionale degli aiuti di Stato". 2. Il Registro di cui al comma 1 contiene, in particolare, le informazioni concernenti: a) gli aiuti di Stato di cui all'articolo 107 del Trattato sul funzionamento dell'Unione Europea, ivi compresi gli aiuti in esenzione dalla notifica; b) gli aiuti de minimis come definiti dal regolamento (CE) n. 1998/2006 della Commissione, del 15 dicembre 2006, e dal regolamento (UE) n. 1407/2013 della Commissione, del 18 dicembre 2013, nonché dalle disposizioni dell'Unione Europea che saranno successivamente adottate nella medesima materia; c) gli aiuti concessi a titolo di compensazione per i servizi di interesse economico generale, ivi compresi gli aiuti de minimis ai sensi del regolamento (UE) n. 360/2012 della Commissione, del 25 aprile 2012; d) l'elenco dei soggetti tenuti alla restituzione degli aiuti incompatibili dei quali la Commissione europea abbia ordinato il recupero ai sensi dell'articolo 14 del regolamento (CE) n. 659/1999 del Consiglio, del 22 marzo 1999. [...].

⁴⁴7. ((A decorrere dal 1° luglio 2017)), la trasmissione delle informazioni al Registro di cui al comma 1 e ((...)) l'adempimento degli obblighi di interrogazione del Registro medesimo costituiscono condizione legale di efficacia dei provvedimenti che dispongono concessioni ed erogazioni degli aiuti di cui al comma 2. I provvedimenti di concessione e di erogazione di detti aiuti indicano espressamente l'avvenuto inserimento delle informazioni nel Registro e l'avvenuta interrogazione dello stesso. L'inadempimento degli obblighi di cui ai commi 1 e 3 nonché al secondo periodo del presente comma e' rilevato, anche d'ufficio, dai soggetti di cui al comma 1 e comporta la responsabilità patrimoniale del responsabile della concessione o dell'erogazione degli aiuti. L'inadempimento e' rilevabile anche dall'impresa beneficiaria ai fini del risarcimento del danno.

5 Networking

The EU State aid policy has led to the development of forms of networking between Member States and the Commission. The governance of State aid control necessarily requires different patterns of cooperation in which critical tasks are discussed and dealt with using the same general principles.

The Member State is the sole participant in the administrative procedure, except for interested parties,⁴⁵ and the unique addressee of Commission decisions. In other words, in the meaning of the Commission and as confirmed by the ECJ,⁴⁶ the Member State is the real interested party in preventing incompatible and illegal aids.

We – Member States and the Commission – are completing the State Aid Modernisation (SAM) programme, the biggest overhaul of our rules in more than 50 years of State aid control. To me this symbols [*sic*] a new partnership where we work together, listen to each other and have the same general principles.

Changing the rules is only half the battle. One of the key challenges of my mandate will be to see that SAM is implemented in practice.⁴⁷

The speech of Competition Commissioner Margrethe Vestager was held at the High Level Forum and addressed to all Member States. It is part of the set of formal and informal appointments coordinated by the DG Competition of the EU Commission, in which the critical aspects of existent rules and amendments are discussed.

This Directorate-General is responsible on the one hand for the implementation of competition and State aid rules, and on the other for ensuring competition in the EU single market is not disrupted. Therefore, the aim of its efforts, and in particular those of the Policy unit, is to ensure the strengthening of the competitiveness of the EU through the MS, moving MS legislation towards a State aid culture, that is, harmonization.

In this context, Working Groups are meeting civil servants from each of the 28 Member States, DG Competition officials and State aid experts. Italy, and the DPE, has always taken part in the discussions, making stimulating contributions.

Given the lack of a Member State central authority, leading to a system of networking between Member States, the Working Groups become the principal forum for the exchange of opinions, information, practices (and more importantly best practices), and approaches to the implementation of the EU State aid regime

⁴⁵‘Interested party’ means any Member State and any person, undertaking or association of undertakings whose interests might be affected by the granting of aid, in particular the beneficiary of the aid, competing undertakings and trade associations. Article 1 (h) COUNCIL REGULATION (EU) 2015/1589 of 13 July 2015 laying down detailed rules for the application of Article 108 of the Treaty on the Functioning of the European Union (codification).

⁴⁶Joined Cases C-74/00 P and C-75/00 P, *Falck and Acciaierie di Bolzano v. Commission* [2002] ECR I-7869, para. 81.

⁴⁷Speech at High Level Forum of Member States by Margrethe Vestager, Commissioner for Competition, 18 December 2014. See http://ec.europa.eu/commission/2014-2019/vestager/announcements/speech-high-level-forum-member-states-margrethe-vestager-commissioner-competition-18-december-2014_en.

among MS. In that sense, the Commission takes upon itself not only compliance control but also harmonization between the States.

6 Conclusion

The intent of this contribution is to make a clarification into a distinction. The objective of the Commission is to move towards a soft harmonization of MS State aid control. On the one hand, there are founding States, including Italy, without central State aid authority. On the other hand, there are States that have only recently joined the Union, in which the creation of a State aid central authority formed part of their obligations. However, although the dichotomy makes sense in the cultural State aid gap of acceding countries, no empirical evidence of its necessity has been forthcoming.

In the case of Croatia, only one year after accession, the State aid central authority was dismissed and incorporated in the Ministry of Finance through the State aid act of April 2014. The reason lies either in the Croatian legal order, in which there was no need for a State aid central authority, or, on the contrary, in the inadequacy of such an authority on the European stage.

Under these circumstances two considerations must be made. Firstly, influential economic decisions, such as State aid, need a very strong and powerful authority, supported by the EU Commission rather than by national politicians. Secondly, although the EU encouraged the creation of such authorities, it has never established a network between them. In fact, glancing through the national State aid contacts provided by the Commission,⁴⁸ there are no central authorities nor central bodies entrusted with an oversight role (except in Greece).

Therefore, given this state of play, it seems there are well-founded arguments against the necessity of central State aid authorities as well as a network between them. Conversely, the issue of SAM fostering growth through simplification in order to improve and upgrade the *ex ante* control and the parallel absence of central authorities or at least of a networking structure between MS in order to exchange different improvements or best practices can appear paradoxical.

In other words, the paradox is that the Member States that are made responsible for SAM informally share their fully autonomous efforts within SAM networking to improve the operation of State aids at national level, without actually having any power in this regard.

In addition, a second paradox that can be found in SAM is that a delegated and decentralized model of *ex ante* control (from Commission to Member States) cannot correspond to a domestic delegated and decentralized *ex ante* control (from central administrative body to local and decentralized granting authorities), because local

⁴⁸See http://ec.europa.eu/competition/state_aid/overview/contacts.html.

granting authorities must report every kind of measure to an informal central authority.

In this sense, the Italian approach seems to be in line with SAM's European model: the *quasi-federal* constitutional system obliges the local granting authorities to take some financial measures (i.e. aids) autonomously in compliance with the division of (constitutional) competences.

As a matter of fact, the domestic constitutional differences between Member States demonstrate that it is impossible—at this stage—to provide a 'one size fits all' control of aids.

The above being said, if the aim of SAM is still a better oversight by MS of the *ex ante* control, it will be more appropriate to achieve this aim with soft or hard national law provisions regulating the matter.

In other words, SAM highlights the lack of detailed rules for each individual national situation in the absence of application of the 'one size fits all' principle. This EU legislative vacuum could produce confusion within certain MS where State aid competences are allocated across different bodies and without national hard law provisions. Moreover, the dialogue between different parties could create confusion in the bureaucratic administrative machinery, with the spillover effect of an increased risk of granting illegal aids.

Given the lack of supranational coordination by the Commission and a networking 'one size fits all' regulation, the internal upgrading of compliance remains the responsibility of the MS. In that sense, the Italian State aid registry represents a huge improvement. It includes both the *ex ante* conditionalities, as an arrangement for the effective application of Union State aid rule, and transparency, in which the setup of a central State aid electronic register connecting all granting authorities identifies the recipients of aids.

For the reasons set out above, the formal exchange of best practices between MS is encouraged under the guidance (and not the control) of the Commission, aiming to enhance the quality of *ex ante* internal scrutiny and better organize the MS administrative machinery.

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Massimo Merola and Omar Diaz

1 Introduction

The Commission's State Aid Modernization (SAM)¹ initiative, adopted in 2012, led to a substantial reform of the State aid rules on public interventions in all sectors. Overall, the reform has improved the assessment of public measures to support energy and environmental projects—clarifying standards and reducing the need for notifications in some cases—but the complex interface of State aid control and energy policies has remained largely unchanged.

The reform is considered an essential element of the strategy for sustainable growth adopted in 2010 under the Europe 2020 initiative.² As a result of this reform, national authorities have more responsibilities in the application of State aid rules and, as fewer cases require notification, the Commission can focus on those cases more likely to negatively affect competition. Due to the lesser degree of intervention by the Commission, effective enforcement is instead guaranteed through reinforced

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¹COM (2012) 209 final of 8.5.2012.

²COM (2010) 2020 final of 3.3.2010.

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monitoring mechanisms and transparency requirements, as well as the *ex post* assessment of large aid schemes to appraise their effectiveness.

In concrete terms, the reform has been achieved through instruments that provide guidance on the interpretation of the notion of aid, broaden the categories of block-exempted aid that do not require prior notification to the Commission, and introduce common assessment principles on compatibility of notifiable aid. Among the instruments adopted as part of the SAM initiative, three directly impacted the assessment of energy and environmental projects:

- 1) Commission Notice on the Notion of State aid (Notion of Aid Notice)³;
- 2) Commission Regulation No. 651/2014 of 17 June 2014 declaring certain categories of aid compatible with the internal market in application of Articles 107 and 108 of the Treaty (GBER)⁴; and
- 3) The Environmental and Energy State Aid Guidelines 2014–2020 (EEAG).⁵

The interpretative guidance provided in the Notion of Aid Notice and the revised notification exemptions under the General Block Exemption Regulation (GBER) are thoroughly examined in other chapters; this chapter focuses on selected aspects more relevant to energy and environmental projects only. This chapter also describes the compatibility criteria developed in the EEAG for energy and environmental aid.

As regards the success of the SAM initiative in stimulating economic growth in the energy sector, a preliminary aspect to be taken into account is that energy and environmental projects are usually capital intensive and have relatively long amortization periods. For these types of projects, the degree of legal certainty is one of the main, if not the most important, factors that drive investment decisions. Therefore, any appraisal of the success of the SAM initiative in stimulating economic growth in the energy sector largely depends on legal certainty considerations. However, the Commission did not acknowledge the importance of legal certainty for the delivery of an economic growth strategy at the time the SAM initiative was launched. The strategy was defined by the Commission mainly in terms of revised compatibility criteria to facilitate the treatment of “good aid”, which is well-designed, targeted at identified market failures and objectives of common interest, and least distortive.⁶ The SAM initiative placed emphasis on improved compatibility criteria to achieve economic growth through the definition of common assessment principles and the revision and streamlining of existing guidelines.⁷ By contrast, the Notion of Aid

³OJ C262 of 19.7.2016, p. 1.

⁴OJ L187 of 26.6.2014, p. 1, as amended by Commission Regulation (EU) 2017/1084 of 14.6.2017 amending Regulation (EU) No 651/2014 as regards aid for port and airport infrastructure, notification thresholds for aid for culture and heritage conservation and for aid for sport and multifunctional recreational infrastructures, and regional operating aid schemes for outermost regions and amending Regulation (EU) No 702/2014 as regards the calculation of eligible costs, OJ L156 of 20.06.2017, p. 1.

⁵OJ C200 of 28.6.2014, p. 1.

⁶Para. 12 of the SAM.

⁷Para. 18 of the SAM.

Notice was seen as a mere tool to streamline and reform procedures, with the objective of delivering decisions within business-relevant timelines.⁸

The Commission's position became more flexible during the implementation of the SAM initiative and, by the time the Notion of Aid Notice was issued in 2016, improved legal certainty had been recognized as an important factor for fostering economic growth, at least in relation to public investment in the construction or upgrading of infrastructures. In particular, the Commission acknowledged that the improved interpretative guidance on the application of the notion of aid to infrastructure projects helps to maximize the effect of investments on economic growth and jobs. This stance is in line with the Commission's Investment Plan for Europe to mobilize at least €315 billion in private and public investment over 3 years.⁹ Improved legal certainty is not only important for infrastructures but also for most energy and environmental projects, particularly as multi-billion investments are needed to achieve the smooth and efficient transition to a low-carbon economy.¹⁰ Even though the SAM initiative has brought much needed additional legal certainty, as discussed in this chapter, clarification in some areas should come from future Commission decisions and developments in the case law.

2 Notion of Aid

The Notion of Aid Notice was published in May 2016,¹¹ more than 2 years after the public consultation announced in January 2014. The long period needed by the Commission to complete this last element of the SAM initiative is indicative of the challenges posed by this interpretative exercise. It was not the first time that the Commission provided guidance on the application of Article 107(1) of the Treaty on the Functioning of the European Union (TFEU), but earlier initiatives were narrower in scope and focused on specific types of measures.¹² The Notice was the Commission's first attempt to systematically summarize the case law of the EU courts and the Commission's decision-making practice in order to define a framework to interpret and apply the four requirements to qualify any measure as State aid, namely:

- 1) the State origin;
- 2) the selective advantage;

⁸Para. 23 of the SAM.

⁹Press release IP/16/1782 of 19.5.2016.

¹⁰Average annual additional investments in 2011–2030 estimated at €38 billion (source: 2030 climate and energy framework, MEMO/14/40 of 22.1.2014).

¹¹Press release IP/16/1782 of 19.5.2016. Following this press release, the final text was published in the Official Journal only 2 months later.

¹²For a recent example after the SAM initiative, please see the Commission's Framework for State aid for research and development and innovation, OJ C198, of 27.6.2014, p. 1 (R&D&I Framework), which interprets the notion of aid in relation to R&D&I projects.

- 3) the distortion of competition; and
- 4) the effect on trade.

The scope and contents of the Notion of Aid Notice are examined elsewhere; this chapter deals only with the aspects directly related to energy and environmental projects.

A preliminary issue to be addressed is the interpretative value of the Notion of Aid Notice and the margin of discretion enjoyed by the Commission for its application. It is uncontroversial that the notion of aid is an objective and legal concept defined directly by the TFEU and that any interpretation by the Commission is without prejudice to the interpretation to be given by the EU courts.¹³ However, even though bound by the objective nature of this notion, in principle the Commission also enjoys a limited margin of discretion when the assessments are technical or complex, particularly in situations involving economic assessments.¹⁴ This margin of discretion enjoyed by the Commission, albeit limited, is particularly relevant for projects in the energy sector due to the inherent characteristics of national regulatory frameworks, which usually define intricate mechanisms for the financing of, among others, regulated activities, incentive mechanisms for renewables, and services needed for the efficient and safe operation of the market. In this context, the Commission can be required to engage in complex technical assessments while interpreting the notion of aid and, in certain cases, it can become controversial whether the Commission exercised this limited margin of discretion without infringing Article 107(1) TFEU.

Complex assessments in State aid cases are not unique to energy projects, but they can have a negative impact on investment in capital-intensive sectors, such as that of energy. Arguably, national authorities can always submit notifications to the Commission on a precautionary basis to seek greater legal certainty. However, this approach cannot be seen as an acceptable compromise, given that pre-notification discussions in complex cases have an unpredictable timeframe, which is hard to reconcile with business-relevant deadlines.

These challenges are only expected to increase in the near future as national authorities are required to design innovative and flexible regulatory responses to manage an orderly transition in the electricity sector from a centralized model, based on large power plants, to a decentralized one, based on small-scale generation from renewable energy sources. The transition needs to be managed to ensure that the risk to security of supply remains within an acceptable range and in compliance with the security of supply rules under EU law.¹⁵ In the electricity sector this will inevitably

¹³Para. 3 of the Notion of Aid Notice, also Judgment of 22.12.2008, *British Aggregates/Commission*, Case C-487/06 P, ECLI:EU:C:2008:757, para. 111.

¹⁴Para. 4 of the Notion of Aid Notice, also Judgment of 21.7.2011, *Alcoa Trasformazioni/Commission*, Case C-194/09 P, ECLI:EU:C:2011:497, para. 125.

¹⁵See, among other EU instruments addressing security of supply concerns, Directive No. 2005/89/EC of the European Parliament and of the Council of 18.1.2006 concerning measures to safeguard security of electricity supply and infrastructure investment, OJ L33, of 4.2.2006, p. 22, which is

entail increased complexity of mechanisms, as indirectly acknowledged by the Commission in the 2015 public consultation on a new energy market design.¹⁶

The document published for consultation describes an “energy-only” model, which requires a revised regulatory framework that allows for extraordinary price hikes that adequately reflect scarcity events in the wholesale electricity market. The underlying logic of this model is that expensive power plants (usually those that have seen revenues fall due to the increasing volume of energy produced by less expensive renewables plants) should be given the opportunity to become profitable through extremely high energy prices if/when scarcity events occur. The other side of the coin is that suppliers will be confronted with the risk that scarcity events, even if just for a few hours a year, trigger a 10- or 20-fold price increase for the energy they need to honour supply commitments to their customers. Energy suppliers will require sophisticated hedging mechanisms to manage price risks associated with these price hikes. As a result, it cannot be ruled out that public intervention may be required in order, for example, to organize market-wide hedging mechanisms or other regulatory instruments that prevent hedging costs from driving smaller suppliers out of the market or preventing new entry.

In the absence of bright-line criteria for assessing the existence of aid in relation to public interventions in the energy sector, it is difficult to argue that the Notion of Aid Notice is a positive development for stimulating economic growth. Indeed, it merely confirms the status quo without improving legal certainty for energy and environmental projects, which can involve long investigation procedures. Indeed, investigations in the energy sector can take several years, only to conclude that no aid was involved.¹⁷

One of the few aspects for which the Notion of Aid Notice tries to improve legal certainty is the application of Article 107(1) TFEU to measures aimed at supporting the upgrading and development of infrastructures. It provides guidance about the Commission’s position following *Leipzig* and *Halle*,¹⁸ and even though the focus is on infrastructures in general and not specifically energy infrastructures, this is perhaps the most important contribution to achieving the SAM objectives. In relation to energy and environmental projects, the Notion of Aid Notice also summarizes the

under review following consultations launched in 2015, and Regulation (EU) 2017/1938 of the European Parliament and of the Council of 25 October 2017 concerning measures to safeguard the security of gas supply and repealing Regulation (EU) No 994/2010, OJ L 280 of 28.10.2017, p. 1.

¹⁶Press release IP/15/5358 of 15.7.2015, and the Commission’s related communication launching the public consultation process on a new energy market design, COM (2015) 340 final of 15.7.2015.

¹⁷For cases closed after the SAM initiative, see Commission Decision of 4.2.2014 in Case C3/2007 – Spanish Electricity Tariffs – consumers and Commission Decision of 4.2.2014 in Case SA.36559 – Spanish Electricity Tariffs – distributors. In these related cases, the formal investigation took around 7 years.

¹⁸Judgment of 24.3.2011, *Freistaat Sachsen, Flughafen Leipzig-Halle/Commission*, Joined Cases T-443/08 and T-455/08, ECLI:EU:T:2011:117, paras. 93 and 94, confirmed by Judgment of 19.12.2012, *Mitteldeutsche Flughafen AG and Flughafen Leipzig-Halle GmbH/Commission*, Case C-288/11P, ECLI:EU:C:2012:821.

Commission's interpretation of the requirements of State resources and the existence of an advantage when applying the market economy operator (MEO) test. This chapter examines these two aspects first.

2.1 *State Resources*¹⁹

As a result of the liberalization of electricity and gas markets, economic activities are organized based on principles of a free market economy, with the intervention of public authorities focused mainly on the definition and enforcement of a regulatory framework. The identification of State resources in the energy sector follows the same criteria that apply to any other economic sector, but due to the structure and organization of energy markets, there are interpretative challenges that are particular to this sector.

One of the unique features of electricity and gas markets is the coexistence of liberalized and regulated activities. Wholesale and retail supply activities are fully liberalized and, in principle, their profitability depends on revenues from customers. It is a different situation for transport networks and infrastructures, which are regulated activities whose remuneration mechanisms are defined by the regulatory framework. Due to the importance of these infrastructures, the principles for their remuneration are part of the EU liberalization framework.²⁰ In addition to transport networks and infrastructures, there are several other services that are unable to obtain revenues from customers despite being essential or otherwise important for the safe, efficient, and sustainable operation of energy markets. For example, market prices do not necessarily reflect the value of generation adequacy services provided by some power plants, despite their indispensability for the stable and safe operation of the market. A similar situation exists in relation to energy from renewable sources, which is needed for the long-term, sustainable operation of the market. Remuneration mechanisms designed by the national regulators to ensure the financing of these activities require a careful assessment of the presence of State resources, although in most cases private market participants will fully cover these costs without any funding from the State budget.

¹⁹The requirement of State origin demands that the measure financed through State resources is imputable to the public authorities. The Notion of Aid Notice does not contain any specific guidance on imputability for energy and environmental projects. In general, imputability to the State is easily established given that measures are usually implemented through regulatory measures approved by legislative instruments. However, in the framework of regulatory measures introduced in compliance with EU law that leave a limited margin of discretion to national authorities, some doubts may arise as regards the imputability of the measure. For national measures based on EU law and the requirement of imputability, see paragraphs 44–46 of the Notion of Aid Notice.

²⁰For example, in relation to electricity networks, see recitals 35 and 36, Articles 37(3)(d), 37(6)(a), and 37(8) of Directive No. 2009/72/EC of the European Parliament and of the Council of 13.7.2009 concerning common rules for the internal market in electricity, repealing Directive 2003/54/EC, OJ L211 of 14.8.2009, p. 55.

The financing of these mechanisms is usually made possible through para-fiscal charges or compulsory contributions imposed on energy customers or other market participants. This is nothing more than a redistribution of funds among private parties. However, the Notion of Aid Notice recalls that it is not the private origin of the funds that is relevant for identifying State resources, but rather whether they come under public control and are therefore available to the national authorities.²¹ The relevant factor is whether public authorities exert a controlling influence over the resources, or, in other words, whether there is a sufficient degree of intervention by the public authority as regards the definition of the measure and its method of financing.²² If this controlling influence can be established in an individual case, it is not necessary to demonstrate that resources become the property of public authorities or that the operation of the financing mechanism is entrusted to a public entity to conclude that the measure involves State resources.²³

The existence of a controlling influence over the resources is, however, insufficient to assess certain situations in the energy sector. National measures leading to a mere financial redistribution from one private entity to another do not entail a transfer of State resources “if the money flows directly from one private entity to another, without passing through a public or private body designated by the State to administer the transfer”.²⁴ This was the situation underlying the *PreussenElektra* judgment, in which the obligation for private electricity suppliers to purchase electricity produced from renewable energy sources at fixed minimum prices was not regarded as entailing the direct or indirect transfer of State resources.²⁵

Funds transferred directly between private parties in compliance with the regulatory framework would not constitute State resources while, under the same circumstances, funds transferred indirectly through an intermediary would. It is doubtful that the mere presence of an intermediary in itself suffices to automatically identify State resources; it would, for example, be controversial to argue that power exchanges remunerate market participants using State resources just because financial flows are usually managed by an intermediary operating under rules established by public authorities. An intermediary makes it easier for public authorities to exert a

²¹Para. 57 of the Notion of Aid Notice, also Judgment of 17.7.2008, *Essent Netwerk Noord*, Case C-206/06, ECLI:EU:C:2008:413, para. 70; Judgment of 16.5.2000, *France/Ladbroke Racing Ltd and Commission*, Case C-83/98 P, ECLI:EU:C:2000:248, para. 50.

²²Para. 58 of the Notion of Aid Notice; also Judgment of 27.9.2012, *France et al/Commission*, Joined Cases T-139/09, T-243/09 and T-328/09, ECLI:EU:T:2012:496, paras. 63 and 64.

²³Paras. 57 and 58 of the Notion of Aid Notice, also Judgment of 2.7.1974, *Italy/Commission*, Case 173/73, ECLI:EU:C:1974:71, para. 16; Judgment of 11.3.1992, *Compagnie Commerciale de l'Ouest*, Joined Cases C-78/90 to C-83/90, ECLI:EU:C:1992:118, para. 35; Judgment of 17.7.2008, *Essent Netwerk Noord*, Case C-206/06, ECLI:EU:C:2008:413, paras. 58–74.

²⁴Para. 61 of the Notion of Aid Notice, also Judgment of 24.1.1978, *Van Tiggele*, Case 82/77, ECLI:EU:C:1978:10, paras. 25 and 26.

²⁵Para. 62 of the Notion of Aid Notice, also Judgment of 13.3.2001, *PreussenElektra*, Case C-379/98, ECLI:EU:C:2001:160, paras. 59–62, and, outside the energy sector, Judgment of 5.3.2009, *UTECA*, Case C-222/07, ECLI:EU:C:2009:124, paras. 43–47.

controlling influence over any financing mechanism, but whether funds are actually under the control or otherwise available to public authorities should be established based on the circumstances of the given case.

The Notion of Aid Notice seems to automatically identify State resources whenever charges or contributions paid by private parties transit through a private or public entity that channels them to the beneficiaries.²⁶ However, the Notice also explains that this applies in situations where funds remain under public control due, for example, to rules that define the purposes for which the funds can be used. As regards private intermediaries, it further explains that the decisive element is whether they remain under the strict monitoring of national authorities.²⁷

The dividing line between contractual relationships among private parties in the sense of *PreussenElektra* and the redistribution of funds between private parties through an intermediary is not always clear. If the intermediation involves a private party collecting funds from one group of private parties to pass them on to a second group, it would not be implausible to argue that there is a double *PreussenElektra*, as there are two sequential contractual relationships required by the regulatory framework. In this regard, it is worth recalling that in cases where State resources were identified due to the existence of an intermediary, most notably in *Essent Netwerk Noord*, the Courts stressed the high degree of control over the funds and the fact that the intermediary never “appropriated to itself” the amounts collected, which remain “under public control and therefore available to the national authorities”.²⁸ It is clear that for State resources to be identified, there must be a high degree of control and supervision over the funds transiting through the intermediary. Otherwise, *PreussenElektra* could apply even in situations where funds are redistributed through an intermediary. This possibility is not reflected in the Notion of Aid Notice, but this aspect may need to be reinterpreted in light of the outcome of the pending appeal by Germany against the judgment of the General Court that confirmed the Commission’s decision on the EEG surcharge for energy-intensive users.²⁹ In this appeal, the Court of Justice has been asked to confirm that, despite funds being collected and redistributed by private intermediaries, no State resources can be identified as the mechanism is based on private-law contractual relations between private undertakings, without any control by national authorities.

The fact that State resources cannot be identified in purely contractual relationships within the meaning of *PreussenElektra* does not necessarily mean that State resources are also absent in closely related mechanisms. This is the situation examined in *Vent de Colère*³⁰ and, in this regard, the Notion of Aid Notice clarifies that a compensation mechanism to offset the costs imposed on private parties, for

²⁶Para. 63 of the Notion of Aid Notice.

²⁷Para. 64 of the Notion of Aid Notice.

²⁸Judgment of 17.7.2008, *Essent Netwerk Noord*, Case C-206/06, ECLI:EU:C:2008:413, para. 70.

²⁹Case C-405/16 P, concerning Germany’s appeal of 19.7.2016 against the judgment of the General Court on 10.5.2016, Case T-47/15, *Germany/Commission*.

³⁰Judgment of 19.12.2013, *Vent de Colère and Others*, Case C-262/12, ECLI:EU:C:2013:851.

example due to the mandatory acquisition of certain products above market prices, can constitute an intervention through State resources.³¹ The mandatory acquisition of certain products by private parties does not involve any State resources, but the mechanism to offset the costs of such mandatory acquisition should be considered a different mechanism that may involve State resources, despite them being closely related. In this regard, the Commission has clarified that if a mechanism to offset costs is financed through contributions made by final consumers, even when partly based on a direct transfer of resources between private entities, it will constitute an intervention through State resources.

The identification of State resources is usually the deciding factor in examining energy and environmental projects. In the energy sector, the dividing line between national measures that grant an advantage and those that merely organize the functioning of the market is sometimes blurred and, as a result, a large number of regulatory interventions can be viewed as granting an economic advantage to certain categories of beneficiaries. For example, a rule imposing the priority dispatch of renewable energy can be seen as merely organizing the operation of a power exchange, but this is actually not very different from a mandatory obligation to purchase renewable energy. In fact, it is inevitable that many policy choices in the energy sector can be seen as favouring a certain category of market operators and, irrespective of whether this is done for legitimate policy reasons, the question of whether a public intervention involves State resources becomes a decisive factor in ascertaining whether these choices require prior approval under State aid rules.

2.2 *The Market Economy Operator Test*

The market economy operator (MEO) test serves to establish whether public authorities have granted an advantage to an undertaking by not acting like a market economy operator with regard to a certain transaction. To establish compliance with market conditions, the Notion of Aid Notice describes different methodologies; for instance, compliance can be directly established if the conditions for a transaction were identified through a tender.³²

Provided that adequate safeguards are in place, the general principle is that transactions completed through competitive, transparent, non-discriminatory and unconditional tender procedures are in line with market conditions. However, the Notion of Aid Notice clarifies the limits to the application of the MEO test in situations where the tender is organized within the framework of a mechanism that provides support to a certain activity for public policy reasons. In relation to activities in the energy sector, it is made clear that tendering out the amount of

³¹Para. 65 of the Notion of Aid Notice, also judgment of 19.12.2013, *Vent de Colère and Others*, Case C-262/12, ECLI:EU:C:2013:851, paras. 25 and 26.

³²Para. 84 of the Notion of Aid Notice.

funding to support an activity, for instance to support the production of renewable energy or the mere availability of electricity generation capacity, minimizes the economic advantage granted to the beneficiaries but cannot make it disappear.³³

This limitation to the application of the MEO test is a consequence of its underlying logic, which requires an assessment of whether the public authorities acted as a market economy operator would have done in a similar situation. If public authorities deviate from this standard, it is understood that the beneficiary receives an economic advantage it would not have under normal market conditions.³⁴ In situations where public authorities' actions are determined by public policy reasons that an economic operator would normally not take into account, in principle the MEO test should not be applicable.³⁵ For example, in relation to measures that support the development of renewables, it is obvious that market operators would not consider granting any incentive to ensure the long-term sustainability of the energy sector, even if this is entirely rational from a policy perspective.

This conclusion is, however, less clear in relation to mechanisms to support availability of generation capacity, given that ensuring the uninterrupted supply of energy is certainly driven by public policy reasons but, at the same time, it would also be rational for a market economy operator to enter into contractual arrangements to protect itself against the economic consequences of an electricity blackout. The fact that the current market organization makes it difficult, if not impossible, to enter into these contractual arrangements does not necessarily mean that it would be irrational for a market economy operator to wish to do so. It can be argued that a system that requires consumers to acquire products, directly or indirectly through suppliers, to reduce the probability of interruption of supply due to generation adequacy problems, is not very different from a mandatory insurance system and, in principle, the MEO test should apply in situations where tenders can ensure compliance with market conditions.

The guidance provided by the Commission concerning the application of the MEO test within the framework of a support mechanism in the energy sector does not go beyond the application of existing principles. However, the identification of specific mechanisms to which the MEO test cannot apply seems premature and, until the EU courts have had an opportunity to rule on specific cases, the guidance is of limited value. If anything, the guidance in the Notion of Aid Notice merely confirms that the SAM initiative has hardly altered the long-established Commission preference to broaden the scope of the notion of aid.

³³Para. 89 of the Notion of Aid Notice.

³⁴Para. 76 of the Notion of Aid Notice.

³⁵Para. 77 of the Notion of Aid Notice.

2.3 Infrastructures

To provide guidance in this area, the Notion of Aid Notice makes a distinction between the support granted to the developer or first owner of the infrastructure,³⁶ to the operator of the infrastructure,³⁷ and to the end users.³⁸

In relation to the developer or first owner of the infrastructure, the first element examined in the Notice concerns the principle that State aid rules are relevant for economic activities only and the concrete application of this principle to the public financing of infrastructure investments. The Commission explains that the development of infrastructure has traditionally been considered to constitute a general measure of public policy and not an economic activity³⁹ but, due to recent market developments, the scope for the commercial exploitation of infrastructures is now broader.⁴⁰ Among the recent market developments that explain this evolution, those of particular relevance to the energy sector are privatizations and the liberalization process. The judgments in *Aéroports de Paris*⁴¹ and *Leipzig/Halle*⁴² are understood to confirm that State aid rules can be applied to all categories of infrastructure. Even though they relate to airport infrastructures, it is the Commission's view that these principles can be interpreted more broadly and thus applied to the construction of other infrastructures that are inseparably linked to an economic activity.⁴³ In principle, it appears reasonable that market developments may require a reassessment of whether the construction of infrastructures can be defined as an economic activity, and this new approach seems justified in industries that have gone through a liberalization process.

³⁶Paras. 201–221 of the Notion of Aid Notice.

³⁷Paras. 222–224 of the Notion of Aid Notice.

³⁸Paras. 225–228 of the Notion of Aid Notice.

³⁹Para. 175 of the Twenty-Fifth Report on Competition Policy, 1995; commenting on consultations received in several cases about the application of State aid rules to public investment in infrastructures.

⁴⁰Para. 201 of the Notion of Aid Notice.

⁴¹Judgment of 12.12.2000, *Aéroports de Paris/Commission*, Case T-128/98, ECLI:EU:T:2000:290, para. 125, confirmed on appeal in the Judgment of 24.10.2002, *Aéroports de Paris/Commission*, Case C-82/01 P, ECLI:EU:C:2002:617. The Notion of Aid Notice also makes reference to the Judgment of 17.12.2008, *Ryanair/Commission*, Case T-196/04, ECLI:EU:T:2008:585, para. 88.

⁴²Judgment of 24.3.2011, *Freistaat Sachsen and Land Sachsen-Anhalt and Others/Commission*, Joined Cases T-443/08 and T-455/08, ECLI:EU:T:2011:117, paras. 93 and 94, upheld on appeal in the Judgment of 19.12.2012, *Mitteldeutsche Flughafen AG and Flughafen Leipzig-Halle GmbH/Commission*, Case C-288/11 P, ECLI:EU:C:2012:821, paras. 40–43, and 47.

⁴³Para. 202 of the Notion of Aid Notice, also Judgment of 19.12.2012, *Mitteldeutsche Flughafen AG and Flughafen Leipzig-Halle GmbH/Commission*, Case C-288/11 P, ECLI:EU:C:2012:821, paras. 43 and 44; Judgment of 14.1.2015, *Eventech/The Parking Adjudicator*, Case C-518/13, ECLI:EU:C:2015:9, para. 40.

Apart from guidance concerning infrastructures that are not meant to be commercially exploited and those used for both economic and non-economic activities,⁴⁴ the Commission also provides guidance on the application of State aid rules over time due to this evolution in market conditions. It is noted that national authorities could legitimately expect support measures definitely adopted prior to *Aéroports de Paris* not to require notification under State aid rules.⁴⁵ In practical terms, this means that the application of the principle of legitimate expectations precludes any aid recovery for old projects that predate *Aéroports de Paris*. However, the choice of *Aéroports de Paris* as the relevant point in time to acknowledge legitimate expectations is not consistent with the position taken by the Commission in applying cohesion rules. Indeed, in 2012, after the first *Leipzig/Halle* judgment, the Commission released an interpretative note about infrastructures and State aid (COCOF note)⁴⁶ and, although this document relates to the application of cohesion rules and does not prejudice State aid enforcement, its lenient approach to State aid compliance was extended to all projects prior to the date of the COCOF note. This declaration in the Notion of Aid Notice does not mean that legitimate expectations cannot be established in relation to the development of energy infrastructures after *Aéroports de Paris*, but the presence of aid and legitimate expectations will have to be established on case-by-case basis.⁴⁷

The distortion of competition and effect on trade is the second element examined in relation to public support received by the developer or first owner of infrastructures. The Commission notes that these essential requirements of the notion of aid are not fulfilled in relation to local or municipal infrastructures even if they are commercially exploited, provided that adequate evidence exists of lack of effects on trade.⁴⁸ Even assuming that certain types of energy infrastructures may be developed at purely local or municipal level, the fact that energy markets are liberalized with a significant degree of cross-border trading would make it difficult to produce evidence that energy infrastructures are not capable of affecting trade only because they were developed at local or municipal level.

The Notion of Aid Notice also notes that there is no distortion of competition and effect on trade in relation to infrastructures that do not face direct competition from similar infrastructures or from different ones offering services that are close substitutes. These infrastructures are usually qualified as natural monopolies. In this regard, the Commission's view is that the distortion of competition and effect on trade can be ruled out only if three cumulative conditions are fulfilled. In addition to the lack of competition from other infrastructures, private financing must be insignificant in the sector (based on an assessment at national level), and the infrastructure

⁴⁴Paras. 203–208 of the Notion of Aid Notice.

⁴⁵Para. 209 of the Notion of Aid Notice.

⁴⁶Commission's guidance note to the COCOF of 21.11.2012: Verification of compliance with State aid in infrastructure cases.

⁴⁷Para. 209 of the Notion of Aid Notice.

⁴⁸Para. 210 of the Notion of Aid Notice.

must provide benefits for society at large without being designed to selectively favour a specific undertaking or sector.⁴⁹ Of these three conditions, the existing degree of private financing is the hardest one to verify in relation to energy infrastructures, which are usually privately financed using resources collected through user tariffs.

Although private financing is generally understood to be predominant for energy infrastructures, this conclusion may need to be reassessed based on market developments in the electricity sector. In recent years we have seen a transition from passive infrastructures to more sophisticated ones allowing the development of new services for end users and better integration of renewables, which are commonly known as smart grids. These infrastructures certainly qualify as natural monopolies that provide benefits for society at large given their essential role in making the flexible integration of renewables possible, the development of demand-side response services, the availability of energy storage and electric car recharge capabilities, among other innovative services that benefit not only energy operators but operators in all economic sectors. For this type of infrastructure, private financing is not necessarily predominant given that the costs would require increasing user tariffs to socially unacceptable levels. These market developments are not examined in the Notion of Aid Notice, which concludes that public funding of energy infrastructures favours an economic activity and, due to a significant degree of private financing, is also likely to have an effect on trade between Member States.⁵⁰

In relation to the assessment of public support for the development of infrastructures, a significant contribution of the Notion of Aid Notice is the introduction of an improved methodology that differentiates between the support to the developer of the infrastructure and the support to the operator of the infrastructures. This clear differentiation was not always made in past cases concerning energy infrastructures. For example, the Commission has sometimes assessed the existence of advantage and effect on trade by referring to the impact of the notified measure on the operator of the infrastructure, even though it can be argued that the notified aid referred to the construction of infrastructures and not to the activities of the operator of the infrastructure.⁵¹

A clear differentiation between aid to the developer of the infrastructure and aid to the operator of the infrastructure would make it plausible to conclude that public support for the construction of certain types of energy infrastructures is not very different from the construction of railways, which are then managed by operators that make them available, without discrimination, to anyone who requests access. In

⁴⁹Para. 211 of the Notion of Aid Notice.

⁵⁰Para. 217 of the Notion of Aid Notice.

⁵¹See, for example, Commission Decision of 15.3.2010 in case N594/2009 Aid to Gaz-System S.A. for gas transmission networks in Poland, paragraphs 30–40, Commission Decision of 13.7.2009 in case N56/2009 Aid for modernisation and replacement of electricity distribution networks in Poland, paras. 23–32; and Commission Decision of 13.7.2009 in case State aid N 56/2009 Aid for modernisation and replacement of electricity distribution networks in Poland, paras. 26–35.

relation to the latter, the Notion of Aid Notice concludes that public support is not capable of affecting trade between Member States or distorting competition.⁵² In relation to energy infrastructures, however, indirect beneficiaries can be identified more easily and, for example, in past cases the Commission concluded that the development of electricity networks may indirectly benefit the power generation operations of a vertically integrated group, particularly if the interest in power generation of a vertically integrated group influences the development plans for the infrastructures.⁵³ The possibility of identifying indirect aid should be considered exceptional given that the operation of energy infrastructures is heavily regulated and taking into account the strict unbundling requirements that apply to transport activities and, to a lesser extent, distribution activities.

In relation to the operator of an infrastructure, the Notion of Aid Notice clarifies that the exploitation of an infrastructure being entrusted to an operator is irrelevant for the examination of aid in relation to the first owner or developer.⁵⁴ However, the operator of the infrastructure may receive aid if the right to exploit the infrastructure is not obtained at market conditions. If a tender is used to allocate a concession to operate the infrastructure, this will be considered to comply with market conditions. A tender can eliminate the advantage to the operator, but if a tender is used to grant public support to the first owner or developer of the infrastructure, it can only minimize the aid, not make it disappear.⁵⁵

In relation to the end users of infrastructures, the Notion of Aid Notice notes that whenever State resources can be identified, the conditions at which services are provided by the infrastructure operator should comply with the MEO test.⁵⁶ For energy infrastructures, it is expected that State resources will be identified more often than not, given that their operation is a regulated activity.

3 Block-Exempted Aid Under the GBER

One of the key elements of the SAM initiative is the GBER, which replaced Commission Regulation No. 800/2008.⁵⁷ The GBER has raised notification thresholds and broadened the aid categories covered by the notification exemption, which now include aid for the remediation of contaminated sites, district heating and

⁵²Para. 219 of the Notion of Aid Notice.

⁵³See, for example, Commission Decision of 13.7.2009, case State aid N 56/2009 Aid for modernisation and replacement of electricity distribution networks in Poland, paras. 29 and 34.

⁵⁴Para. 222 of the Notion of Aid Notice.

⁵⁵Para. 223 of the Notion of Aid Notice.

⁵⁶Paras. 225–228 of the Notion of Aid Notice.

⁵⁷Commission Regulation No. 800/2008 of 6.8.2008 declaring certain categories of aid compatible with the common market in application of Articles 87 and 88 of the Treaty, OJ L 241 of 9.8.2008, p. 3.

cooling, waste management, operating aid for electricity from renewable sources, and energy infrastructures.

The GBER is in fact the most significant element of the SAM initiative and has had an immediate impact on State aid enforcement. It not only introduces legal certainty as regards public funding for a large variety of projects for which notification is unnecessary, but it also eliminates any legal uncertainty in relation to past projects that were not notified and are now covered by the GBER.⁵⁸ In the case of energy infrastructures, at least in assisted areas, any uncertainty about a past project that was not notified disappears if the amount of aid granted is below the notification threshold and complies with all other conditions of the GBER.

The unprecedented broadening of the block exemptions under the GBER coupled with enhanced responsibilities on national authorities to ensure compliance with conditions, some of them implying complex economic assessments, have introduced significant changes in State aid enforcement. As fewer aid schemes require notification and the number of block-exempted grants increases, aid beneficiaries are confronted with the need to assess the risk that national authorities are applying the rules incorrectly, potentially with major financial consequences in terms of aid recovery. The new transparency mechanisms only increase the likelihood of detecting incorrect applications of the GBER. However, overall, the positive aspects of the broadening of the block exemption largely outweigh the negative ones linked to increased compliance risks, particularly due to the increased legal certainty in relation to energy infrastructures.

The overall architecture and general conditions of application of the GBER expand the scope of block exemptions and simultaneously strengthen transparency, monitoring and proper evaluation of schemes with large budgets, which strike the right balance between reducing notification requirements and ensuring effective enforcement of State aid rules to avoid competition distortion. The common principles that form the foundation of the GBER aim to ensure that the aid serves a purpose of common interest, has a clear incentive effect, is appropriate and proportionate, is granted in full transparency, is subject to a control mechanism and regular evaluation, and does not adversely affect trading conditions to an extent that is contrary to the common interest.⁵⁹

One general condition of application of the GBER that demands detailed consideration for energy and environmental projects is the requirement that the aid must be transparent. The GBER applies only to aid for which it is possible to precisely calculate the gross grant equivalent of the aid *ex ante* without any need to undertake a risk assessment.⁶⁰ Although compliance with transparent aid should not be problematic for future projects, in the assessment of past projects, it might not always be the case that direct grants or any of the other transparent methods identified in the GBER were applied. Due to the regulated nature of the energy industry, past

⁵⁸Article 58 (1) of the GBER.

⁵⁹Recital 5 of the GBER.

⁶⁰Article 5(1) of the GBER.

mechanisms or measures to support energy and environmental projects may have used indirect or complex mechanisms that fail to meet the requirements of the GBER.

On the basis of the principles for aid cumulation, notification thresholds cannot be circumvented by artificially splitting up aid schemes or aid projects into several aid schemes or projects with similar characteristics, objectives or beneficiaries.⁶¹ It is worth commenting on some issues with relevance for energy and environmental projects, particularly energy infrastructures. The guidance provided by the Commission states that “there are no pre-established criteria for the delimitation on an energy infrastructure project. Each project must be assessed individually, taking into account in particular the technical features of the projects, as well as its economic and administrative aspects”. Therefore, national authorities should assess “whether several projects receiving aid are separate projects, or if they are parts of a single project that was split artificially, on the basis of the detailed information they usually receive about the respective projects, including approvals, accreditations or licences for certain projects”.⁶² For the purpose of the cumulation of energy infrastructures, the Commission has provided guidance concerning projects that, due to geographical proximity, have economic or technological links. In this regard, the Commission has clarified that “if the only linking element is economic or technological synergies it might not be sufficient to conclude that the entire investment is part of one single project” and that national authorities should be well placed to assess whether “it is one investment decision or several ones as such projects are subject to a variety of permits (construction, environmental, etc.) from which the initial investment decision becomes clearer”.⁶³ From the guidance provided by the Commission, it follows that whether several projects should be treated as a single one depends essentially on the availability of objective evidence of the existence of a single investment decision in relation to a group of projects, not so much on purely technological or economic synergies that may arise, for example, due to geographic proximity. For energy transport and distribution networks in which upgrades or other investments affecting different elements of the infrastructure usually give rise to synergies, this clarification will prove useful in the application of the GBER.

Another important clarification in relation to cumulation rules and energy and environmental projects concerns energy and environmental projects that are part of a wider project of a different nature. In relation to measures to achieve energy efficiency as part of a project for the construction or upgrade of research

⁶¹Recital 16 of the GBER.

⁶²Pt. 210 of the General Block Exemption Regulation (GBER) Frequently Asked Questions, March 2016.

⁶³Pt. 36 of the General Block Exemption Regulation (GBER) Frequently Asked Questions, March 2016.

infrastructures, the Commission has clarified that the higher aid intensities to support research infrastructures can apply also to energy efficiency measures.⁶⁴

In relation to the calculation of aid intensities for energy and environmental projects, the Commission has provided guidance in relation to aid granted to a group of undertakings of different sizes, each of them qualifying for different aid intensities. Because thresholds are defined per undertaking, aid intensities should be established on an individual basis if there is more than one beneficiary. The Commission understands that this interpretation is supported by the rules for the calculation of aid intensities in the State aid rules for research and development and innovation, particularly in relation to collaborative projects. Therefore, eligible costs of each partner must first be identified, and then the applicable maximum aid intensity that applies to each beneficiary can be used to calculate the maximum aid amount.⁶⁵ This interpretation has been given for environmental aid to meet EU standards; in principle it should apply to other types of environmental aid and all categories of block-exempted aid.

As regards activities in the energy sector that are excluded from the scope of the GBER, aid to facilitate the closure of uncompetitive coal mines is the only one expressly excluded. However, other types of public funding for the coal sector remain possible under the GBER except for regional aid, which is not available for the coal industry.⁶⁶

The provisions that apply to investment and operating aid for energy and environmental projects are set out in Section 7 of the GBER on aid for environmental protection. The following sections examine the aid categories below:

- Investment aid for early adaptation to future Union standards, to enable undertakings to go beyond EU standards for environmental protection or to increase the level of environmental protection in the absence of EU standards (Articles 36 and 37)
- Energy efficiency measures (Article 38)
- Investment aid for energy efficiency projects in buildings (Article 39)
- Investment aid for high-efficiency cogeneration (Article 40)
- Promotion of renewable energy sources (Articles 41–43)
- Reductions in environmental taxes (Article 44)
- Remediation of contaminated sites (Article 45)
- Investment aid for the installation of energy-efficient district heating and cooling system (Article 46)
- Waste recycling and reutilization (Article 47)
- Energy infrastructure (Article 48)
- Environmental studies (Article 49)

⁶⁴Pt. 125 of the General Block Exemption Regulation (GBER) Frequently Asked Questions, March 2016.

⁶⁵Pt. 154 of the General Block Exemption Regulation (GBER) Frequently Asked Questions, March 2016.

⁶⁶Article 1(3)(d) and Article 13(a) of the GBER.

3.1 Investment Aid for Early Adaptation to Future Union Standards, to Enable Undertakings to Go Beyond EU Standards for Environmental Protection or to Increase the Level of Environmental Protection in the Absence of EU Standards

The notification exemption under the GBER applies to investment aid to increase the level of environmental protection in the absence of EU standards or, even in the presence of EU standards, to enable undertakings to go beyond them or to anticipate the positive effects of those already adopted but not yet in force. The conditions of application of the GBER are not affected by the existence of mandatory national standards that are more rigorous than EU standards, which does not create a disincentive for national authorities to introduce a higher level of protection of the environment.⁶⁷

Investment aid for early implementation of EU standards is block-exempted only if the investment is implemented and finalized at least a year before the date of entry into force of the standard concerned, otherwise the general principle is that aid cannot be granted to merely ensure compliance with EU standards already adopted, even if they are not yet in force.⁶⁸ An investment is considered implemented and finalized when it can deliver a result that guarantees the achievement of EU standards.⁶⁹ Investment aid for energy efficiency measures that anticipate EU standards is excluded from the GBER, but same project can qualify for investment aid for early adoption of EU standards.⁷⁰

For the retrofitting or acquisition of new transport vehicles for roads, railways, and inland waterways, investment aid can be granted if the entry into operation of retrofitted vehicles or the acquisition of new vehicles takes place before standards enter into force. In these exceptional cases, the notification exemption applies provided that, once the standards enter into force, new vehicles purchased after that date are excluded and there is no retroactive application to retrofitted vehicles.⁷¹ Investment aid granted in relation to these new or retrofitted transport vehicles will qualify as aid to increase the level of environmental protection and not a mere anticipation of EU standards.

⁶⁷Article 36(1) and (2); and Article 37(1) of the GBER. The notion of EU standards is defined in the GBER, and the Commission has provided guidance to clarify its meaning in the case of best available techniques (BAT). See Article 2(102) of the GBER, and pt. 156 of the General Block Exemption Regulation (GBER) Frequently Asked Questions, March 2016.

⁶⁸Article 36(3) and Article 37(2) of the GBER. Investment aid for early adoption of EU standards cannot apply in case of retroactive EU standards, see Recital 57 of the GBER.

⁶⁹Pt. 160 of the General Block Exemption Regulation (GBER) Frequently Asked Questions, March 2016.

⁷⁰Article 38(2) of the GBER, and pt. 161 of the General Block Exemption Regulation (GBER) Frequently Asked Questions, March 2016.

⁷¹Article 36(4) of the GBER.

No specific threshold applies to this type of investment aid. In principle, the general threshold for investment aid for environmental protection should apply: €15 million per undertaking per investment project.⁷² Eligible costs are defined as the extra investment costs necessary to achieve the higher level of environmental protection, provided that these costs are directly linked to this objective. Two methodologies are provided for defining these extra costs:

1. if they can be clearly separated from the total investment costs of the project, the full costs of the relevant part are eligible; whereas
2. if they can be identified only by reference to a similar, less environmentally friendly investment that would have been carried out had aid not been granted, the cost difference is eligible.⁷³

This definition of eligible costs implies that national authorities should carry out a strict control of the cost methodology to avoid overcompensation; for example, when the costs are defined by reference to a similar, less environmentally friendly investment, the alternative investment cannot be just any alternative investment but the one the beneficiary would have chosen had aid not been granted. For the purpose of determining a similar project, point 73 of the EEAG should be used as a reference.⁷⁴

For assets acquired through leasing, the Commission's interpretation is that lease costs can be financed through investment aid only when in the form of financial leasing and provided that there is an obligation to purchase the asset at the expiry of the term of the lease.⁷⁵

Aid intensities in relation to small, medium-sized, and large companies are set at 60%, 50%, and 40%, respectively. However, lower aid intensities apply for the early adoption of EU standards: 20%, 15%, and 10% respectively, if the implementation and finalization of the investment take place more than 3 years before the date the new standard entered into force; and 15%, 10%, and 5% respectively, if this happens between 1 and 3 years prior that date. For investments in assisted areas that meet the conditions of Articles 107(3)(a) and 107(3)(c) of the Treaty, an additional regional bonus is available: 15 and 5 percentage points, respectively.⁷⁶ To determine the

⁷²Article 4, paragraph 1(s) of the GBER.

⁷³Article 36(5) and Article 37(3) of the GBER. As regards the cost difference compared to a similar project, the Commission has clarified that operating costs and benefits do not need to be taken into account: see pt. 159 of the General Block Exemption Regulation (GBER) Frequently Asked Questions, March 2016.

⁷⁴Pt. 163 of the General Block Exemption Regulation (GBER) Frequently Asked Questions, March 2016.

⁷⁵Pt. 155 of the General Block Exemption Regulation (GBER) Frequently Asked Questions, March 2016.

⁷⁶Article 36(6) to (8) and Article 37(4) and (5) of the GBER.

applicable aid intensity, the existence of adopted EU standards should be assessed on the date of the grant; changes after that date should not be taken into account.⁷⁷

3.2 *Energy Efficiency Measures*

The notification exemption under the GBER applies to investment aid for energy-efficient measures provided that improvements in energy efficiency are not aimed at merely ensuring compliance with EU standards already adopted, even if they are not yet in force.⁷⁸ The notion of energy efficiency is not linked to any economic sector but rather to the reduction of energy consumption regardless of the beneficiary's economic activity.⁷⁹ It is defined as the amount of saved energy as a result of the implementation of an energy efficiency improvement measure, by comparing consumption before and after the investment while ensuring normalization for external conditions that affect energy consumption.⁸⁰

The Commission has interpreted that vehicle fleet management systems and mobility plans of undertakings can qualify for investment aid for energy efficiency provided that they lead to reduced energy consumption.⁸¹ Also measures aimed at fuel savings in power and heat generation (including cogeneration units) could be block-exempted (for example, new, more efficient boilers for power and heat generation) provided the measures lead to reduced energy consumption.⁸²

No specific threshold applies to the investment aid on energy efficiency measures. In principle, the general threshold for investment aid for environmental protection should apply: €15 million per undertaking per investment project.⁸³ Eligible costs are defined as the extra investment costs necessary to achieve the higher level of energy efficiency, provided that these costs are directly linked to this objective. Two methodologies are provided to define these extra costs:

1. if they can be clearly separated from the total investment costs of the project, the full costs of the relevant part will be eligible;

⁷⁷Pt. 157 of the General Block Exemption Regulation (GBER) Frequently Asked Questions, March 2016.

⁷⁸Article 38(1) and (2) of the GBER.

⁷⁹Pt. 167 of the General Block Exemption Regulation (GBER) Frequently Asked Questions, March 2016.

⁸⁰Article 2(103) of the GBER.

⁸¹Pt. 162 of the General Block Exemption Regulation (GBER) Frequently Asked Questions, March 2016.

⁸²Pt. 165 of the General Block Exemption Regulation (GBER) Frequently Asked Questions, March 2016.

⁸³Article 4(1)(s) of the GBER.

2. if they can only be identified by reference to a similar, less energy-efficient investment that would have been carried out had aid not been granted, the cost difference will be eligible.⁸⁴

This definition of eligible costs implies that national authorities need to carry out a strict control of the cost methodology to avoid overcompensation. For example, when the costs are defined by reference to a similar, less energy-efficient investment, the alternative investment cannot be just any alternative investment, but must be the one that the beneficiary would have chosen had aid not been granted. To determine what constitutes a similar project, point 73 of the EEAG should be used as a reference.⁸⁵

Aid intensities in relation to small, medium-sized, and large companies are set at 50%, 40%, and 30%, respectively. For investments in assisted areas that meet the conditions of Articles 107(3)(a) and 107(3)(c) of the Treaty, an additional regional bonus of 15 and 5 percentage points, respectively, is available.⁸⁶ Because aid for energy efficiency measures does not directly influence the functioning of energy markets and may contribute both to regional policy objectives and to energy and environmental objectives, the rules on regional aid may also be applicable, depending on the main objective pursued by the measure concerned.⁸⁷

3.3 Investment Aid for Energy Efficiency Projects in Buildings

The notification exemption under the GBER applies to investment aid for energy-efficient projects relating to buildings, provided that improvements on energy efficiency are not aimed at merely ensuring compliance with EU standards already adopted.⁸⁸ The notion of energy efficiency that applies to buildings is the same that applies to all energy efficiency measures; therefore, there is no limitation based on the economic activity of the beneficiary, and the efficiency is calculated by comparing consumption before and after the investment.⁸⁹

Unlike other categories of block-exempted aid, the intermediation of an energy efficiency fund or other financial intermediary is required. Aid is granted in the form

⁸⁴Article 38(3) of the GBER. As regards the cost difference in relation to a similar project, the Commission has clarified that operating costs and benefits do not need to be taken into account, see point 159 of the General Block Exemption Regulation (GBER) Frequently Asked Questions, March 2016.

⁸⁵Pt. 163 of the General Block Exemption Regulation (GBER) Frequently Asked Questions, March 2016.

⁸⁶Article 38(4)–(6) of the GBER.

⁸⁷Recital 34 of the GBER.

⁸⁸Article 39(1), (2) and (9) of the GBER.

⁸⁹Article 2(103) and (104) of the GBER.

of an endowment, equity, a guarantee or loan to the intermediary, who must fully pass it on to the final beneficiaries: building owners or tenants.⁹⁰ The aid granted to the final beneficiaries can only take the form of loans or guarantees and, as regards grants, the Commission has clarified that these cannot be granted through an energy efficiency fund or other financial intermediary.⁹¹ This is without prejudice to the possibility of granting direct grants to the building owners or tenants in line with the general provisions on energy efficiency.⁹²

For the notification exemption to apply, at least 30% of the total financing provided to an energy efficiency project must be leveraged on the basis of private investment: in other words, co-financed by private investors. In case of intermediation by an energy efficiency fund, this requirement concerning leverage can be met at the level of the energy efficiency projects, at the level of the fund itself, or at both levels if the 30% threshold is reached in the aggregate.⁹³ The selection criteria of intermediaries, their remuneration and other conditions relating to the organization of this intermediation mechanism, as well as private investment leverage, is regulated by precise rules in the GBER.⁹⁴

The notification threshold for investment aid for energy efficiency projects in buildings is €10 million per project, based on the nominal value of the loan or the amount guaranteed, at the level of the final beneficiaries.⁹⁵ Eligible costs are defined as the overall costs of the energy efficiency project. In case of guarantees, the guarantee may not exceed 80% of the underlying loan. For loans, the condition is that repayment to the financial intermediary may not be less than the nominal value of the loan.⁹⁶ Given that aid for energy efficiency measures, including in buildings, does not directly influence the functioning of energy markets and may contribute both to regional policy objectives and to energy and environmental objectives, the rules on regional aid may also be applicable, depending on the main objective pursued by the measure concerned.⁹⁷

⁹⁰Article 39(4) of the GBER. For definitions related to the energy efficiency fund, see Article 2(105) and (106) of the GBER. Energy efficiency funds are different from financial intermediaries, see point 168 of the General Block Exemption Regulation (GBER) Frequently Asked Questions, March 2016.

⁹¹Pt. 169 of the General Block Exemption Regulation (GBER) Frequently Asked Questions, March 2016.

⁹²Recital 59 of the GBER.

⁹³Article 39(5) and (7) of the GBER.

⁹⁴Article 39(8) and (9) of the GBER.

⁹⁵Article 4(1)(t) and Article 39(5) of the GBER.

⁹⁶Article 39(3), (5) and (6) of the GBER.

⁹⁷Recital 34 of the GBER.

3.4 *Investment Aid for High-Efficiency Cogeneration*

The notification exemption under the GBER applies to investment aid for high-efficiency cogeneration only in relation to newly installed or refurbished cogeneration capacities.⁹⁸ The requirements vary depending on whether the high-efficiency cogeneration unit is new or refurbished. A new cogeneration unit must provide overall primary energy savings compared to the separate production of heat and electricity, taking into account the Energy Efficiency Directive.⁹⁹ For the improvement of an existing cogeneration unit or the conversion of a power generation unit into a cogeneration one, the only requirement is that the investment leads to primary energy savings compared to the original situation.¹⁰⁰

No specific threshold applies to investment aid for high-efficiency cogeneration. In principle, the general threshold for investment aid for environmental protection should apply: €15 million per undertaking per investment project.¹⁰¹

Eligible costs are calculated as the additional investment costs for equipment needed to ensure that the installation operates as a high-efficiency cogeneration installation, compared with conventional electricity or heating installations of the same capacity. For an existing installation that already meets the high-efficiency threshold under the Energy Efficiency Directive, eligible costs are the additional investment cost to upgrade to a higher efficiency.¹⁰² Aid intensities in relation to small, medium-sized, and large companies are set at 65%, 55%, and 45%, respectively. For investments in assisted areas that fulfil the conditions of Articles 107(3) (a) and 107(3)(c) of the Treaty, an additional regional bonus of 15 and 5 percentage points, respectively, is available.¹⁰³

3.5 *Promotion of Renewable Energy Sources*

The notification exemption under the GBER applies to investment and operating aid for the promotion of renewable energy sources. This exemption is based on definitions for renewable sources (RES) and for energy from RES.

⁹⁸Article 40(1) and (2) of the GBER, for the definition of cogeneration and high efficiency cogeneration, see also Article 2(107) and (108) of the GBER.

⁹⁹Directive No. 2012/27/EU of the European Parliament and of the Council of 25.10.2012 on energy efficiency, amending Directives 2009/125/EC and 2010/30/EU and repealing Directives 2004/8/EC and 2006/32/EC, OJ L 315 of 14.11.2012, p. 1.

¹⁰⁰Article 40(3) of the GBER, for the definition of energy efficient district heating and cooling system, see also Article 2(124) of the GBER.

¹⁰¹Article 4(1)(s) of the GBER.

¹⁰²Article 40(4) of the GBER.

¹⁰³Article 40(5) and (6) of the GBER.

For the purpose of the GBER, RES are included in a list of renewable non-fossil energy sources, namely, wind, solar, aerothermal, geothermal, hydrothermal and ocean energy, hydropower, biomass, landfill gas, sewage treatment plant gas and biogases. Energy produced at plants that use RES falls within the definition of energy from RES but, due to the existence of hybrid plants that do not rely exclusively on RES, this definition also includes the share of energy (in terms of calorific value) produced from RES at hybrid plants. Electricity from RES used to fill storage installations qualifies as energy from RES, but the electricity produced by these installations does not.¹⁰⁴

Aid for the promotion of RES is divided into:

1. investment aid for the promotion of energy from RES;
2. operating aid for the promotion of electricity from RES; and
3. operating aid for the promotion of energy from RES in small-scale installations.

Investment Aid for the Promotion of Energy from RES

Investment aid for the promotion of energy from RES is block-exempted if the aid is not linked to the output of the installation. Furthermore, aid can be granted only to new installations up to the moment when operations commence; beyond this point, no aid can be granted or paid out.¹⁰⁵

The requirement that no relationship can exist with the output of the installation means that adjustment mechanisms to modify the aid amount based on the quantity or volume of energy produced are not allowed.¹⁰⁶ The condition that installations must be “new” needs to be examined on a case-by-case basis given that, under certain conditions, investment for reconstruction works, upgrading, or refurbishment (including energy source conversion) of an existing installation can qualify as investment in a new installation. The Commission’s position is that investment aid for an existing installation can be block-exempted if the upgrading or refurbishing concerns considerable parts of the facility and prolongs its expected lifetime, provided that no aid is granted merely for the maintenance and replacement of small parts and components of a plant, which are normally carried out during the expected lifetime of the plant. In relation to investment to switch from conventional energy sources to RES in existing installations, aid is also block-exempted—but only in relation to the investment costs necessary for the energy source conversion.¹⁰⁷

¹⁰⁴Article 2(109) and (110) of the GBER.

¹⁰⁵Article 41(5) of the GBER.

¹⁰⁶Pt. 178 of the General Block Exemption Regulation (GBER) Frequently Asked Questions, March 2016.

¹⁰⁷Pts. 174, 181, 183, and 184 of the General Block Exemption Regulation (GBER) Frequently Asked Questions, March 2016.

As regards the limitation on granting or paying out aid after operations commence, the Commission's position is that payments within a short period after the completion of the investment remain possible, for example, to allow the national authorities to verify that the project complies with all the applicable criteria or to avoid overcompensation due to the differences between anticipated and actual expenditure. However, this flexibility should not be understood as authorizing payment in tranches over a certain period after operations commence (for example, through tax credits), as these payments are usually considered operating and not investment aid.¹⁰⁸ Operating aid is subject to different conditions to benefit from the notification exemption under the GBER.

Other than the above requirements that apply to investment aid to promote any type of energy from RES, specific rules apply to hydropower installations and biofuels.¹⁰⁹ As regards the production of hydropower, special conditions are justified by the fact that these installations have a positive impact in terms of low greenhouse gas emissions but might also negatively impact water systems and biodiversity, particularly when criteria for the modification of water bodies are not complied with. Compliance with the Water Framework Directive¹¹⁰ is therefore a requirement for obtaining block-exempted aid for investment in hydropower installations.¹¹¹

The notification exemption for investment aid on biofuels is limited to projects for the production of sustainable biofuels other than food-based biofuels. The notification exemption also applies to the conversion of existing food-based biofuel plants into advanced biofuel plants, provided that there is a reduction in the food-based production that corresponds to the new capacity. Investment aid in relation to biofuels that are subject to a supply or blending obligation cannot be block-exempted given that such obligation is considered to already provide sufficient incentive for these investments.¹¹² Due to the specific rules on energy production, including biofuels, investment aid for production of renewable energy and biofuels is not covered by the regional aid provisions under the GBER.¹¹³

No specific threshold applies to investment aid for the promotion of energy from RES. In principle, the general threshold for investment aid for environmental protection should apply: €15 million per undertaking per investment project.¹¹⁴ For the calculation of eligible costs, only the additional investment costs necessary

¹⁰⁸Pts. 175, 176, and 179 of the General Block Exemption Regulation (GBER) Frequently Asked Questions, March 2016.

¹⁰⁹For definitions that apply to biofuels, see pts. 111–113 of the General Block Exemption Regulation (GBER) Frequently Asked Questions, March 2016.

¹¹⁰Directive No. 2000/60/EC of the European Parliament and of the Council of 23.10.2000 establishing a framework for Community action in the field of water policy, OJ L 327 of 22.12.2000, p. 1.

¹¹¹Recital 62 and Article 41(4) of the GBER.

¹¹²Recital 63 and Article 41(2) and (3) of the GBER.

¹¹³Point 69 of the General Block Exemption Regulation (GBER) Frequently Asked Questions, March 2016.

¹¹⁴Article 4(1)(s) of the GBER

to promote the production of energy from RES should be taken into account. The calculation of the additional investments can be made based on three alternative methodologies:

1. if they can be clearly separated from the total investment costs of the project, mainly in case of additional investment in existing plants, the full costs of the relevant part will be eligible;
2. if they can only be identified by reference to a similar, less environmentally friendly investment that would have been carried out had aid not been granted, the cost difference will be eligible; and
3. if they cannot be identified by reference to similar, less environmentally friendly investment due to the limited size of the plant,¹¹⁵ the total investment costs to achieve a higher level of environmental protection will be eligible.¹¹⁶

This definition of eligible costs implies that national authorities need to carry out a strict control of the cost methodology to avoid overcompensation; for example, when the costs are defined by reference to a similar, less environmentally friendly investment, the alternative investment cannot be just any alternative investment, but must be the one the beneficiary would have chosen had aid not been granted. The methodology and conditions to apply counterfactuals has been developed by the Commission through interpretative notes.¹¹⁷ For the purpose of determining a similar project, point 73 of the EEAG should be used as a reference.¹¹⁸

Aid intensity is set at 45% or 30% of the eligible costs depending on the method applied to identify the eligible costs. For investments in assisted areas that fulfil the conditions under Articles 107(3)(a) and 107(3)(c) of the Treaty, an additional regional bonus is available: 15 and 5 percentage points, respectively. If aid is granted through a competitive bidding process on the basis of clear, transparent, and non-discriminatory criteria, 100% aid intensity can be reached, provided that strict conditions are applied as regards budget and bidding process design.¹¹⁹

¹¹⁵For the interpretation of the situations in which a small installation can be identified, particularly as part of an integrated system for the production of energy, see pt. 180 of the General Block Exemption Regulation (GBER) Frequently Asked Questions, March 2016.

¹¹⁶Article 41(6) of the GBER. As regards the cost difference with a similar project, the Commission has clarified that operating costs and benefits do not need to be taken into account, see point 159 of the General Block Exemption Regulation (GBER) Frequently Asked Questions, March 2016.

¹¹⁷Pt. 173 and 182 of the General Block Exemption Regulation (GBER) Frequently Asked Questions, March 2016.

¹¹⁸Pt. 163 of the General Block Exemption Regulation (GBER) Frequently Asked Questions, March 2016.

¹¹⁹Article 41(7) to (10) of the GBER.

Operating Aid for the Promotion of Electricity from RES

This notification exemption applies only to operating aid granted for the production of electricity from RES but not to other forms of energy. To be block-exempted, the grants must be structured as a premium that supplements the market price of the electricity sold directly in the market, provided that no premium is available if and when prices are negative. Another general requirement is that aid beneficiaries may not receive any favourable treatment as regards the standard balancing responsibilities¹²⁰ and, therefore, must be subject to the same obligations as other electricity producers. To fulfil balancing responsibilities, beneficiaries may rely on aggregators or, more generally, outsource these responsibilities to other undertakings that manage compliance on their behalf.¹²¹ These conditions are aimed at limiting market distortions by preventing aid from exacerbating or creating conditions for negative prices. They also serve to expose electricity from RES to market price signals by requiring that aid be granted through price premiums and without any derogation from balancing responsibilities, which makes it necessary for producers of electricity from RES to develop a strategy to maximize revenues from the market while reducing the risk of penalties from balancing responsibilities. Only power plants with a small installed capacity are exempt from these general requirements.¹²²

To identify the beneficiaries of operating aid, the general principle under the GBER is that a competitive bidding process must be used based on clear, transparent and non-discriminatory criteria that must be open, without discrimination, to all generators producing electricity from RES. The bidding process can be limited to specific generation technologies based on a number of conditions defined in the GBER, provided that a report with a detailed assessment carried out by national authorities is included in the information to be provided to the Commission as part of the standard reporting obligations under the GBER. For new and innovative renewable energy technologies, the competitive bidding process can be limited to one generation technology if this aid does not benefit more than 5% of the planned new electricity capacity from RES per year in total.¹²³ In any case, a competitive bidding process must be defined on the basis of the design, budget, and allocation methodologies defined in the GBER, which require that the bidding leads to a situation in

¹²⁰For definitions of balancing responsibilities, see pt. 115 and 116 of the General Block Exemption Regulation (GBER) Frequently Asked Questions, March 2016.

¹²¹Article 42(1) and (5) to (7) of the GBER.

¹²²This derogation applies to wind plants with an installed capacity of less than 3 MW and to wind installations with less than three generation units; for plants producing electricity from any other RES, the installed capacity must be less than 500 kW. Installations with a common connection point to the electricity grid are to be considered one installation (see Article 42(9) and (10) of the GBER and, for the criteria to assess the presence of a common connection point, see point 186 of the General Block Exemption Regulation (GBER) Frequently Asked Questions, March 2016).

¹²³Article 42(2) to (4) of the GBER. For details about reporting requirements to the Commission, see pt. 192 of the General Block Exemption Regulation (GBER) Frequently Asked Questions, March 2016.

which not all bidders can receive aid.¹²⁴ Only power plants with a small installed capacity are exempt from launching a competitive bidding process, but they are subject to conditions regarding the calculation of the aid amount.¹²⁵ For the application of the notification exemption, support schemes are not required to be open to other EEA countries and contracting parties of the Energy Community.¹²⁶

The notification threshold for operating aid for the production of electricity from RES is €15 million per undertaking, per project. Only when aid is granted on the basis of a competitive bidding process is the notification threshold €150 million annually, taking into account the combined budget of all schemes in the Member State concerned.¹²⁷ Operating aid must be discontinued after the plant has been fully depreciated according to generally accepted accounting principles and, if any investment aid has been received previously, this amount must be deducted from the operating aid.¹²⁸ As regards the depreciation method, it can vary from one Member State to another, and the Commission assesses this aspect on a case-by-case basis.¹²⁹

Operating Aid for the Promotion of Energy from RES in Small-Scale Installations

The notification exemption is granted for operating aid in relation to small-scale installations. Wind plants with an installed capacity of less than 3 MW and wind installations with fewer than three generation units, as well as plants producing electricity from any other RES with an installed capacity of less than 500 kW, are considered small-scale installations. However, installations with a common connection point to the electricity grid are to be considered one installation.¹³⁰

In relation to biofuels, this notification exemption applies to plants with an installed capacity of less than 50,000 tonnes annually, provided that the installations produce sustainable biofuels other than food-based biofuels. For plants producing

¹²⁴ Article 2(38) of the GBER and pt. 187 of the General Block Exemption Regulation (GBER) Frequently Asked Questions, March 2016.

¹²⁵ This derogation applies to wind plants with an installed capacity of less than 6 MW or to wind installations with less than six generation units, for plants producing electricity from any other RES the installed capacity should be less than 1 MW. Installations with a common connection point to the electricity grid shall be considered as one installation, see Article 42(8) and (10) of the GBER, and, in relation to the criteria to assess the presence of a common connection point, see point 186 of the General Block Exemption Regulation (GBER) Frequently Asked Questions, March 2016.

¹²⁶ Recital 61 of the GBER.

¹²⁷ Article 4(1)(v) of the GBER.

¹²⁸ Article 42(11) of the GBER.

¹²⁹ Pt. 185 of the General Block Exemption Regulation (GBER) Frequently Asked Questions, March 2016.

¹³⁰ Article 43(1) and (2) of the GBER. For the criteria to assess the presence of a common connection point, see point 186 of the General Block Exemption Regulation (GBER) Frequently Asked Questions, March 2016.

food-based biofuels that commenced operations before 31 December 2013 and are not yet fully depreciated, aid will be block-exempted until 2020. Biofuels which are subject to a supply or blending obligation are excluded from this notification exemption.¹³¹

The notification threshold for operating aid for the promotion of energy from renewable sources in small-scale installations is €15 million per undertaking per project.¹³² A detailed methodology is provided to calculate the aid amount based on costs¹³³ adjusted annually,¹³⁴ including a cap based on a rate of return.¹³⁵ Operating aid should be discontinued after the plant has fully depreciated according to generally accepted accounting principles and, if any investment aid has been received previously, this amount must be deducted from the operating aid.¹³⁶ As regards the depreciation method, it can vary from one Member State to another, and the Commission assesses this aspect on a case-by-case basis.¹³⁷

3.6 *Reductions in Environmental Taxes*

To be block-exempted, the reductions must relate to environmental taxes that meet the conditions of the Energy Taxation Directive¹³⁸ and be granted through aid schemes.¹³⁹ The latter means that the notification exemption does not apply to ad hoc aid granted outside the framework of an aid scheme.

Due to the EU harmonization in this field, the notification exemption applies only if the beneficiaries pay at least the minimum level of taxation set by the Energy Taxation Directive. The beneficiaries must also be selected on the basis of transparent and objective criteria.¹⁴⁰ This selection criterion ensures that aid is granted to all

¹³¹Article 43(2) to (4) of the GBER.

¹³²Article 4(1)(v) of the GBER.

¹³³For the methodology to calculate costs, see pt. 193 and 195 of the General Block Exemption Regulation (GBER) Frequently Asked Questions, March 2016.

¹³⁴For the scope of the annual adjustment obligation, which has been interpreted to affect only new applications, see point 196 of the General Block Exemption Regulation (GBER) Frequently Asked Questions, March 2016.

¹³⁵For the identification of the financial indicator to determine a cap, see pt. 194 of the General Block Exemption Regulation (GBER) Frequently Asked Questions, March 2016.

¹³⁶Article 43(5) to (7) of the GBER; for related definitions, see also Article 2(118) of the GBER.

¹³⁷Pt. 185 of the General Block Exemption Regulation (GBER) Frequently Asked Questions, March 2016.

¹³⁸Council Directive No. 2003/96/EC of 27.10.2003 restructuring the Community framework for the taxation of energy products and electricity, OJ L283 of 31.10.2003, p. 51.

¹³⁹Article 44(1) of the GBER. Nor can block-exempted aid be granted in relation to biofuels which are subject to a supply or blending obligation, see Article 44(4) of the GBER.

¹⁴⁰Article 44(2) of the GBER.

competitors found to be in a similar factual situation and, by avoiding discrimination, the distortion of competition is minimized.

As regards the mechanism to grant the aid, national authorities are given some degree of flexibility that can be used to better preserve the price signal that companies should receive from environmental taxes. In particular, the GBER provides that aid can be granted based on a reduction of the applicable environmental tax rate, on the payment of a fixed compensation amount, or on a combination of them.

No threshold applies to aid granted through reductions in environmental taxes. Due to the detrimental impact of any tax reduction on the objective of internalizing the social costs of emissions through environmental taxes, it is anticipated this notification exemption will no longer be available after the current GBER expires and, at that time, Member States will need to re-evaluate the appropriateness of the tax reductions.¹⁴¹ If this time limitation is confirmed, any aid schemes granting reductions in environmental taxes will require prior notification after the current GBER expires.

3.7 Remediation of Contaminated Sites

The notification exemption applies to aid invested in a contaminated site leading to the repair of environmental damage, including to the quality of the soil, surface water or groundwater.¹⁴² On the basis of the definitions provided by the GBER, a contaminated site is one in which the presence of hazardous substances has been confirmed and their presence is due to human intervention. The level of hazardous substances must be such that they pose a significant risk to human health or the environment, taking into account current and approved future use of the land.¹⁴³

As the definition of a contaminated site is linked to the presence of hazardous substances that pose a significant risk to human health or the environment, only investment aid to remediate the presence of such substances can be block-exempted. On this basis, the Commission has clarified that, in principle, public support to remove any material from a contaminated site can be block-exempted, including materials associated with permanent structures (for example, concrete) provided that they are hazardous substances that pose a significant health or environmental risk.¹⁴⁴ In practice, this requirement restricts the application of the GBER to investment aid for derelict or brownfield land or buildings if there are no hazardous substances and, even if some are present, only the part of the costs strictly related to the removal of such substances is eligible for aid.

¹⁴¹Recital 64 of the GBER.

¹⁴²Article 45(2) of the GBER.

¹⁴³Article 2(121) of the GBER.

¹⁴⁴Pt. 199 and 200 of the General Block Exemption Regulation (GBER) Frequently Asked Questions, March 2016.

Another important limitation relates to the application of the ‘polluter pays’ principle, which requires that the costs of measures to deal with pollution must be borne by the polluter.¹⁴⁵ No aid shall be granted if a person is liable for the environmental damage under the law applicable in each Member State, without prejudice to the EU rules.¹⁴⁶ The person responsible for the remediation or decontamination can receive aid only if the person liable for the environmental damage cannot be identified or be made to bear the costs.¹⁴⁷ For the application of this condition, liability is established by applying national and EU rules and, in the absence of full harmonization, different conclusions may be reached depending on the location of the contaminated site. In addition, it can be expected that the position of polluters that are not liable or cannot be made to bear the costs, for example due to limitation periods, will require careful consideration on a case-by-case basis.

The notification threshold for investment aid for remediation of contaminated sites is €20 million per undertaking per investment project.¹⁴⁸ Eligible costs are the expenditures incurred in the remediation work irrespective of their accounting treatment as fixed assets in the financial statements of the aid beneficiary. Any increase in the value of the land, which must be established by an independent expert, will be deducted from the value of the eligible costs. Aid intensity can reach 100% of the eligible costs.¹⁴⁹ The eligible costs can be adjusted to reflect a positive change in the value of the land and, from this provision, it follows that no adjustment would be acceptable based on negative changes in the value of the land. In view of the fact that aid for the remediation of contaminated sites does not directly influence the functioning of energy markets and may contribute both to regional policy objectives and to energy and environmental objectives, the rules on regional aid may also be applicable, depending on the main objective pursued by the measure concerned.¹⁵⁰

¹⁴⁵Recital 65 of the GBER.

¹⁴⁶The non-exhaustive list of EU rules provided in Article 45(3) of the GBER, includes: Directive No. 2004/35/EC of the European Parliament and of the Council of 21.4.2004 on environmental liability with regard to the prevention and remedying of environmental damage, OJ L143 of 30.4.2004, p. 56, as amended by Directive No. 2006/21/EC of the European Parliament and of the Council of 15.3.2006 on the management of waste from extractive industries, OJ L102 of 11.4.2006, p. 1; Directive No. 2009/31/EC of the European Parliament and of the Council of 23.4.2009 on the geological storage of carbon dioxide and amending Council Directive 85/337/EEC, European Parliament and Council Directives 2000/60/EC, 2001/80/EC, 2004/35/EC, 2006/12/EC, 2008/1/EC and Regulation (EC) No 1013/2006; OJ L 140 of 5.6.2009, p. 114; Directive No. 2013/30/EU of the European Parliament and of the Council of 12.6.2013 on safety of offshore oil and gas operations and amending Directive 2004/35/EC, OJ L 178 of 28.6.2013, p. 66.

¹⁴⁷Article 45(3) of the GBER.

¹⁴⁸Article 4(1)(u) of the GBER.

¹⁴⁹Article 45(4) to (6) of the GBER.

¹⁵⁰Recital 34 of the GBER.

3.8 Investment Aid for the Installation of Energy-Efficient District Heating and Cooling Systems

The notification exemption applies to investment aid for energy-efficient district heating and cooling systems, including investments for the construction, expansion and refurbishment of one or more generation units to operate as an energy-efficient district heating and cooling system. The investment must be an integral part of the energy-efficient district heating and cooling system, which includes the heating/cooling production plants, the distribution network and related facilities to reach the customers' premises.¹⁵¹

As regards the distribution network, it has been interpreted that there is no limitation to cities or urban areas. Therefore, the network can be expanded to business and industrial zones, including, for example, an expansion to reach an area of greenhouses, provided that the network benefits all users and indirect beneficiaries are excluded.¹⁵²

No threshold applies to investment aid for the production plants of an energy-efficient district heating and cooling system. In principle, the general threshold for investment aid for environmental protection applies: €15 million per undertaking per investment project.¹⁵³ As regards investment aid for the distribution network, the threshold is €20 million per undertaking per investment project.¹⁵⁴ In case of an investment in both the production plants and the distribution network, they are to be treated as two separate projects, which must not exceed the respective thresholds on a stand-alone basis, which means that the maximum aid amount can reach €35 million.¹⁵⁵

Eligible costs for the production plant shall be the additional costs for the construction, expansion and refurbishment of one or more generation units to operate as an energy-efficient district heating and cooling system compared with a conventional production plant. Aid intensities in relation to small, medium-sized, and large companies are set at 65%, 55%, and 45%, respectively. For investments in assisted areas that fulfil the conditions under Articles 107(3)(a) and 107(3)(c) of the Treaty, an additional regional bonus is available: 15 and 5 percentage points, respectively.¹⁵⁶

For the distribution network, the investment costs are the eligible costs. The aid amount may not exceed the difference between the eligible costs and the operating profit of the investment. For the enforcement of this limitation, the operating profit

¹⁵¹Article 46(1) and (2) of the GBER.

¹⁵²Pt. 201 of the General Block Exemption Regulation (GBER) Frequently Asked Questions, March 2016.

¹⁵³Article 4(1)(s) of the GBER.

¹⁵⁴Article 4(1)(w) of the GBER.

¹⁵⁵Pt. 205 of the General Block Exemption Regulation (GBER) Frequently Asked Questions, March 2016.

¹⁵⁶Article 46(3) and (4) of the GBER.

should be detracted from the eligible costs *ex ante*, but it is also possible to apply a claw-back mechanism instead.¹⁵⁷ In view of the definition of operating profit, the Commission understands that operating losses cannot be covered by aid and that this amount should be calculated over the entire economic lifetime of the investment.¹⁵⁸ As regards the duration of the claw-back mechanism, it should be equal to the operating lifetime of the asset, although a shorter duration cannot be ruled out.¹⁵⁹

3.9 Waste Recycling and Reutilization

The notification exemption applies to investment aid for the recycling and reutilization of waste, provided that it is not the beneficiary's own waste but that generated by other undertakings.¹⁶⁰ This means that direct aid to polluters is not block-exempted. Nor is there any block exemption on direct aid that relieves polluters from a burden that should be borne by them under EU law or from a burden that should be considered a normal company cost.¹⁶¹

The precise meaning of recycling and reutilization of materials is encapsulated in definitions provided by the GBER. These clarify that the notion of recycling includes the reprocessing of organic material, but the energy recovery and the reprocessing into materials that are to be used as fuels or for backfilling operations are not block-exempted.¹⁶² To apply the notification exemption, the GBER also requires that the recycled or reutilized materials being treated using the innovative process would otherwise be disposed of, or be treated in a less environmentally friendly manner. The GBER also clarifies that waste recovery operations other than recycling are not block-exempted.¹⁶³

As regards the characteristics of the recycling and reutilization activities, aid is block-exempted only for investments going beyond the state of the art.¹⁶⁴ The latter should be interpreted, where appropriate, from a technological and internal market perspective at EU level.¹⁶⁵ In this regard, the Commission has also clarified that investments that go beyond the state of the art are not a mere optimization or scaling up of an existing technology but rather refer to new and innovative technologies,

¹⁵⁷ Article 46(5) and (6) of the GBER.

¹⁵⁸ Article 2(39) of the GBER; also pt. 203 and 204 of the General Block Exemption Regulation (GBER) Frequently Asked Questions, March 2016.

¹⁵⁹ Pt. 202 of the General Block Exemption Regulation (GBER) Frequently Asked Questions, March 2016.

¹⁶⁰ Article 47(2) and (10) of the GBER.

¹⁶¹ Article 47(4) of the GBER.

¹⁶² Article 2(126) to (128) of the GBER.

¹⁶³ Article 47(3) of the GBER.

¹⁶⁴ Article 47(6) of the GBER.

¹⁶⁵ Article 2(129) of the GBER.

which are unproven compared to the state of the art in the industry and, therefore, imply a risk of technological or industrial failure.¹⁶⁶ Another requirement of the GBER is that investment may not merely increase demand for the materials to be recycled without increasing collection of those materials.¹⁶⁷

No threshold applies to aid for the recycling and reutilization of waste. In principle, the general threshold for investment aid for environmental protection should apply: €15 million per undertaking per investment project.¹⁶⁸ Eligible costs are defined as the “extra investment costs necessary to realise an investment leading to better or more efficient recycling or re-use activities compared to a conventional process of re-use and recycling activities with the same capacity that would be constructed in the absence [of] the aid”.¹⁶⁹ This definition of eligible costs makes implicit the requirement that the conventional process identified in comparison should not be just any alternative process, but must be the one the beneficiary would have chosen had aid not been granted.

Aid intensities in relation to small, medium-sized, and large companies are set at 55%, 45%, and 35%, respectively. For investments in assisted areas that fulfil the conditions under Articles 107(3)(a) and 107(3)(c) of the Treaty, an additional regional bonus is available: 15 and 5 percentage points, respectively.¹⁷⁰

3.10 *Energy Infrastructure*

The notification exemption that applies to investment aid for energy infrastructures is subject to several limitations, which relate to the type of infrastructure, the geographic location, and the regulatory framework that applies once they enter into service.

To identify the type of infrastructure, the GBER provides a precise definition in relation to electricity, gas, oil, and CO₂ storage infrastructures.¹⁷¹ Electricity and gas storage, as well as oil infrastructures, cannot benefit from the notification exemption.¹⁷² The exclusion of oil infrastructures and gas storage is unambiguous, but some uncertainty may arise in relation to hybrid projects for reception, regasification or decompression of gas that also include storage. However, a more detailed assessment is needed for electricity storage, which is defined as “facilities used for

¹⁶⁶Pt. 206 of the General Block Exemption Regulation (GBER) Frequently Asked Questions, March 2016. This clarification builds upon the definition of “new and innovative technology” given for the purpose of renewables technologies, see Article 2(114) of the GBER.

¹⁶⁷Article 47(5) of the GBER.

¹⁶⁸Article 4(1)(s) of the GBER

¹⁶⁹Article 47(7) of the GBER.

¹⁷⁰Article 47(8) and (9) of the GBER.

¹⁷¹Article 2(130) of the GBER.

¹⁷²Article 48(6) of the GBER.

storing electricity on a permanent or temporary basis in above-ground or underground infrastructure or geological sites, provided they are directly connected to high-voltage transmission lines designed for a voltage of 110 kV or more".¹⁷³ In practice, this definition only includes large storage facilities, with smaller ones not directly connected to transmission lines designed for a voltage equal to or greater than 110 kV falling outside the notion of electricity storage of the GBER. The question is whether these smaller storage facilities qualify as energy infrastructure under the GBER. For example, the GBER can apply to such storage facilities if they are seen as part of the transmission or distribution systems or, at least, as equipment or an installation essential for these systems to operate safely, securely and efficiently. The notification exemption can also apply if these small storage facilities are seen as part of smart grids. Taking into account that small electricity storage facilities are not expressly excluded from the GBER, their qualification as energy infrastructure is a technical issue to be assessed on a case-by-case basis.

As regards geographic considerations, the definition of energy infrastructures includes infrastructures located in EU territory or that create an interconnection between EU territory and that of third countries.¹⁷⁴ Another geographic limitation derives from the fact that the notification exemption applies only to energy infrastructures located in assisted areas.¹⁷⁵ Although not expressly mentioned, it should be understood that this exemption also applies to infrastructures linking assisted and non-assisted areas within EU territory. It is understood that infrastructure construction and upgrade in assisted regions contribute to economic, social and territorial cohesion by supporting investment and job creation and the functioning of energy markets in the most disadvantaged areas.¹⁷⁶

An additional requirement for the application of the GBER to investment aid for energy infrastructures is that, once they enter into service, infrastructures should be subject to full tariff and access regulation according to internal energy market legislation.¹⁷⁷ For most gas and electricity infrastructures, the application of tariff and access regulation is uncontroversial. However, the possibility of fully applying the existing regulatory framework may be unclear in relation to certain elements of smart grids. For example, it may be unclear in some circumstances whether full tariff and access regulation applies to small storage facilities. It is reasonable to expect that the scope of the GBER exemption will need to be flexible to take into account the evolution of the regulatory framework as it adapts to technological developments.

For energy infrastructures that comply with all the conditions set out in the GBER, investment aid is block-exempted if it remains below the notification

¹⁷³ Article 2(130) of the GBER.

¹⁷⁴ Article 2(130) of the GBER.

¹⁷⁵ Article 48(2) of the GBER. For a definition of assisted areas, see Article 2(27) of the GBER.

¹⁷⁶ Recital 67 of the GBER.

¹⁷⁷ Article 48(3) of the GBER. For a definition of internal energy market legislation, see Article 2 (131) of the GBER.

threshold: €50 million per undertaking per investment project.¹⁷⁸ Eligible costs are the investment costs.¹⁷⁹ The aid amount may not exceed the difference between the eligible costs and the operating profit of the investment. For the enforcement of this limitation, the operating profit should be detracted from the eligible costs *ex ante*, but it is also possible to apply a claw-back mechanism instead.¹⁸⁰ In view of the definition of operating profit, the Commission understands that operating losses cannot be covered by aid.¹⁸¹

As regards the possibility of investment aid for energy infrastructures being block-exempted under other provisions of the GBER, it is clarified that regional aid does not apply to energy infrastructures.¹⁸² The same exclusion applies to block-exempted aid for local infrastructures, as there are already specific and well-designed criteria to ensure its compatibility with the internal market.¹⁸³

3.11 *Environmental Studies*

Environmental studies include energy audits, provided that the studies and audits are linked to the investments referred to in Section 7 of the GBER. For investment projects not covered by this section of the GBER, environmental studies remain subject to the notification obligation.

The Commission has clarified that the notion of environmental studies includes financing risk analyses prior to the clean-up of a contaminated location, for example, an analysis that examines suitable clean-up methods, clean-up limits, and usually alternative clean-up scenarios.¹⁸⁴ Although a notification exemption is to be interpreted narrowly, the notion of environmental studies is flexible enough to include several categories of studies, provided that they help to identify the investments necessary to achieve a higher level of environmental protection. Environmental studies are required to link to specific categories of investments for environmental

¹⁷⁸ Article 4(1)(x) of the GBER

¹⁷⁹ As regards eligible costs for smart grids, intangible assets related to this infrastructure and essential to its proper functioning that can be included as eligible costs, in particular software, see pt. 33 of the General Block Exemption Regulation (GBER) Frequently Asked Questions, March 2016.

¹⁸⁰ Article 48(4) and (5) of the GBER.

¹⁸¹ Article 2(39) of the GBER, also pt. 208 and 209 of the General Block Exemption Regulation (GBER) Frequently Asked Questions, March 2016.

¹⁸² Recital 33 and Article 13(a) of the GBER. As regards the specific NACE codes of this exclusion and the interpretation method, it is clarified that only NACE division 35 is concerned and that the activity that is target of the financing/investment should be the main criterion, see pt. 60 of the General Block Exemption Regulation (GBER) Frequently Asked Questions, March 2016.

¹⁸³ Recital 76 and Article 56(2) of the GBER.

¹⁸⁴ Pt. 211 of the General Block Exemption Regulation (GBER) Frequently Asked Questions, March 2016.

protection. However, the Commission has clarified that a link to a specific investment project is not needed.¹⁸⁵

No threshold applies to aid for environmental studies. In principle, the general threshold for investment aid for environmental protection applies: €15 million per undertaking per investment project.¹⁸⁶ Taking into account that the Commission has clarified that no link to any specific investment project is needed, it is expected that an environmental study or audit will be treated as a separate project for the purposes of applying the notification thresholds. Aid intensities in relation to small, medium-sized, and large companies are set at 70%, 60%, and 50%, respectively. The eligible costs are the costs of the studies.

Large undertakings are required to carry out energy audits in compliance with Article 8(4) of the Energy Efficiency Directive.¹⁸⁷ No aid can be granted for mere compliance with legal requirements unless energy audits are carried out in addition to the requirements under EU law. In view of the fact that aid for environmental studies does not directly influence the functioning of energy markets and may contribute both to regional policy objectives and to energy and environmental objectives, the rules on regional aid may also be applicable, depending on the main objective pursued by the measure concerned.¹⁸⁸

4 Aid Compatibility Under the EEAG

A framework to assess the compatibility of aid with environmental objectives was outlined in various instruments as far back as the 1970s.¹⁸⁹ The framework was ultimately replaced by the Commission's guidelines on State aid for environmental protection in 1994,¹⁹⁰ subsequently updated in 2001¹⁹¹ and again in 2008.¹⁹² Earlier guidelines already covered a few aid measures at the intersection of energy and environmental objectives; the EEAG were approved with a significantly broader scope, although not all the measures initially considered made it to the final version

¹⁸⁵Pt. 212 of the General Block Exemption Regulation (GBER) Frequently Asked Questions, March 2016.

¹⁸⁶Article 4(1)(s) of the GBER.

¹⁸⁷Directive No. 2012/27/EU of the European Parliament and of the Council of 25.10.2012 on energy efficiency, amending Directives 2009/125/EC and 2010/30/EU and repealing Directives 2004/8/EC and 2006/32/EC. OJ L 315 of 14.11.2012, p. 1.

¹⁸⁸Recital 34 of the GBER.

¹⁸⁹Letter to Member States SEC(74)4264 of 6.11.1974; Fourth Report on Competition Policy, pt. 175–182. This initial framework was subsequently amended and extended in 1980, 1987, and 1993.

¹⁹⁰OJ C 72 of 10.03.1994, p. 3. The initial validity (31.12.1999) was extended in 1999 and 2000.

¹⁹¹OJ C 37 of 03.02.2001, p. 3. The initial validity (31.12.2007) was extended in 2007.

¹⁹²OJ C 82 of 01.04.2008, p. 1.

(for instance, there is no compatibility criteria for public support for nuclear energy). The name of the guidelines was adjusted accordingly.

The Commission's initiative to broaden the scope of the EEAG can be explained by the fact that the energy sector was already the largest beneficiary in terms of aid granted by Member States for environmental protection objectives.¹⁹³ As a result, the EEAG serve to design better and more targeted aid measures while minimizing market distortions in the energy sector, which are certainly not a negligible risk given the significant aid amounts involved. Furthermore, a wider scope of application of the compatibility framework favours consistency in the design of aid measures to achieve an efficient and smooth transition of the energy sector to a new market design that integrates RES.

In the design of the compatibility criteria under the EEAG, the Commission has taken into account the objectives of the Europe 2020 initiative and related instruments.¹⁹⁴ Moreover, in view of the requirements of the SAM initiative, the EEAG are based on common assessment principles aimed at strengthening the internal market and promoting greater effectiveness in public spending.¹⁹⁵ Against this background, the EEAG define the conditions for establishing that aid must be considered compatible with the internal market under Article 107(3)(c) TFEU. However, due to the stronger focus of the EEAG on public interventions in the energy sector and the fact that security of energy supply qualifies as a service of general economic interest (SGEI), uncertainty remains as to whether public interventions should be assessed applying the compatibility criteria for SGEI under Article 106(2) TFEU instead of the EEAG, which are based on Article 107(3)(c) TFEU. The EEAG provide no guidance on this interpretative issue.

To define their scope of application, the EEAG identify a number of measures granted for environmental protection or energy purposes, namely¹⁹⁶:

- a. aid for going beyond Union standards or increasing the level of environmental protection in the absence of Union standards (including aid for the acquisition of new transport vehicles);
- b. aid for early adaptation to future Union standards;
- c. aid for environmental studies;
- d. aid for the remediation of contaminated sites;
- e. aid for energy from renewable sources;
- f. aid for energy efficiency measures, including cogeneration and district heating and district cooling;
- g. aid for resource efficiency and waste management;

¹⁹³Following the adoption of the EEAG, the Commission reported that out of the €10 billion granted in environmental protection measures between 2008 and 2012, member states granted €8 billion to RES and combined heat and power projects. Competition Policy Brief, Issue 16, October 2014.

¹⁹⁴Paras. 3–9 of the EEAG.

¹⁹⁵Para. 12 of the EEAG.

¹⁹⁶Para. 18 of the EEAG.

- h. aid for CO₂ capture, transport and storage, including individual elements of the Carbon Capture Storage (CCS) chain;
- i. aid in the form of reductions in or exemptions from environmental taxes;
- j. aid in the form of reductions in funding support for electricity from renewable sources;
- k. aid for energy infrastructure;
- l. aid for generation adequacy measures;
- m. aid in the form of tradable permits; and
- n. aid for the relocation of undertakings.

The EEAG apply to these aid measures in all the sectors covered by the Treaty, including sectors subject to specific EU rules or State aid guidelines, unless such rules or guidelines provide otherwise.¹⁹⁷ However, certain aid measures are expressly excluded from the EEAG: aid for the design and manufacture of environmentally friendly products; measures to improve safety and hygiene within production plants; environmental protection measures relating to transport infrastructures; stranded costs; and aid for research, development and innovation.¹⁹⁸ Aid for businesses in difficulty and aid for the extraction of fossil fuels are also excluded.¹⁹⁹

Unless aid is block-exempted or qualifies as *de minimis* aid, a notification should be submitted to the European Commission and aid compatibility should be assessed based on the guidance provided in the EEAG. For aid granted within the framework of aid schemes, the EEAG clarify that additional notifications are required in relation to individual aid not granted on the basis of a competitive bidding process that exceeds the following thresholds²⁰⁰:

- €15 million per undertaking for investment aid;
- 250 megawatts (MW) of renewable electricity generation capacity per site for operating aid in relation to the production of renewable electricity or combined production of renewable heat;
- 150,000 tonnes (t) of production annually, for operating aid in relation to the production of biofuel;
- 300 MW of cogeneration electricity capacity for operating aid in relation to cogeneration (notification obligation for aid concerning heat production to be assessed based on electricity production capacity);
- €50 million per undertaking per project for energy infrastructure aid;
- €50 million per project for aid concerning carbon capture and storage; and
- €15 million per project per undertaking for aid concerning generation adequacy.

In relation to the lack of notification obligation for aid granted through a competitive bidding process, this provision of the EEAG applies only in relation to

¹⁹⁷Para. 13 of the EEAG.

¹⁹⁸Para. 15 of the EEAG.

¹⁹⁹Paras. 6 and 16 of the EEAG.

²⁰⁰Para. 20 of the EEAG.

notified aid schemes—not aid schemes exempt from the notification obligation under the GBER. Indeed, the scope of notification exemption under the GBER cannot be expanded through the EEAG and, even though several of the different language versions of the EEAG do not refer to a “notified” aid scheme, at least the Spanish version makes it clear that this provision applies to “notified” schemes only. Another important element to bear in mind is that this bidding process should be defined on the basis of the design, budget, and allocation methodologies defined by the EEAG, which require that the bidding leads to a situation in which not all bidders can receive aid.²⁰¹

The EEAG define the compatibility criteria that apply to aid granted outside an aid scheme (ad hoc aid), to aid schemes, and to individual aid granted under an aid scheme but exceeding the notification thresholds. On the basis of common assessment principles, the EEAG provide general compatibility criteria that apply to all aid measures covered by these guidelines, unless more specific or amended criteria are defined in relation to certain aid measures. The application of the EEAG is limited to between 1 July 2014 and 31 December 2020²⁰² without prejudice to the retroactive application to certain aid measures.

4.1 General Compatibility Criteria

A measure is deemed compatible if it contributes to the Union’s environmental or energy policies without having a negative impact on trade within the internal market.²⁰³ Compatibility is to be assessed according to the common approach required by the SAM initiative.²⁰⁴ In particular, the EEAG identify the following criteria: contribution to a well-defined objective of common interest; need for State intervention to achieve an improvement which cannot be brought about by the ordinary functioning of the market; appropriateness of the aid measure to the objective of common interest; incentive effect of the aid on the beneficiary; proportionality of the aid; avoidance of undue negative effects on competition and intra-EU trade; and transparency of the aid.²⁰⁵

In the absence of more detailed rules, the following aid categories will be assessed exclusively on the basis of the general compatibility criteria: aid for environmental studies; aid for the remediation of contaminated sites; aid for undertakings going

²⁰¹Para. 19(43) of the EEAG.

²⁰²Para. 246 of the EEAG. Detailed rules on application to unlawful aid and individual aid within the framework of older schemes are also defined in paras. 247–249 of the EEAG.

²⁰³Para. 23 of the EEAG.

²⁰⁴Para. 12 of the EEAG.

²⁰⁵Para. 27 of the EEAG.

beyond Union standards or increasing environmental protection in the absence of Union standards; and aid for the early adaptation to future Union standards.²⁰⁶

The EEAG clarify that for aid schemes with a particular risk profile, the Commission may impose a requirement of an *ex post* evaluation and limit their duration, usually to 4 years or less. This requirement will be imposed for schemes with large aid budgets, for schemes that have novel characteristics, or when significant market, technology or regulatory changes are foreseen. At the time the extension of these schemes is notified, their compatibility will also be examined on the basis of the *ex post* evaluation of the original scheme.²⁰⁷ This means that the outcome of the *ex post* evaluation will be part of the compatibility criteria, as these evaluations should help the Commission to establish “whether the aid really changed the behaviour of the beneficiaries, whether the effects differed significantly across beneficiaries, whether the scheme led to spill-over effects on the activity of other firms, whether the scheme contributed to the desired policy objective or whether the chosen aid instrument was the most appropriate one”.²⁰⁸

Also, aid measures entailing a non-severable violation of Union law should not be declared compatible. This includes violations due to any financing mechanism that is an integral part of the aid measure.²⁰⁹ In particular, levies imposed to fund a measure in the energy sector need to comply with Articles 30 and 110 TFEU. EU environmental legislation and any requirement to carry out environmental impact assessments should also be complied with.²¹⁰

A brief explanation of each of the general compatibility criteria is provided below.

Contribution to an Objective of Common Interest

The notified measure must explain how it is expected to contribute towards an objective of common interest. For environmental aid, the general objective should be to increase the level of environmental protection compared with the level that would be achieved in the absence of the aid. As regards aid in the energy sector, the objective should be to ensure a competitive, sustainable and secure energy system in a well-functioning Union energy market. Less strict requirements apply to measures

²⁰⁶Para. 25 of the EEAG.

²⁰⁷Paras. 28, 242, and 243 of the EEAG.

²⁰⁸Competition Policy Brief, Issue 7, June 2014.

²⁰⁹Para. 29 of the EEAG; also Judgment of 19.9.2000, *Germany/Commission*, Case C-156/98 ECLI:EU:C:2000:467, para. 78; Judgment of 22.12.2008, *Régie Networks/Rhone Alpes Bourgogne*, Case C-333/07, ECLI:EU:C:2008:764, paras. 94-116, and, in the field of energy, judgment of 14.4.2005, *AEM and AEM Torino*, Joined Cases C-128/03 and C-129/03 ECLI:EU:C:2005:224, paras. 38–51.

²¹⁰Paras. 7 and 29 of the EEAG.

that are co-financed with European structural and investment funds, and to environmental studies.²¹¹

For aid subject to individual notification, the contribution to an objective of common interest may be measured through a quantitative assessment that makes reference, for example, to abatement technologies or to existing and future Union standards.²¹² The purpose of this requirement is to provide the Commission with a concrete evaluation of the expected impact of the measure.

Need for State Intervention

State intervention should be limited to situations in which there is a market failure and, therefore, when the aid can bring a material improvement that the market alone cannot deliver. Market failures can be due to several reasons, and the EEAG identify some, namely, negative and positive externalities, asymmetric information and coordination failures.

Negative and positive externalities affect an undertaking's incentive to carry out an investment. These externalities usually arise in relation to pollution abatement, eco-innovation, system stability, new and innovative renewable technologies, innovative demand-response measures, energy infrastructures, and generation adequacy measures. Asymmetric information increases the level of uncertainty and the risk on the market, reinforcing the focus on the short-term horizon, particularly due to the financing conditions that affect environmental investments having a longer amortization period. As to coordination failures, they may be due to several reasons, including the existence of divergent interests and incentives among investors involved in the project, the need to reach a critical mass for profitability, the cost of contracting, uncertainty about a collaborative outcome or network effects (this arises, for example, in relation to the uninterrupted supply of electricity, energy efficiency measures in buildings, and cross-border infrastructure projects).²¹³

A situation of market failure is not sufficient to conclude that public intervention is needed and, in practice, the existence of other instruments able to address the market failure should be considered, for example, sectorial regulation, mandatory pollution standards and pricing mechanisms. Only if there is still a residual market failure that cannot be addressed through these alternative measures, will the necessity of the aid measure be justified.²¹⁴ In practice, as the improvement of sectorial regulation is under the control of public authorities, this assessment will also serve to identify regulatory amendments to ensure that aid is granted only in relation to a residual market failure.

²¹¹Paras. 30–32 of the EEAG.

²¹²Para. 33 of the EEAG.

²¹³Para. 35 of the EEAG.

²¹⁴Para. 36 of the EEAG.

For individually notified aid, the necessity of the aid should be examined in relation to the position of the beneficiary, as market failures do not necessarily affect everyone in the same manner. This evaluation should be carried out taking into account factors specific to each type of market failure.²¹⁵

Appropriateness of the Aid

The appropriateness of the aid measure to address the market failure will depend on whether the same positive contribution to the objective of common interests can be achieved through less distortive alternative policy instruments or alternative aid measures.

Alternative policy instruments to address market failures should be assessed focusing on sectorial regulation, market-based mechanisms or soft instruments. The potential counteraction between different measures addressing the same or different market failures should be assessed as well. For example, aid measures that erode the polluter pays principle cannot be considered appropriate. National authorities should demonstrate that there are no less distortive aid measures for competition and trade and ensure coherence between market failure and the instrument chosen. For example, repayable advances may be appropriate to address uncertainty about future revenues. The outcome of *ex post* evaluations may also serve to demonstrate the appropriateness of an aid scheme.²¹⁶

Incentive Effect

The aid measure should not support an investment that the aid beneficiary would have realized even without receiving the aid. In principle, there will be no incentive if the project is implemented before making the application, which should describe a counterfactual scenario without aid or an alternative scenario or project. In addition to this description, large companies will be required to submit written evidence in support of the counterfactual. National authorities, for their part, are required to carry out a credibility check. This requirement does not apply when aid is awarded through a competitive bidding process.²¹⁷

For aid in relation to the early implementation of EU standards already adopted but not yet in force, including exemptions for the acquisition of new transport vehicles and retrofitting operations, similar compatibility criteria to those contained in the GBER apply. Moreover, the approach adopted in the GBER as regards national standards is applied under the EEAG and, therefore, the presence of more rigorous national standards does not affect the compatibility assessment. For energy

²¹⁵Paras. 38 and 39 of the EEAG.

²¹⁶Paras. 45–48 of the EEAG.

²¹⁷Paras. 49–52 of the EEAG.

audits there is also a limitation similar to the one under the GBER, and an incentive effect is not present unless energy audits are carried out in addition to the requirements under the Energy Efficiency Directive,²¹⁸ which requires mandatory audits for large enterprises.²¹⁹

To identify the incentive effect in relation to individually notified measures, the counterfactual analysis is the most reliable tool to compare alternative scenarios with and without aid, in other words, whether a project would have been profitable without the aid. There are different methodologies to evaluate the profitability of a project, such as the net present value of the project (NPV), the internal rate of return (IRR), and the return on capital employed (ROCE). Once the profitability of the project is determined, it must be compared to the normal rate of return that a company would reasonably expect to earn from a project of the same type or, if not available, alternative criteria defined in the EEAG will apply. To examine the credibility of the analysis, national authorities should obtain credible evidence from the beneficiary's internal documents. The evaluation of the incentive effect must be made on an objective basis relying on the benchmarking of data concerning the aid beneficiary against industry data. An incentive effect may nevertheless be found for projects not reaching the required level of profitability, provided that the project produces other positive effects and evidence supports this finding. A strict evidentiary requirement also applies to aid to adapt to national standards that are more severe than EU standards and aid to go beyond EU standards.²²⁰

Proportionality of the Aid

The aid amount per beneficiary must be limited to the minimum necessary to achieve the environmental or energy objective. In particular, this is the case if the aid covers the net extra cost necessary to meet the objective pursued, and this is determined by the difference between economic benefits and the costs of alternative projects, provided that the comparison is made with the project the beneficiary would have carried out had aid not been granted. If a calculation of all economic benefits is not possible, a simplified method can be used which involves calculating the extra investment costs, not taking into account the operating benefits. For cases that do not require an individual notification, aid will be deemed proportional if the aid amount does not exceed the maximum aid intensity, which is given as a percentage of the eligible costs.²²¹

²¹⁸Directive No. 2012/27/EU of the European Parliament and of the Council of 25.10.2012 on energy efficiency, amending Directives 2009/125/EC and 2010/30/EU and repealing Directives 2004/8/EC and 2006/32/EC, OJ L 315 of 14.11.2012, p. 1.

²¹⁹Paras. 53–56 of the EEAG.

²²⁰Paras. 58–68 of the EEAG.

²²¹Paras. 69–71 of the EEAG.

Eligible costs are calculated as the extra investment costs in tangible/intangible assets that are directly linked to the achievement of the common objective. Two methodologies for defining these extra costs are provided following the same approach as in the GBER:

1. if they can be clearly separated from the total investment costs of the project, the full cost of the relevant part is eligible;
2. if they can only be identified by reference to a counterfactual investment that would have been carried out had aid not been granted, the cost difference is eligible.

If there are insufficient data to build a reliable counterfactual scenario, the Commission is allowed to consider the total costs of a project as an alternative, even though this different calculation method may require lower aid intensities. Annex 2 of the EEAG contains a list of counterfactual scenarios for different aid categories.²²²

The maximum aid intensities defined in Annex 1 of the EEAG grant a certain level of predictability and ensure a level playing field. Provided that it does not exceed 100% of eligible costs, an investment in assisted areas that fulfils the conditions of Articles 107(3)(a) and 107(3)(c) of the Treaty obtains a regional bonus of 15 and 5 percentage points, respectively. Medium-sized and small companies also obtain an additional bonus of 10 and 20 percentage points, respectively. Aid intensity can reach 100% for aid granted to the beneficiary through a competitive bidding process on the basis of clear, transparent and non-discriminatory criteria, provided that strict conditions are applied to budget and bidding process design.²²³ Aid intensities should be applied within the limits imposed by cumulation rules.²²⁴

Compliance with the maximum aid intensities under Annex 1 of the EEAG is not enough for the proportionality of individually notified aid, and these aid intensities will serve only as a cap. The amount of the aid will be considered to be limited to the minimum if the amount corresponds to the net extra costs of the subsidized investment against the counterfactual scenario in the absence of the aid. All the relevant costs and benefits must be taken into account over the lifetime of the project. If a counterfactual cannot be identified, a detailed analysis will be required, using the information and the evidence provided for the incentive effect analysis. The general conditions for the proportionality assessment are presumed to be met in relation to individual operating aid granted through a competitive bidding process.²²⁵

²²²Paras. 73–76 of the EEAG.

²²³Paras. 77–80 of the EEAG.

²²⁴Paras. 81–82 of the EEAG.

²²⁵Paras. 83–87 of the EEAG.

Avoidance of Undue Negative Effects on Competition and Trade

The aid measure can be compatible with the internal market if the negative effects in terms of distortions of competition and impact on trade between Member States are limited and outweighed by the positive ones in terms of contribution to the achievement of the objective of common interest. Two main types of distortion are identified by the EEAG: product market distortions and location effects.²²⁶

The assessment of the potential negative effects of environmental aid will be carried out taking into account the overall environmental effect of the measure and its negative impact on those undertakings which are not beneficiaries of the aid. Public support may have distortive effects by strengthening or maintaining the beneficiary's market power and, even when aid does not strengthen market power, it may induce the exit or discourage entry or expansion of competitors.²²⁷ The maximum aid intensities should prevent manifest negative effects. It is also required that aid not be aimed at merely preserving economic activity in one region or attracting it away from other regions within the internal market, which may lead to displacing activities or investments from one region to another without any net environmental impact but further fragmenting the internal market.²²⁸

To ensure the least possible distortion of competition, the process of selecting the beneficiary should be conducted in a non-discriminatory, transparent and open manner leading to the selection of beneficiaries that can achieve the environmental or energy objectives using the least amount of aid or in the most cost-effective way. Negative effects of the aid will be assessed in particular based on the risk of increased sales for the beneficiary due to reduced production or operating costs, or due to the introduction of a new product, including a "first mover" advantage.²²⁹

In addition to the general conditions, the Commission will take into account and assess whether the individually notified aid leads to:

1. supporting inefficient production that impedes growth in the sector;
2. distorting dynamic incentives;
3. creating or enhancing market power or exclusionary practices;
4. artificially altering trade flows or the location of production.

The cumulative effect of planned aid schemes will also be taken into account. Another element to take into account is the possible relocation effects of aid due to reduced production costs or higher production standards achieved through the aid.²³⁰

²²⁶Paras. 88–89 of the EEAG.

²²⁷Paras. 90–92 of the EEAG.

²²⁸Paras. 95–96 of the EEAG.

²²⁹Paras. 99 and 100 of the EEAG.

²³⁰Paras. 101–103 of the EEAG.

Transparency

To ensure transparency, Member States are required to publish information about aid schemes and individual aid decisions on a website. This includes details about implementing provisions, granting authority, beneficiaries, form and amount of the aid, date, type of beneficiaries, region of the beneficiaries, and main economic sector of beneficiaries. In line with the limitation period, this information should be available to the general public for 10 years. Only individual grants below €500,000 can be excluded.

4.2 *Specific Aid Measures*

The EEAG, having described the common assessment principles which need to be observed to determine whether the aid is compatible with the internal market, adapt this general framework to specific aid measures that can be adopted in respect of environmental protection and energy.

Aid to Energy from Renewable Sources

The framework established within the EEAG will apply until 2020, since it is expected that in the period between 2020 and 2030, renewable energy sources will become competitive and subsidies and exemptions from balancing responsibilities in their favour will be phased out.

Competitive bidding processes open to all generators producing electricity from renewable energy sources should ensure that subsidies are reduced to a minimum. However, some exceptions might be justified for smaller installations, installations at demonstration phase or based on the stage of technological development of the different renewable energy technologies.²³¹ Regarding food-based biofuels, the Commission will generally consider investment aid for new and existing capacity unjustifiable in view of the overcapacity prevalent in this market. However, investment aid to convert food-based biofuel plants into advanced biofuel plants is allowed to cover the costs of conversion. Operating aid to food-based biofuels can also be granted until 2020 under strict conditions. As regards biofuels subject to a supply or blending obligation, aid can be granted in relation to sustainable biofuels that are too expensive to come on the market.²³²

As regards aid for the production of hydropower, its impact can be positive in terms of lower greenhouse gas (GHG) emissions, although the negative effects may be measured in terms of water systems and biodiversity. Thus, the EEAG suggest

²³¹Paras. 109–111 of the EEAG.

²³²Paras. 112–114 of the EEAG.

that, when granting the aid for the production of hydropower, Member States must comply with the Water Framework Directive²³³ and, in particular, the criteria for allowing new modifications of bodies of water.²³⁴

Regarding renewable sources from waste, a core EU principle is the waste hierarchy,²³⁵ which prioritizes the ways in which waste should be treated. Provided that this principle is observed, State aid for energy from renewable sources using waste can also make a positive contribution to meeting environmental objectives.²³⁶

The general compatibility criteria apply to investment aid while Section 3.3.2 of the EEAG sets out additional provisions which apply to the granting of operating aid:

1. to electricity from renewable energy sources and energy from renewable sources other than electricity;
2. to aid for existing biomass plants;
3. to aid granted by way of certificates.

Regarding aid for electricity from renewable energy sources, the following cumulative conditions apply to new aid schemes and measures from 1 January 2016:

- a) the aid is granted as a premium that supplements the market price of the electricity sold directly in the market;
- b) the beneficiaries are subject to standard balancing responsibilities, provided that there are no liquid intra-day markets;
- c) measures are put in place to ensure that generators have no incentive to generate electricity under negative prices.²³⁷

²³³Directive No. 2000/60/EC of the European Parliament and of the Council of 23.10.2000 establishing a framework for Community action in the field of water policy, OJ L327 22.12.2000.

²³⁴Para. 117 of the EEAG; see also, among others, Commission Decision of 19.2.2015, in Case SA.39399 (2015/N) – The Netherlands Modification of SDE+ scheme and Commission Decision of 10.10.2016 in Case SA.41998 (2015/N) – Slovenia's support to electricity from renewable energy sources and combined heat and power installations, and support for electro-intensive users in the form of reductions in electricity support scheme contributions.

²³⁵The waste hierarchy consists of: (a) prevention, (b) preparation for re-use, (c) recycling, (d) other recovery, for instance energy recovery, and (e) disposal. See Article 4(1) of Directive No. 2008/98/EC of the European Parliament and of the Council of 19.11.2008 on waste and repealing certain Directives (Waste Framework Directive), OJ L312 of 22.11.2008. Para. 118 of the EEAG.

²³⁶See, among others, Commission Decision of 28.4.2016 in Case SA.43756 (2015/N) – Support to electricity from renewable sources in Italy, Commission Decision of 16.12.2015 in Case SA.36659 2013/N – Denmark: Aid for all forms of biogas use and Commission Decision of 22.8.2016 in Case SA.43451 (2015/N) – Czech Republic: Operating support for small scale biogas installations with capacity of up to 500 kW.

²³⁷Para. 124 of the EEAG, subject to exemptions for demonstration projects and smaller installations as defined in para. 125 of the EEAG.

In the transitional phase covering 2015 and 2016, competitive bidding is required for at least 5% of the planned new electricity capacity receiving State aid.²³⁸ From 2017 onwards, as a general rule, aid will be granted on the basis of a competitive bidding process unless the Member State concerned can demonstrate that: (1) only a single or a very limited number of projects or sites could be eligible; (2) a competitive bidding process would lead to higher support levels; or (3) a competitive bidding process would result in low project realization rates.

A competitive bidding process, which must be open to all generators producing electricity from renewable energy sources, can be limited to certain technologies if opening it to all generators would lead to sub-optimal results. In the absence of a competitive bidding process, the detailed compatibility conditions defined for financing energy from renewable sources other than electricity are also applicable.²³⁹ Lastly, aid can be granted until the plant has been fully depreciated and provided that any investment aid received has been deducted from the operating aid.²⁴⁰ Energy from renewable sources other than electricity is subject to additional compatibility conditions. The compatibility criteria under this section of the EEAG have been applied in two cases concerning Bulgaria and Luxembourg.²⁴¹

According to Section 3.3.2.3 of the EEAG, operating aid may be granted for the production of energy from biomass (including biogas) even after depreciation of the installation. This is because, unlike most other renewable sources, producing energy from biomass requires relatively low investment costs but higher operating costs. Hence, the EEAG defines compatibility criteria for aid that, even after depreciation of the installation, is justified because the operating costs may be higher than the revenues (the market price of the energy produced), or the use of biomass as an input source may be less economically advantageous than the use of fossil fuel.²⁴²

Another way to support renewable energy sources is using market mechanisms, such as green certificates, which allow all renewable energy producers to benefit from guaranteed demand for their energy. This type of aid will be deemed compatible by the Commission if the Member State concerned demonstrates that the aid: (1) is essential to ensure the viability of the renewable energy sources in question;

²³⁸Para. 126 of the EEAG; also see Commission Decision of 26.8.2016 in Case SA. 43995 (2015/N) – Malta Competitive Bidding Process for Renewables Sources of Energy Installations.

²³⁹Para. 128 of the EEAG.

²⁴⁰Para. 129 of the EEAG.

²⁴¹Para. 131 of the EEAG; also see Commission Decision of 4.8.2016 in Case SA.44840 (2016/NN) – Support for renewable energy generation in Bulgaria, and Commission Decision of 11.12.2015, SA. 40010 (2014/N) – Luxemburg: Modification du règlement grand-ducal sur le biogaz.

²⁴²Paras. 132–134 of the EEAG; also see Commission Decision of 15.2.2016 in Case SA.42218 (2015/N) – Finland: Operating aid for forest-chip fired power plants and Commission Decision of 16.12.2015 in Case SA.36659 2013/N – Denmark: Aid for all forms of biogas use.

(2) does not result in overcompensation; and (3) does not work as a disincentive for renewable energy producers to become more competitive.²⁴³

In general, it can be noted that in the first years of application of the EEAG there have been several decisions of the Commission approving aid to energy from renewable sources. While the assessment of these measures is more predictable under the EEAG, the number of decisions suggests that the GBER is not contributing adequately to the reduction of the notifications in relation to this aid category.

Energy Efficiency Measures, Including Cogeneration and District Heating and District Cooling

Under Section 3.4 of the EEAG, aid for heat and power cogeneration (CHP), district heating and district cooling contributes to a higher level of environmental protection only if granted for investment in high-efficiency CHP and energy-efficient district heating and district cooling (including upgrades), provided that the waste hierarchy principle is not circumvented in case of installations using waste as input fuel. The Commission considers that aid may be considered an appropriate instrument to finance energy efficiency measures, irrespective of the form in which it is granted, including repayable advances if the revenues from the energy-efficiency measure are uncertain and a financial instrument set up by the public authorities for funding renovation works.²⁴⁴ As for the proportionality, the Commission will consider operating aid for energy efficiency to be proportionate if:

1. the aid is limited to compensating for net extra costs resulting from the investment, taking account of benefits resulting from energy saving and provided that any investment aid received has been deducted from the operating aid; and
2. the duration of operating aid is limited to 5 years.

As regards the proportionality of operating aid for high-efficiency CHP, the compatibility criteria valid for operating aid for electricity from renewable energy sources apply in addition to the following:

1. the aid is granted only to undertakings generating electric power and heat to the public for which the production costs exceeds the market price; and
2. for the industrial use of the combined production of electricity and heat where it can be shown that the production costs of a unit of energy exceed the market price of a conventional unit of energy.

²⁴³Paras. 135–137 of the EEAG; also see Commission Decision of 2.8.2016 in Case SA. 37345 (2015/NN) – Poland: Polish certificates of origin system to support renewables and reduction of burdens arising from the renewables certificate obligation for energy intensive users and Commission Decision of 16.12.2016 in Case SA.46894 (2016/N) – Romania: Amendments to the green certificates support system for promoting electricity from renewable sources.

²⁴⁴Paras. 139–141 (objective of common interest) and paras. 145–147 of the EEAG (appropriateness).

As for the other compatibility assessment principles, the general provisions apply.²⁴⁵

The Commission has approved a scheme adopted by the French government that aims to support high-efficiency combined heat and power plants using natural gas, finding it compatible with the internal market under Section 3.4 of the EEAG.²⁴⁶ In this case, combined heat and power plants that generate up to 1 MW will receive support in the form of a premium on top of the market price, while plants up to 300 kW will receive support in the form of a feed-in tariff. The general objective of the measure is to promote the integration of electricity produced by combined heat and power plants. The Commission found that the aid was compatible with the internal market since it pursued an objective of common interest. Additionally, the Commission found that the other compatibility criteria were all fulfilled, given that, considering the low price of the electricity at the time of adoption of the decision, the high-efficiency combined heat and power plants would have never been capable of generating the revenue needed to cover the costs. Therefore, the operators would not have been able to carry out this investment with their own means without receiving any incentive to do so. The aid was therefore deemed necessary, appropriate, proportionate and capable of establishing an incentive effect and keeping the negative impact on competition to a minimum.

Aid for Resource Efficiency and in Particular Aid to Waste Management

Under Section 3.5 of the EEAG, the Commission recognizes that market failures are particularly relevant for resource efficiency. However, in order to demonstrate the need for State intervention in case of individual measures, Member States should demonstrate quantifiable benefits, for example, the amount of resources saved or the resource efficiency gains. For the proportionality and determination of aid intensities, an eco-innovation bonus may be available due to the close ties with new innovative methods of production.

As regards aid for waste management, aid designed by Member States should be consistent with the implementation of the established waste management plan²⁴⁷ and with the principle of waste hierarchy.²⁴⁸ Therefore, provided that specific conditions

²⁴⁵Paras. 142–144 (need for State intervention and incentive effect), paras. 148–149 (proportionality for investment aid) and paras. 150–151 of the EEAG (proportionality for operating aid).

²⁴⁶Commission Decision of 8.8.2016 in Case SA.43719 (2015/N) – France: Système d’aides aux cogénérations au gaz naturel à haute efficacité énergétique. See also Commission Decision of 19.9.2016 in Case SA.41539 (2016/N) – Lithuania: Investment aid for high-efficiency cogeneration power plant in Vilnius, UAB Vilniaus kogeneracinė jėgainė.

²⁴⁷Article 28, Directive No. 2008/98/EC of the European Parliament and of the Council of 19.11.2008 on waste and repealing certain Directives, OJ L 312 of 22.11.2008.

²⁴⁸Para. 188 of the EEAG.

listed in the EEAG are fulfilled,²⁴⁹ the Commission will consider aid for waste management to serve an objective of common interest. Additionally, the Commission specifies that if the aid is not intended for the management of the waste generated by other undertakings but for the management of the beneficiary's own waste, it will be assessed on the basis of the general criteria applicable to aid for undertakings that go beyond EU standards or increase environmental protection in the absence of Union standards.²⁵⁰

The Commission has approved a measure adopted by the French government that aims to support producers of electricity from mine gas through a purchase obligation.²⁵¹ The Commission has taken into consideration that, at the time of the decision, no installations producing electricity from mine gas were active, thus allowing the mine gas to be subject to a process of combustion in the air, leading to the emission of methane, which is harmful to the environment. Through the scheme approved, the measure aimed on the one hand at protecting the environment, and on the other at using this resource to produce electricity.

Aid to Carbon Capture and Storage (CCS)

To promote the long-term decarbonization objectives, the Commission considers that aid for CCS contributes to the common objective of environmental protection. There is a presumption that aid is appropriate for both investment and operating aid. It can be granted in relation to industrial installations and power plants using fossil fuels or biomass that are equipped with elements of the CCS chain, provided that aid to support the costs of CCS projects does not include aid for the CO₂-emitting installations as such and that aid is limited to the additional costs for capture, transport and storage of the CO₂ emitted.

In this area, the counterfactual scenario must refer to a situation where the project is not carried out; therefore, the eligible costs are defined as the funding gap but including all revenues in the calculation, for example the cost savings from the reduced need for emission allowances. The general compatibility assessment principles apply for the remaining aspects, taking into account the dissemination of

²⁴⁹Para. 158 of the EEAG lists the following cumulative conditions: "(a) the investment is aimed at reducing waste generated by other undertakings and does not extend to waste generated by the beneficiary of the aid; (b) the aid does not indirectly relieve the polluters from a burden that should be borne by them under Union or national law, such a burden should be considered a normal company cost for the polluters; (c) the investment goes beyond the state of the art, i.e., prevention, re-use, recycling or recovery or uses conventional technologies in an innovative manner notably to move towards the creation of a circular economy using waste as a resource; (d) the materials treated would otherwise be disposed of, or be treated in a less environmentally friendly manner; and (e) the investment does not merely increase demand for the materials to be recycled without increasing collection of those materials".

²⁵⁰Paras. 156–159 of the EEAG.

²⁵¹Commission Decision of 12.12.2015 in Case SA. 40713 (2015/N) – France: Mesure adoptée par la France pour soutenir la production d'électricité à partir du gaz de mine.

knowledge, third-party access and effects on other installations of the beneficiary when assessing the distortive effects of the aid.²⁵²

Aid in the Form of Reductions in or Exemptions from Environmental Taxes and in the Form of Reductions in Funding Support for Electricity from Renewable Sources

Concerning environmental taxes, the Commission restates that the overall objective is to discourage environmentally harmful behaviour. Although reductions in or exemptions from environmental taxes may undermine this objective, they may be necessary when it would not be feasible to introduce the environmental tax in the first place. A more favourable treatment in relation to some undertakings may allow a higher general level of environmental taxes leading to a higher level of environmental protection. Aid schemes may be authorized if they last no longer than 10 years subject to a revaluation of their appropriateness.²⁵³

As regards reductions in and exemptions from environmental taxes, the Commission makes a distinction between harmonized and non-harmonized taxes (specific compatibility criteria apply in the case of taxes designed in a way to be directly linked to the carbon emission allowance prices). In the first case, the Commission can consider the measure necessary and proportional if:

1. beneficiaries, which must be chosen through objective and transparent criteria, pay at least the minimum tax level set by EU law (otherwise aid must comply with the criteria that apply to non-harmonised taxes); and
2. the aid is granted in the same way—tax refunds being preferred over tax rate reductions in order to preserve the price signal of the environmental tax—for all competitors in the same sector if they are in a similar factual situation.

In the second case, the Commission will review the necessity and proportionality of the measure in detail. The measure could be considered necessary and proportional if the abovementioned criteria are met (except for the payment of the minimum amount of tax required), and if:

1. the environmental tax, without the reduction, leads to a substantial increase in production costs as a proportion of the gross value added (GVA) for each sector or category of beneficiaries;
2. the substantial increase in production costs cannot be passed on to customers without leading to a significant reduction in sales; and
3. beneficiaries pay at least 20% of the national environmental tax; or the tax reduction is conditional on the conclusion of agreements between a Member

²⁵²Paras. 160–166 of the EEAG.

²⁵³Paras. 167–180 (reductions in or exemptions from environmental taxes) and paras. 181–200 of the EEAG (reductions in funding support for electricity from renewable sources).

State and beneficiaries, which achieve environmental protection objectives with the same effect as a 20% national tax.

The Commission has also dealt with reductions in the funding of support for energy from renewable sources which can be allowed in order to avoid undertakings affected being put at a significant competitive disadvantage. In this case, Member States are required to demonstrate that the additional costs reflected in higher electricity prices faced by the beneficiaries result only from the support to energy from renewable sources. Additionally, the beneficiaries should belong to sectors identified in the EEAG as being particularly exposed to a risk to their competitive position due to the costs resulting from the funding of support to energy from renewable sources as a function of their electro-intensity and their exposure to international trade. Undertakings in other sectors can receive aid if they have an electro-intensity of at least 20% and belong to a sector with a trade intensity of at least 4% at EU level. The aid should be available to beneficiaries in the same sector based on objective, non-discriminatory and transparent criteria with additional safeguards for competitors in the same sector. For the measure to be considered proportional, beneficiaries should pay at least 15% of the additional costs without reduction. However, Member States may limit the amount paid by beneficiaries to 4% of their respective GVA or, for undertakings with electro-intensity of at least 20%, to 0.5% of their respective GVA.

The compatibility criteria for aid granted to reduce the burden related to funding support for electricity from renewable sources will be applicable by 1 January 2019 at the latest. Moreover, the Commission considers that such aid granted prior to 2019 can be declared compatible to the extent that it complies with an adjustment plan, which must entail progressive adjustment to the aid levels resulting from the application of the eligibility and proportionality criteria.

Although the investigation started before the adoption of the EEAG, it is worth mentioning the Commission's review of the German measure set out in the EEG Act 2012 and its implementing regulations to grant an exemption from levies to finance renewables. In December 2013, State aid proceedings were launched.²⁵⁴ On 25 November 2014, the Commission decided that aid granted for the years 2013 and 2014 under the EEG Act involved State aid that had to be assessed under the EEAG. This measure has been considered largely in line with EU State aid rules. However, the Commission found a limited portion of the reductions exceeding what is permitted under EU State aid rules and ordered a partial recovery for the years 2013 and 2014. On 2 February 2015, Germany brought an annulment action against the decision and the General Court dismissed the action concluding that the reduction in the EEG surcharge for electricity-intensive undertakings conferred an

²⁵⁴The opening decision was challenged before the European Courts and was later withdrawn in April 2015, following the adoption by the Commission of the decision concluding the formal investigation.

advantage involving State resources.²⁵⁵ The German government has appealed the judgment before the Court of Justice.²⁵⁶

The Commission has adopted a few decisions on aid in the form of reductions in or exemptions from environmental taxes and in the form of reductions in funding support for electricity from renewable sources. In 2014, the Commission found that the Romanian green certificate reduction scheme, which reduced contributions to the financing of renewable energy of certain energy-intensive users, was in line with EU State aid rules.²⁵⁷ As regards eligibility, the beneficiaries would need to show that they:

1. do not have debts to the general consolidated budget of the State;
2. carry out energy audits and implement measures to improve their energy efficiency;
3. do not lay off more than 25% of the employees and maintain activities in the EEA; and
4. conclude partnerships with educational institutions in order to narrow the theory-practice gap, increase professional levels and attract skilled personnel.

The Commission concluded that reductions are limited to companies active in sectors recognized by the EEAG as being both energy-intensive and exposed to international trade. Additionally, it was also confirmed that the conditions to select eligible beneficiaries are objective, transparent and do not discriminate between companies that are in a similar factual situation.

Similarly, in 2015, the Commission approved amendments proposed by Germany to the Renewable Energy Act (EEG 2014).²⁵⁸ The EEG 2014, approved by the Commission in July 2014, provides support for the production of electricity from renewable energy sources and from mining gas and reduces the financial burden on certain energy-intensive users by lowering their level of payment of the EEG surcharge. The proposed amendments allow individual companies active in two sectors (forging and treatment and coating of metals) to benefit from reduced levels of the EEG surcharge. The Commission concluded that, although not included in the list defined by the EEAG, these sectors are particularly exposed to international competition, and therefore individual energy-intensive companies active in these sectors are eligible to benefit from the reductions to the EEG surcharge.

In addition to the abovementioned decisions, the Commission has approved the Bulgarian scheme to compensate energy-intensive users for part of the surcharge to

²⁵⁵Judgment of 10.5.2016, *Germany/European Commission*, Case T-47/15, ECLI:EU:T:2016:281.

²⁵⁶*Germany/European Commission*, Case C-405/16 P, still pending before the Court of Justice.

²⁵⁷Commission Decision of 15.10.2014 in Case SA.39042 (2014/N) – Romania: RES support reduction for energy-intensive users.

²⁵⁸Commission Decision of 27.5.2015 in Case SA.41381 2015/N – Germany: Relief from the EEG surcharge for companies in NACE sectors 25.50 and 25.61.

finance the support for renewable electricity,²⁵⁹ the French scheme²⁶⁰ and the Slovenian scheme.²⁶¹

Aid to Energy Infrastructure

In principle, aid to energy infrastructure should be granted in the form of investment aid, including aid for modernization and upgrading. Modern energy infrastructures are crucial for an integrated energy market and the development of infrastructures is a precondition for a functioning energy market. Therefore, if market operators are unable to establish the needed infrastructure (for example due to diverging interests among the investors, uncertainty about the collaborative outcome and network effects), State aid may be necessary in order to overcome market failures and contribute to an objective of common interest. Usually market failures in this area are addressed via tariff and access regulation and unbundling requirements. However, for smart grids, infrastructure investments in assisted areas, and projects of common interest—which are those projects necessary to implement the energy infrastructure priority corridors and areas, as defined under Regulation No. 347/2013²⁶²—the market failures in terms of positive externalities and coordination problems are such that State aid may be necessary and appropriate. For infrastructures falling outside these three categories (or partially outside these categories) the assessment of necessity by the Commission will be made on a case-by-case basis, taking into account factors such as:

1. to what extent a market failure leads to a sub-optimal provision of the necessary infrastructure;
2. to what extent the infrastructure is open to third-party access and subject to tariff regulation; and
3. to what extent the project contributes to the EU's security of energy supply.

The common assessment principles apply, bearing in mind some specific features, such as the fact that the counterfactual scenario would be a situation in which the project does not take place. Thus, the eligible cost is the funding gap, and aid intensity should not exceed 100% of the eligible costs. The Commission will consider that undue distortive effects do not arise if aid for energy infrastructure is

²⁵⁹Commission Decision of 4.8.2016 in Case SA.45861 (2016/N) – Bulgaria: Support to energy-intensive users in the form of a reduced surcharge.

²⁶⁰Commission Decision of 11.8.2016 in Case SA.43468 (2016/NN) – France: Taux réduits de taxe intérieure sur la consommation finale d'électricité.

²⁶¹Commission Decision of 10.10.2016 in Case SA.41998 (2015/N) – Slovenia's support to electricity from renewable energy sources and combined heat and power installations, and support for electro-intensive users in the form of reductions in electricity support scheme contributions.

²⁶²Regulation (EU) No. 347/2013 of 17.4.2013 on Guidelines for trans-European energy infrastructure and repealing Decision No. 1364/2006/EC and amending Regulations (EC) No. 713/2009, (EC) No. 714/2009 and (EC) No. 715/2009, OJ L 115 of 25.4.2013, p. 39.

subject to internal market legislation but a case-by-case analysis will be necessary for projects partially or wholly exempted from such legislation and underground gas storage facilities.²⁶³

In July 2015, the Commission approved aid for nine gas projects in Poland.²⁶⁴ These projects aimed at building a true energy Union by increasing gas interconnection capacity between Poland and neighbouring countries, by eliminating bottlenecks and by reinforcing the existing Polish gas transmission network. It was concluded that these measures could not have been implemented without public funding. The Commission also approved aid for an LNG terminal in Finland, which was found to contribute to environmental protection and to the security of gas supply while maintaining competition in the single market.²⁶⁵ The Finnish project aimed at improving security of energy supply in the region and at contributing to the reduction of carbon dioxide emissions.

Aid for Generation Adequacy

Market and regulatory failures may cause insufficient investments in generation capacity—a situation that is likely to occur where wholesale prices are capped and electricity markets fail to generate sufficient investment incentives. Therefore, measures are necessary to support generators able to ensure generation adequacy, which refers to a level of generation capacity deemed adequate to meet demand levels in any given period. The measures may grant operating and investment aid pursuing a variety of objectives (short-term or not) provided that the generation adequacy problem is clearly identified in a manner consistent with generation adequacy analysis carried out regularly by the European Network of Transmission Operators. The aid is appropriate if it remunerates only the service of pure capacity availability provided by the generator, that is, the commitment to be available to deliver electricity, without any remuneration for the sale of electricity, and it introduces adequate incentives to both existing and future generators, including those using substitutable technologies. The calculations of the overall amount of aid should result in beneficiaries earning a reasonable rate of return, and a competitive bidding process will usually be considered as leading to reasonable rates of return. The measure must be designed so as to ensure that the price paid for the availability automatically tends to zero when the level of capacity supplied is expected to meet the level of capacity demanded. For the avoidance of undue negative effects on competition and trade, the measure should allow the participation of any capacity which can effectively contribute to addressing the generation adequacy problem

²⁶³Paras. 201–215 of the EEAG.

²⁶⁴Commission Decision of 17.7.2015 in Case SA.39050 (2015/N) – Poland: Individual Aid Measure for Gas Infrastructure in Poland.

²⁶⁵Commission Decision of 18.3.2016 in Case SA.42889 – Finland: Individual aid to LNG infrastructure (Hamina).

while ensuring compliance with detailed assessment criteria defined in the EEAG.²⁶⁶

Capacity mechanisms are measures taken by Member States to ensure that electricity supply can match demand in the medium and long term. They are designed to fill the expected capacity gap and ensure security of supply. Typically, capacity mechanisms offer additional rewards to capacity providers, on top of income from selling electricity on the market, in return for maintaining existing capacity or investing in new capacity needed to guarantee security of electricity supply. These measures may involve State aid and, on this basis, the Commission launched a sector inquiry on 29 April 2015 into national capacity mechanisms.²⁶⁷

The first decision on a national capacity mechanism adopted under the EEAG concerned the United Kingdom's capacity mechanism for Great Britain.²⁶⁸ In this case, the Commission concluded that the UK capacity mechanism was in line with the criteria set out in the EEAG because the mechanism was shaped in a way that ensured that sufficient electricity supply was available to cover consumption at peak times. The UK system operator was in charge of organizing annual centrally-managed auctions to procure the level of capacity required to ensure generation adequacy. Auctions were open to both existing and new generators, demand-side response operators and storage operators. Successful bidders in the auction were required to provide capacity at times of stress on the electricity system or face financial penalties. Aid represents a function of the amount of capacity set out in each provider's capacity agreement and the measure should be financed through a levy on electricity suppliers.

The Commission has also decided not to raise any objections and thus declared the transitory electricity flexibility remuneration mechanism adopted by Greece to compensate certain electricity generators for the provision of "flexibility services" to the Greek electricity transmission system operator (TSO)²⁶⁹ compatible with the internal market. In particular, on instructions from the TSO, beneficiaries increase or decrease the amount of electricity injected into the electricity system at a specified minimum rate on a multi-hour timescale. The objective of the measure is to ensure sufficient provision of flexibility services which would be at risk should the plants able to provide those services be retired. The measure aims at minimizing that risk by providing economic incentives for the provision of flexibility services. The Commission concluded that the measure addresses market or regulatory failures that cannot be more appropriately addressed in the near term, contributes to an objective of common interest, has an incentive effect and is transparent. Additionally, the Commission considered the measure appropriate since it only compensates for

²⁶⁶ Paras. 216–233 of the EEAG.

²⁶⁷ See http://ec.europa.eu/competition/sectors/energy/state_aid_to_secure_electricity_supply_en.html.

²⁶⁸ Commission Decision of 23.7.2014 in Case SA.35980 (2014/n-2) – United Kingdom: Electricity market reform – Capacity mechanism.

²⁶⁹ Commission Decision of 31.3.2016 in Case SA.38968 (2015/N) – Greece: Transitory Electricity flexibility remuneration mechanism (FRM).

availability of capacity, is open to both new and existing generators meeting the eligibility criteria and, although not open to demand-side response and interconnected capacity, Greek authorities provided commitments in this regard. Moreover, the measure is considered proportional, given that:

1. the mechanism has a limited duration before a capacity mechanism based on competitive bidding may be introduced;
2. the maximum available budget is lower than the system's opportunity costs;
3. the remuneration paid to the main providers of flexibility services is lower than the cost of providing the service;
4. the amount of eligible hydro capacity was estimated simulating dry weather conditions; and
5. a cap applies on the remuneration to be paid to individual beneficiaries.

Finally, the Commission concluded that the measure does not result in undue distortion of competition and trade.

In addition, the Commission approved the French plans to give aid to *Compagnie Electrique de Bretagne* (CEB) for the construction of a gas-fired power plant in Brittany, but subject to conditions.²⁷⁰ In this case, CEB won the tender for the construction of this power plant, which also provided for a subsidy of €94,000 per megawatt per year for a period of 20 years in return for a commitment from the plant operators to ensure electricity generation when required by the network operator. The aim of this measure was to address concerns regarding the security of electricity supply in Brittany. At the end of the investigation, the Commission found the aid compatible with the internal market in light of the EEAG, since France demonstrated that the measure was fundamental to ensuring sufficient voltage levels in a specific part of the electricity network and the aid amount is proportionate given the expected rate of return of the beneficiary. However, in order to avoid any distortion of competition, the Commission made its approval subject to the condition that CEB will not sell output from that power plant to any undertaking with a share of more than 40% of the electricity generation capacity in the French market.

Finally, the Commission decided not to raise objections and to approve the German Network Reserve for ensuring security of electricity supply.²⁷¹ The measure involved paying operators of power plants that were planning to close down but that were essential for the balance of the electricity system for remaining available to the network. The Commission classified it as a capacity mechanism and authorized it in accordance with the EEAG, since State intervention was necessary in response to internal congestion in the German electricity grid that hinders sufficient power flows from Northern to Southern Germany.

²⁷⁰Commission Decision of 15.5.2017 in Case SA.40454 2015/C (ex 2015/N) – France: Tender for additional capacity in Brittany.

²⁷¹Commission Decision of 20.12.2016 in Case SA.42955 (2016/N-2) – Germany: Network Reserve.

Aid in the Form of Tradable Permit Schemes

Tradable permit schemes can be set up to reduce emissions but they should go beyond the environmental objectives to be achieved on the basis of mandatory Union standards. They can involve State aid, particularly when Member States grant permits and allowances below their market value. If the global amount of permits granted by a Member State is lower than the global expected needs of undertakings, the overall effect on the level of environmental protection will be positive. From the perspective of each undertaking, if the allowances granted do not cover all expected needs of the undertaking, the undertaking must either reduce its pollution, therefore contributing to the improvement of the level of environmental protection, or buy supplementary allowances on the market, therefore paying compensation for its pollution.²⁷² The EEAG describe the cumulative compatibility conditions that must be fulfilled in relation to the definition of environmental objectives, and the requirements of transparency and non-discrimination of the allocation methodology. It also covers the necessity and proportionality criteria that must be met.²⁷³

Aid for the Relocation of Undertakings

The aim of investment aid for the relocation of undertakings is to create individual incentives to reduce negative externalities by relocating undertakings that create major pollution to areas where this pollution will have a less damaging effect. The aid may be justified if the relocation is made for environmental reasons, but aid granted for relocation for any other purpose should be avoided.

Provided that the general compatibility assessment principles related to the incentive effect and to transparency are observed, the EEAG set out criteria to fulfil as regards the type of beneficiaries of the aid, aid intensities, and the costs and benefits to be taken into account to determine the amount of eligible costs.²⁷⁴

5 Conclusions

The modernization of State aid law is based on the idea that, from a common interest perspective, there is wide scope for improving the allocation of State financial resources devoted to supporting businesses throughout the EU. The challenge, however, is to attain the efficiency objective at a reasonable administrative cost, that is, with the limited resources currently available at the Directorate-General for

²⁷²Para. 234 of the EEAG.

²⁷³Paras. 235 and 236 of the EEAG.

²⁷⁴Paras. 237–241 of the EEAG.

Competition of the European Commission. Indeed, the underlying principle is that State aid control and enforcement can be effective only if exercised at a level that permits the internalization of all the relevant assessment factors, including the spillover effects of national measures and budgetary discipline considerations.

This issue has not, however, arisen from the SAM initiative. It has actually been a recurring problem in shaping State aid rules and policy ever since the first modernization initiatives back in 1998—and was at the heart of the 2005–2009 State Aid Action Plan and the Lisbon strategy, which were followed by Agenda 2020. The enlargement of the EU at the beginning of the century and the 2008 financial and economic crisis have only increased the challenge, which can be summarized as follows:

1. to make the best possible use of the Commission's resources to increase the overall effectiveness of public spending in the common interest; and
2. direct resources to the essential objectives of fostering growth and employment.

Clearly, this challenge can be met only by allocating appropriate human resources at law-making level, by incorporating the desired common economic objectives at the same level, and by replacing *ex ante* with *ex post* control as much as possible. However, this in turn requires some degree of cooperation from Member States and other stakeholders. This is especially true for strategic sectors such as the energy sector, which are highly regulated and concentrated on the supply side.

Therefore, a proper assessment of the achievements of the SAM initiative can be drawn by looking at stakeholders' behaviour and the resulting economic effects. This, however, could not be covered in this chapter, which is naturally limited to a review of the relevant law provisions, focusing on how the modernization objectives shaped the related rules and the Commission's practice in the energy sector. It is now time to raise the question of whether the rules have been appropriately shaped in view of the objectives underpinning the SAM initiative.

The growth objective underpinning the SAM initiative can be considered achieved at least as regards energy and environmental projects—and this despite the regulatory complexity of the sector and the inherent challenges of a transition to a market design that accommodates the increased role of RES in energy production. However, as the transition to a low-carbon economy will bring about fundamental changes in the energy sector, this assessment is only provisional. Unless State aid rules are constantly upgraded to adapt to rapidly changing market conditions, any positive impact in terms of growth-enhancing policies achieved by the SAM initiative will be rapidly eroded.

The Notion of Aid Notice, in contrast, has not made any significant contribution to the Europe 2020 strategy for sustainable growth, at least in relation to energy and environmental projects. Indeed, in relation to the objective of delivering streamlined rules and faster decisions, the Notion of Aid Notice merely confirms the status quo as regards the complex assessment of the constitutive elements of the notion of aid, particularly regarding the existence of State resources, which is one of the most difficult issues facing energy and environmental projects. The Notion of Aid Notice is, in fact, one of the most extensive interpretative exercises carried out by the

Commission concerning the application of State aid rules, yet it has not brought about any noticeable improvements in terms of legal certainty for energy projects. Consequently, it cannot be considered an instrument that promotes investment in the energy sector.

The EU courts' preminent role in interpreting primary law may explain the Commission's conservative approach in the Notion of Aid Notice. However, it is regrettable that the Commission did not seize the opportunity to strike a balance between fostering sustainable growth and ensuring effective enforcement of EU law. For example, interpretative principles could have been introduced to acknowledge that (until legal uncertainty is removed by developments in case law or the decisional practice of the Commission) no risk of recovery exists for public interventions supporting certain types of investment.

As far as energy and environmental projects are concerned, public support for infrastructures is the only area in which the Notion of Aid Notice provides guidance, albeit limited, for investors in energy projects. However, the specific case of energy infrastructure assets open to third-party access has not been thoroughly examined in the guidance provided by the Commission, despite the fact that these assets are not very different from some types of transport infrastructures that fall outside the scope of application of State aid rules. Only developments in case law will be able to remove the legal uncertainty as to whether State aid rules can apply to this type of energy infrastructure.

As regards the EEAG, the improved compatibility criteria and the greater focus on economic efficiency make the assessment of notifiable projects more predictable. It also introduced incentives for the design of more targeted and effective public support measures. However, due to the inherent complexity of economic assessments and the greater reliance on the aid beneficiaries' internal documents, the compatibility assessment of notifiable projects is not likely to be straightforward. But the improved criteria will lead to greater effectiveness in the design of aid measures and improved efficiency in the use of public resources—even though these positive effects will be somewhat offset by longer pre-notification discussions and more complex economic assessments of projects in some cases. This, unfortunately, is obviously likely to discourage large investments or, if they can be block-exempted by the GBER, lead to an inefficient downsizing of projects to bring them below notification thresholds.

On a more positive note, one of the most important contributions made by the EEAG to the Europe 2020 strategy for sustainable growth is the revised compatibility criteria for the design of operating aid to promote the introduction of RES electricity production. The EEAG outlines a comprehensive framework to develop electricity from renewables that also aims to offset possible negative market effects. This has been achieved by introducing a compatibility framework to assess public interventions to ensure security of supply and prevent delocalization of industry due to the costs of promoting renewables. A compatibility framework under State aid rules—even though not the ideal instrument to define policies in the energy sector—can help coordinate national responses to reduce market distortions during the transition from fossil fuel technologies to renewable energy technologies.

In relation to operating aid for RES electricity production, the EEAG has chosen to gradually expose RES producers to market conditions. This is a trade-off between preserving a functional electricity market and promoting the rapid development of RES electricity production. Clearly, premature exposure of RES producers to market forces could slow down development of clean and sustainable technologies; on the other hand, however, gradually exposing RES electricity producers to market forces is necessary to avoid most of the electricity production business becoming regulated without effective competition. On the assumption that preserving competitive markets is the best policy to achieve sustainable growth in the long term, this aspect of the EEAG is a positive development despite the risk of RES electricity production from more mature technologies slowing down in the short term.

Another positive aspect of the EEAG that contributes to the Europe 2020 strategy for sustainable growth concerns the incentives to use market-based mechanisms, which improve the efficiency of public spending. One of the most important aspects in this respect is the possibility to avoid notifications for individual aid granted under a notified scheme, irrespective of the amount involved, if the aid is granted based on public procurement rules.

Turning now to the GBER, it is clear that, at least for energy and environmental projects, it has been by far the most successful instrument to promote the Europe 2020 strategy for sustainable growth. The increased thresholds and the new categories of aid covered by the GBER provide legal certainty for the implementation of projects without the need for prior notification. To a certain extent, the shortcomings of the Notion of Aid Notice have been offset by the GBER's wide scope of application. In several cases, the question of whether State aid rules apply to certain public interventions will become moot as, even if the measure does qualify as State aid, it would be block-exempted under the GBER.

Obviously, the fact that more projects will be implemented under the GBER without any prior control by the Commission increases the risk of abusive implementation/application of the rules—not to mention the compliance risks for the recipients. But overall, the trade-off between increased efficiency in project implementation and compliance risks can be considered reasonable. The reinforced transparency requirements make it more likely that block-exempted projects will be subject to complaints and investigations by the Commission. However, increased compliance costs by aid beneficiaries can be considered a small price for the advantages of being able to implement projects without prior notification. Finally, the introduction of a requirement of *ex post* assessment for aid schemes with large budgets ensures that schemes implemented without prior control by the Commission can be renewed only if evidence exists of a positive effect on the market or, at least, if improvements are made to their design. This greater emphasis on the actual effects of schemes in the market can certainly contribute to more efficient public spending and the reduction of market distortions.

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Public Policies for Financing the Deployment of Broadband and Very High-Speed Broadband Networks and EU Rules on State Aid Control

Mario Siragusa and G. Cesare Rizza

1 Introduction

As stated in the Europe 2020 Strategy,¹ the provision of widespread and affordable access to high-speed Internet infrastructure² and services is of strategic importance for the EU's smart, sustainable and inclusive growth. The deployment of high-speed

¹Communication from the Commission “Europe 2020: A strategy for smart, sustainable and inclusive growth” (COM(2010) 2020 final, 3 March 2010), <http://eur-lex.europa.eu/legal-content/EN/TEXT/PDF/?uri=CELEX:52010DC2020&from=en>.

²Access to the Internet via broadband (so-called basic access) can be provided through: existing copper networks (mainly telephone networks, in which case it is called a *Digital Subscriber Line*, DSL), coaxial networks (cable television) or wireless access networks. The access speed using this type of “traditional” network does not exceed 2 Mbps. The expression “next generation access networks” (NGA networks) refers to all fixed networks that provide access to the Internet at a higher speed than basic broadband. This includes: modernized coaxial networks (DOCSIS 3.0 standard), VDSL technology (*Very High Speed DSL*, which uses copper networks such as ADSL), and fibre (which reaches the end user's premises: so-called *Fibre-to-the-home* (FTTH); which reaches the end user's building: so-called *Fibre-to-the-building* (FTTB); or which reaches a street cabinet: so-called *Fibre-to-the-nodes* (FTTN) or *Fibre-to-the-cabinet* (FTTC)). With regard to broadband or NGA network infrastructure it is usual to distinguish between the *backhaul*, which constitutes the part of the network that goes from the backbone to the access network, and the access segment (or “last mile”), which constitutes the final part of the network connecting the *backhaul* with the end-user premises. Because of the high costs of roll-out, fibre networks are almost always a “hybrid”: in fibre in the backhaul segment and in copper (DSL) in the access segment.

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networks and Internet services today has the same revolutionary impact that the utilization of electricity and transport networks had a century ago.³

For these reasons, in 2010 the Digital Agenda for Europe (the “DAE”)⁴ set the objective of creating a digital single market based on high-speed and very high-speed Internet, which entailed bringing the basic broadband network to all Europeans by 2013 and ensuring much higher Internet speeds of above 30 Mbps—and, for at least 50% of European households, above 100 Mbps—by 2020.

In September 2016, following a public consultation on the needs for Internet speed and quality beyond 2020,⁵ the European Commission (the “Commission”) established a new set of objectives for network deployment by 2025.⁶ While the 2010 objectives remain valid up to 2020, the Commission proposed that, by 2025:

- (i) all schools, transport hubs and main providers of public services should have access to Internet connections with download/upload speeds of 1 Gigabit of data per second;
- (ii) all European households should have access to networks offering a download speed of at least 100 Mbps;
- (iii) all urban areas, major roads and railways should have uninterrupted 5G wireless broadband coverage.

By way of background, it is important to note that the telecommunications sector, having been historically subject to public control, underwent a gradual process of liberalization culminating in the full liberalization of all telecommunications networks and services in the EU in 1998. Because of the opening up to competition achieved in electronic communications, it is particularly important that public interventions be complementary and do not substitute investment by market players, that commercial investment incentives be protected, and that, ultimately, competition not be distorted to an extent contrary to the common interest of the EU.⁷

³Communication from the Commission, European Broadband: investing in digitally driven growth, COM (2010) 472 final, para. 1.

⁴Communication from the Commission, A Digital Agenda for Europe, COM (2010) 245 final/2, 26 August 2010.

⁵The public consultation took place from 11 September to 7 December 2015. See: <https://ec.europa.eu/digital-single-market/en/news/full-synopsis-report-public-consultation-needs-internet-speed-and-quality-beyond-2020>.

⁶Communication from the Commission, Connectivity for a Competitive Digital Single Market—Towards a European Gigabit Society, COM (2016) 587 final, the “EGS Communication”.

⁷In the broadband sector in question, three types of competitive dynamics can be identified: (i) infrastructure competition, which implies the existence of more than a passive network infrastructure—such as civil engineering infrastructure, ducts, “dark” fibre (unlit, without transmission systems connected) and street cabinets—branching out in parallel in the same catchment area; (ii) competition between network operators within a single passive network infrastructure when, on the basis of obligatory wholesale access to passive components required by the competent regulatory authority, the owner operator of the duct (normally the *incumbent* operator of electronic communications) is required to allow access and cables roll-out to any competing operator, at its request; and (iii) competition in the downstream market for the provision of services in the sector of

The main actor in the deployment of network infrastructure and high-speed Internet services must, therefore, be the market. However, in light of the forecasts of the Commission,⁸ it is not possible to achieve the abovementioned objectives in an effective and timely manner without intervention by public resources at national level, although any such intervention must be subsidiary in nature and stimulate private investment. In this context, with the DAE and the EGS Communication, the Commission invited the Member States to develop and operationalize (or promptly review the existing⁹) strategies to achieve the targets for coverage and speed of the broadband network, providing, if necessary, for the use of State resources, whilst respecting the rules of the Treaty on the Functioning of the European Union (the “TFEU”) on competition and State aid control.

Indeed, under certain conditions, State aid can correct possible market failures, thereby improving the functioning of markets and enhancing competitiveness. Furthermore, where markets provide efficient outcomes but these are deemed unsatisfactory from the point of view of cohesion policy, State aid may be used to obtain a more desirable and equitable outcome. In particular, well-targeted State intervention in the broadband field can contribute to reducing the “digital divide”¹⁰ between geographic areas where accessible and competitive broadband services are on offer and areas where they are not.

All Member States have adopted such strategies,¹¹ and it is expected that recourse to public funds will increase, particularly in development projects relating to areas where commercial operators have no incentive to invest, or in projects concerning very high-speed broadband networks (so-called next generation access networks, NGA networks), which, as indicated below, entail very substantial investment.

This article discusses the principles that the Commission applies when enforcing State aid rules with regard to public measures supporting the deployment of broadband and/or NGA networks.¹² These principles were codified in its Guidelines for

television, telephony and broadband or very high-speed broadband access to the Internet, in the presence of bitstream access (i.e., where the duct owner and provider of wholesale access up to the customer’s home network makes available to interested third parties the high-speed access link installed by it): Kliemann and Stehmann (2013), pp. 497 and 498.

⁸The Commission estimated that reaching the abovementioned objectives for 2025 will require an overall investment of c. €500 billion over the coming decade, representing an additional €155 billion over and above a simple continuation of the current trend of investments necessary to achieve the objectives for 2020: EGS Communication, para. 4.

⁹Member States shall review and update National Broadband Plans with a time horizon to 2025, in line with the strategic objectives set in the EGS Communication: EGS Communication, para. 4.5.

¹⁰This term refers to the unequal situations of those who have access to certain technologies compared to those who do not. The main cause of digital divide is the lack of adequate infrastructure in the area, often linked to the territory’s morphological characteristics and the resulting degree of urbanization.

¹¹Communication from the Commission, European Broadband: investing in digitally driven growth, COM (2010) 472 final, para. 3. See also <https://ec.europa.eu/digital-agenda/high-speed-broadband>.

¹²See generally Quigley (2015), p. 53 (notion of State aid) and p. 442 (aid to broadband and telecommunications connectivity).

the application of State aid rules in relation to the rapid deployment of broadband networks, adopted in 2009¹³ and amended in 2013,¹⁴ and have been applied in more than 150 cases to date.¹⁵

This examination of the most relevant provisions of the EU regulatory framework is completed by references to the most important Commission decisions, with special attention given to Italian cases. Finally, a brief overview is devoted to the strategy adopted by the Italian Government for the development of broadband and/or NGA networks.

2 Notion of Aid in Support of Broadband and Compatibility with the Internal Market

2.1 Broadband Networks and State Resources

Most of the cases examined by the Commission in the broadband sector concern direct monetary grants that benefit market operators when building, managing and/or commercially exploiting a network.¹⁶

Public resources can also be granted in the form of compensation. A typical case in the context of the deployment of broadband or NGA networks involves the State construction of a passive network housing the electrical cables of the broadband network. In this way, the State gives private operators a very substantial advantage, allowing them not to bear the investment costs required to build the network, which can constitute up to 70% of the total cost of a project. The Commission assessed an initiative (worth approximately €200 million) for the deployment of a passive network infrastructure aimed at providing broadband services in the rural areas of Lombardy disadvantaged by the so-called digital divide.¹⁷ In view of the high costs

¹³OJ 2009, C 235/7 (the “2009 Guidelines”).

¹⁴OJ 2013, C 25/01 (the “2013 Guidelines”).

¹⁵According to the latest available data, (http://ec.europa.eu/competition/sectors/telecommunications/broadband_decisions.pdf), the number of decisions adopted was 152 on 5 September 2017.

¹⁶See 2013 Guidelines, Annex I (Typical interventions for broadband support).

¹⁷Decision of 8 February 2010 (C(2010)888), State aid N 596/2009 – Italy, *Bridging the digital divide in Lombardy*, http://ec.europa.eu/competition/state_aid/cases/233680/233680_1105731_34_1.pdf. The scheme in question aimed to bring broadband connectivity of at least 2 Mbps to at least 90% of the population in unserved areas of Lombardy, where the existing infrastructure was inadequate or non-existent. Through a public tender procedure respecting access obligations and the principle of technological neutrality, the Italian authorities expected to receive an offer combining different technological platforms that would be able to deliver broadband coverage to almost 100% of the population in the remote areas. The Commission also assessed positively that public funding would be available only for multi-fibre ducts and that access to these ducts would be open to all interested operators, without any time limit, so as to foster infrastructure competition for future investment in NGA networks. In accordance with the 2009 Guidelines, the public funding under examination would only be used where no private operator would invest on market terms, and would only be handed out after a public tender. Moreover, thanks to open wholesale access

related to the implementation of such an infrastructure and the fact that investment by private operators was not expected in the near future, the Commission declared the notified measure compatible with the internal market. On similar grounds, the Commission approved a measure planned by Lithuania having as its object the deployment of passive network infrastructure in rural, remote and agricultural areas of the country.¹⁸

Resources from the EU (for example, Structural and Investment Funds), the European Investment Bank or the European Investment Fund, or international financial institutions, such as the IMF or the EBRD, must also be considered as State resources if the national authorities have control over them, particularly where they have a discretion as to the selection of beneficiaries or use.¹⁹

2.2 *Broadband Networks, the Granting of an Advantage and Distortion of Competition*

To determine whether the State has conferred an economic advantage on one or more undertakings it is necessary, in the first place, to identify the normal market conditions and then to verify whether the benefit obtained by the beneficiary undertaking (s) because of the State measure is aligned with those conditions. If public resources are made available in circumstances that correspond to normal market conditions, the intervention does not qualify as aid because it is considered to lack the requirement of granting an advantage.

In particular, under the so-called *market economy investor principle* (the MEIP),²⁰ the Commission, in its analysis of an investment decision taken by a

respecting the principle of non-discrimination, several providers would offer competitive services on the new networks. See also Commission press release IP/10/140, *State aid: Commission approves Italian scheme to bridge digital divide in Lombardy*.

¹⁸Decision of 4 July 2017 (C(2017)4530 final), State Aid N 46372/2017—Support for broadband infrastructure (Stage II), http://ec.europa.eu/competition/state_aid/cases/269367/269367_1921788_100_4.pdf.

¹⁹Commission Notice on the notion of State aid as referred to in Article 107(1) of the Treaty on the Functioning of the European Union, OJ 2016, C 262/1, § 60; and Decision of 22 November 2006 (C (2006)5492 final), State Aid N 157/2006—United Kingdom South Yorkshire Digital Region Broadband Project, http://ec.europa.eu/competition/state_aid/cases/204313/204313_655838_46_2.pdf, paras. 21 and 29.

²⁰Founded on the principles of neutrality with regard to the systems of property ownership enshrined in Article 345 TFEU and of the equal treatment of public and private undertakings—from which it follows, in particular, that the Commission's action may neither penalize nor favour public authorities that provide capital injections—the MEIP qualifies as normal commercial transactions, rather than as aid measures, financial transactions that involve public authorities or public undertakings. The MEIP was originally developed by the Commission with regard to company capital interventions, and subsequently was validated by the Court and gradually extended to various other types of measures. See Commission Communications “*Application of Articles*

public investor, verifies what the likely behaviour “*in the circumstances of the case*” would be of a prudent private investor that, for its size and the importance of the capital contribution in question, is in the most similar position possible to that of the Member State in question, taking into account in particular the available information and foreseeable developments at the date of the contribution.²¹ To determine whether State intervention is in line with the behaviour of the hypothetical private investor, it is necessary to evaluate *ex ante* the profitability of the investment in question, on the basis of the information available on the date on which the transaction was adopted, and to determine whether or not the expectation of normal return (in dividends or in value) on capital invested by the public investor within a reasonable time is justified.²²

92 and 93 of the EEC Treaty to public authorities' holdings in company capital" (1984), Bulletin EC 9-1984, §§ 3.2 and 3.3; "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", OJ 1993, 307/3, § 29; "Application of Articles 92 and 93 of the EC Treaty and Article 61 of the EEA Agreement to State aids in the aviation sector", OJ 1994, C 350/5, part IV; and Commission Notice on the notion of State aid, paras. 89–96.

²¹See, e.g., Case C-124/10 P, *Commission/EDF*, ECLI:EU:C:2012:318, paras. 82–85, esp. para. 84. The applicability of the MEIP depends, in short, on the Member State concerned having conferred—in its capacity as shareholder, as opposed to its capacity as the State exercising its public authority—an economic advantage on an undertaking belonging to it. In this case, the economic benefit must be assessed on the basis of the MEIP even if it is granted by the use of resources related to public authority, which a private operator, by definition, cannot have (*in casu*, a waiver of a tax claim), given that the measure must be assessed not only in the light of its form, but also in terms of its nature, its object and its objectives. It follows that a Member State that invokes the MEIP in the course of the administrative procedure must prove in objective and verifiable terms that, before or at the same time as conferring the economic advantage, it took the decision to make an investment, by means of the measure actually implemented, in the public undertaking. In this case, the Commission must make a global assessment, taking into consideration, in addition to the information provided by the Member State, any other relevant factors in the case that enable it to determine whether the measure in question is attributable to the quality of shareholder or that of public power of the Member State.

²²The characteristic feature of the behaviour of a market economy investor is the central focus on the purely economic return on the investment that it intends to make, whereas any considerations of general interest on which the investment decision of the public authorities is based remain irrelevant. This seems entirely consistent and rational, as it is highly unlikely in principle that the hypothetical prudent private investor could be induced to put its resources at the disposal of an intervention project, bearing the related risk, based only on industrial policy, economic (regional and/or sectoral), social or employment reasons: established case-law from Case 40/85, *Belgium/Commission (Boch)*, ECLI:EU:C:1986:305, para. 13. As stated more clearly by the General Court: “nothing precludes public undertakings from taking into consideration social, regional or sectoral policies. However, a subscription of capital by public authorities must be assessed in the light of the private investor test, leaving aside all social, regional policy and sectoral policy considerations”: see, e.g., Case T-20/03, *Kahla/Thüringen Porzellan/Commission*, ECLI:EU:T:2008:395, para. 242. In other words, for the applicability of the MEIP to be excluded, the intervention of the State must be entirely devoid of an economic nature: “In such situations, the intervention by the State cannot be adopted by a private operator acting with a view to profit but falls within the exercise of public powers of the State, such as tax policy or social policy. The MEIP is therefore not material, since, by definition, there cannot be any breach of equal treatment as between the public and private sectors”:

Moreover, the behaviour of the hypothetical private investor, which the intervention of the public investor must be compared with, is not necessarily that of the ordinary investor laying out capital with a view to realizing a profit in the relatively short term. It can be, alternatively, that of a private holding company or a private group of undertakings pursuing a global or sectoral structural policy, guided by prospects of profitability in the longer term.²³ For the existence of aid to be established, public intervention—even if, hypothetically, intended for productive investment—must disregard any prospect of profitability, even in the long term, and therefore a hypothetical private investor would not have carried it out.

With specific reference to the broadband deployment sector, in the case of Citynet Amsterdam²⁴ the Commission concluded, on the basis of the MEIP, that no aid was involved in the investment made by the municipality of Amsterdam in a partnership (GNA) owning and managing the passive infrastructure for a fibre-to-the-home (FTTH) network, intended to serve about 10% of the municipality (37,000 households, already reached by various service providers).²⁵ The Dutch authorities notified the Commission of the measure for reasons of legal certainty, to confirm that the investment complied with the MEIP. The Commission initiated formal investigation proceedings on the ground that it had serious doubts about whether the investment of the Municipality of Amsterdam had been made simultaneously with that of the private investors²⁶ and on similar terms (so-called *pari passu*). In addition, it had doubts about the feasibility of GNA's business plan. At the conclusion of its investigation the Commission, however, established the following: the *pari passu* requirement had been complied with²⁷; the private operators' intervention was not

Opinion of Advocate General Mazák delivered on 20 October 2011 in *EDF* (Case C-124/10 P), ECLI:EU:C:2012:318, para. 82 (discussing the Opinion of Advocate General Léger delivered on 14 January 2003 in Case C-280/00, *Altmark Trans*, ECLI:EU:C:2003:415, paras. 20–27).

²³See, e.g., Case C-42/93, *Spain/Commission (Merco)*, ECLI:EU:C:1994:326, paras. 12–14.

²⁴Decision of 11 December 2007, 2008/729/EC, on the State aid case C 53/06, Investment by the city of Amsterdam in a fibre-to-the-home (FttH) network (OJ 2008, L 247/27).

²⁵As observed in the literature, it is only in exceptional circumstances that a measure in support of the deployment of broadband or NGA networks can satisfy the MEIP test, given that public investment in this sector is usually aimed at correcting market failures in geographic areas where private investors are not inclined to invest: Gaál et al. (2008), p. 82 and Chirico and Gaál (2014), pp. 32 and 33 (adding that, on the procedural level, the Commission has invariably opened an in-depth formal investigation procedure when notified of measures that are allegedly compatible with the MEIP, while the measures notified as compatible aid under the 2009 or the 2013 Guidelines have, in most cases, been declared compatible upon completion of the preliminary examination).

²⁶The Municipality owned a third of the share capital of GNA, and ING Real Estate and Reggefiber (the two private investors) jointly owned another third, whereas five commercial subsidiaries of housing corporations held the remaining third.

²⁷Although the Municipality had made certain limited preliminary investments before the formal establishment of GNA, this was not considered sufficient to exclude the concurrence of public and private interventions, given that there was a consensus among all of the shareholders that the Municipality would later be reimbursed for these investments. In addition, it was agreed that, in the event of the project's failure, losses from bad corporate results or from even the bankruptcy of GNA would fall proportionately on all of the investors.

symbolic or marginal in size, but had real economic significance²⁸; finally, there was no other relationship between the municipality and the private investors outside of the investment in GNA such as to call into question the MEIP-compliant nature of the transaction. Together with the detailed analysis of the joint venture's business plan, which was also accepted by the private investors,²⁹ the above factors led the Commission to decide that the investment in question did not involve elements of aid. As a result, the analysis of its compatibility within the meaning of and for the purposes of the 2009 Guidelines was unnecessary.

We emphasize, however, that if a State intervention is qualified as State aid—including where it does not fulfil the MEIP, typically because the State subsidy is not granted under normal market conditions—in order to minimize the unavoidable economic advantage linked to the subsidy, the State will have to select the beneficiaries of the aid (and determine the amount of the subsidy) through a transparent open tender procedure. The competitive procedure, even though it has the undeniable advantage of ensuring that the amount of the contribution is contained, does not however eliminate the economic advantage of the successful tenderer, given that the latter will be subsidized through public resources (for example, in terms of gap funding or in-kind contribution) and that the purpose of this procedure is precisely the selection of the aid beneficiary.³⁰ Even in this case, therefore, the measure remains subject to the analysis of compatibility, discussed below.

²⁸*Ibid.*, paras. 91 and 97: “In absolute terms, the two private investors both invest a substantial amount (€3 million, respectively) in the partnership GNA. If an investment of €3 million, compared to the financial strength of both ING RE and Reggefiber, could be considered in relative terms to the size of the investors to be a small investment, such an investment is certainly significant in relative terms to the overall capitalisation of GNA [€18 million] and the capital contribution of the municipality of Amsterdam [€6 million]”.

²⁹In the *Citynet Amsterdam* decision as per note 24 above, paras. 128 and 129, the Commission—without disclosing the internal rate of return in the business plan of GNA, and having correctly observed that, “[g]iven the novelty of the project and the dynamic nature of the broadband telecommunication markets, it is difficult to carry out a benchmarking exercise”—observed that it was within an acceptable range, between the maximum and minimum values of the industry figures for the WACC of other companies in the broadband telecommunications sector (8.1% to 10.6%).

³⁰2013 Guidelines, para. 12 (recalling that, besides the direct beneficiary of the aid, third-party operators receiving wholesale access to the subsidized infrastructure can be indirect beneficiaries thereof). As highlighted in the literature, the Commission's approach concerning the existence of the element of advantage in the presence of a public tender in the broadband sector is different, perhaps inconsistently, to its approach to the construction of public infrastructure in other sectors, where the Commission typically considers that a public procedure is sufficient to rule out the existence of an advantage for the successful tenderer on the ground that the latter's offer coincides with the best price found on the market: see Kliemann and Stehmann (2013), pp. 507 and 508. See also Commission Notice on the notion of State aid, paras. 84–86, 89–95.

2.3 *Broadband Networks and Selectivity*

In general terms, public interventions to support the deployment of broadband and/or NGA networks are, by definition, selective, in that they target, in the context of the entire market for electronic communications services, only investors in broadband. Moreover, public support for the deployment of broadband can be (doubly) selective where the broadband or NGA network that is the object of the public investment specifically targets a predetermined category of users; for example, undertakings operating in a particular sector of the economy or domestic consumers.³¹ The Commission addressed this issue, among others, in a case concerning a measure adopted by the Province of Lucca in support of the deployment of a fibre network to provide high-speed services to undertakings in certain industrial districts, i.e. aggregation areas made up of undertakings belonging to the same sector of activity with a view to benefiting from synergies arising from physical proximity.³² The intervention of the Province aimed at overcoming the persistent lack of broadband availability in some areas due to the geographical, demographic and economic characteristics of the provincial territory. The Commission emphasized that the scheme proposed by the Province of Lucca proved doubly selective since it was designed solely for undertakings operating in certain markets for electronic communications services and, moreover, was based in certain industrial districts. In the end, the Commission decided not to raise objections as the aid element that the project involved met the criteria of the 2009 Guidelines and was, therefore, compatible with the internal market.

2.4 *Broadband Networks and Effect on Intra-EU Trade*

Finally, for a measure adopted by a Member State benefiting certain undertakings to be prohibited pursuant to Article 107(1) TFEU, it must distort or threaten to distort competition and affect trade between Member States. Although these are two distinct elements, they are closely related and are thus usually assessed jointly by the Commission.

Given the unique characteristics of the telecommunications sector, an expected distortion of competition is particularly critical when the beneficiary of the aid is the incumbent or former national monopoly.

In addition, given that the markets in question are open to competition between operators and service providers, selective State support typically also affects trade flows between Member States and may adversely affect the situation of operators

³¹2013 Guidelines, para. 13.

³²Decision of 28 June 2010 (C(2010)4473), State aid N 626/2009—Italy, NGA for industrial districts in Lucca, http://ec.europa.eu/competition/state_aid/cases/233841/233841_1221847_50_2.pdf.

from other Member States and even discourage their establishment in those States.³³ The effect on intra-EU trade can also concern undertakings that use the electronic communications services made possible by the measure, as well as their competitors in other Member States.³⁴

3 Compatibility of State Aid in Support of Broadband; Characterization of the Provision of a Broadband or NGA Network as an SGEI

3.1 Introduction: Aid Exempt from the Obligation to Notify and Possible SGEI Mission

Public support measures for the deployment of broadband and/or NGA networks are typically analysed in terms of their compatibility with the internal market, the precondition that they contain aid elements being easily satisfied.

In certain cases, however, the Commission took the view that no State aid was involved on the grounds that the funded infrastructure was not meant to be commercially exploited (i.e. not to be used for offering services on the market).³⁵

The Commission's assessment of the compatibility of a public support measure, following its notification by the Member State concerned,³⁶ is conducted mostly on

³³2013 Guidelines, para. 15.

³⁴Decision of 5 November 2008 (C(2008) 6705), State aid N 237/08—Germany, Broadband support in Niedersachsen http://ec.europa.eu/competition/state_aid/cases/225613/225613_885452_25_1.pdf, para. 32.

³⁵See Decision of 30 May 2007 (C(2007)2200), State aid N 24/2007—Czech Republic Prague Municipal Wireless Network (http://ec.europa.eu/competition/state_aid/cases/219861/219861_688145_7_1.pdf; network to be used only by the public administration for the provision of free public access strictly limited to non-commercial public services and content (public-sector Internet websites, including e-Government services and tourism information)), and Decision of 30 May 2007 (C(2007) 2212 final), State aid N 46/2007—United Kingdom Welsh Public Sector Network Scheme (http://ec.europa.eu/competition/state_aid/cases/218491/218491_683319_19_2.pdf; the end users of the network would be organizations receiving funding from, delivering services on behalf of, or forming a constituent part of, the National Assembly for Wales (such as National Health Service Wales, local authorities, fire services, police, national parks authorities, Welsh Assembly Government and National Assembly for Wales, higher and further education, and assembly sponsored public bodies)). See generally Commission Notice on the notion of State aid, para. 203.

³⁶Cf. Commission Regulation (EC) No 794/2004 of 21 April 2004 implementing Council Regulation (EC) No 659/1999 laying down detailed rules for the application of Article 93 of the EC Treaty (OJ L 140/1), as amended by Commission Regulation (EU) of 27 November 2015, No 2015/2282, as regards the notification forms and information sheets (OJ L 325/1), see Annexes, http://ec.europa.eu/competition/state_aid/legislation/forms_docs/file_annexe_en.pdf, Annex I, Part III.1. B—Supplementary Information Sheet on regional investment aid schemes, para. 1.2.3; and Annex II, Part III.5—Supplementary Information Sheet on State aid to broadband.

the basis of Article 107(3)(c) TFEU,³⁷ under which “aid to facilitate the development of certain economic activities or of certain economic areas” may be considered compatible to the extent that it “does not adversely affect trading conditions to an extent contrary to the common interest.”³⁸

First, it must be pointed out that the following categories of aid to the deployment of broadband and/or NGA networks are compatible *ex lege* and thus exempt from the obligation of prior notification:

- aid provided for in the General Block Exemption Regulation.³⁹ In particular, State aid for passive network infrastructure, civil engineering works related to broadband,⁴⁰ the deployment of basic broadband networks, and the deployment of NGA networks is exempted from notification, provided that the amount of aid does not exceed €70 million per project, if the investment takes place in white areas, the aid is allocated on the basis of a competitive selection process and the network operator offers the widest possible active and passive wholesale access (including physical unbundling for NGA networks).⁴¹ The decision to include aid to the broadband and/or NGA networks sector in the scope of this regulation reflects the fact that most of the aid authorized consists of national regimes, on the basis of which individual aid is then granted. The mechanism underlying the General Block Exemption Regulation is modelled on the “umbrella” compatibility mechanism of the above national regimes⁴²;

³⁷Projects that provide for the granting of State aid to develop broadband in so-called assisted areas are governed by the Regional Aid specific rules applicable *ratione temporis*. This type of intervention is, however, outside the scope of the present analysis.

³⁸See 2013 Guidelines, para. 30 et seq.

³⁹Commission Regulation (EU) of 17 June 2014, No. 651/2014, declaring certain categories of aid compatible with the internal market in application of Articles 107 and 108 of the Treaty (OJ L 187/1), as amended, Articles 14(10) (Regional aid for broadband network development) and 52 (Aid for broadband infrastructures).

⁴⁰See Decision of 8 February 2010, Amendment of State aid N 150/08—Germany, Broadband in the rural areas of Saxony (see Commission press release IP/10/141, State aid: Commission approves broadband support for rural areas in Saxony; the Commission decided that the measures notified by the German authorities were intended for general civil engineering works, such as road maintenance, that did not involve State aid, given that they would have been carried out by the State in any event for maintenance purposes. The ability to place ducts and other infrastructure for broadband on the occasion of road maintenance, and at the expense of the operators, had been announced publicly, and was not limited to or mainly oriented towards the broadband sector). However, it cannot be ruled out that the public funding of such work may fall within the notion of aid if it is limited to or clearly oriented towards the broadband sector.

⁴¹See <https://ec.europa.eu/digital-single-market/en/state-aid>.

⁴²See Chirico and Gaál (2014), p. 36: “[M]ost national measures are ‘umbrella’ aid schemes, under which individual broadband projects can be implemented. These framework schemes, in most cases, work according to a logic similar to that of a block-exemption: if the rules and conditions of the general framework scheme are complied with, individual projects can be implemented without individual notifications to the Commission”.

- aid that does not exceed the thresholds set out in the *de minimis* regulation⁴³;
- existing aid, namely, individual aid granted under a general scheme already authorized by the Commission.

Furthermore, where the provision of a broadband or NGA network is characterized by the Member State concerned as a service of general economic interest (SGEI), pursuant to Article 106(2) TFEU, it must be assessed in accordance with the relevant rules.⁴⁴ The Commission has clarified that Member States cannot consider potential State intervention as an SGEI in the presence of investment from private operators in network infrastructure for broadband and in the presence of competitive services that guarantee satisfactory network coverage.⁴⁵ However, if

⁴³Commission Regulation (EU) of 18 December 2013, No 1407/2013, on the application of Articles 107 and 108 of the Treaty on the Functioning of the European Union to *de minimis* aid (L 352/1). An aid is “*de minimis*” if its maximum amount is €200,000 to an undertaking over a period of 3 years.

⁴⁴2013 Guidelines, para. 18. See 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 2012, C 8/4); Commission Decision of 20 December 2011 on the application of Article 106(2) of the Treaty on the Functioning of the European Union to state aid in the form of public service compensation granted to certain undertakings entrusted with the operation of services of general economic interest (OJ 2012, L7/3); Communication from the Commission, European Union framework for state aid in the form of public service compensation (OJ 2012, C 8/15); and Commission Regulation (EU) No 360/2012 of 25 April 2012 on the application of Articles 107 and 108 of the Treaty on the Functioning of the European Union to *de minimis* aid granted to undertakings providing services of general economic interest (OJ 2012, L 114/8).

⁴⁵As clarified by the Commission, in general terms Member States cannot attach specific public service obligations to services that are already provided by undertakings operating under normal market conditions, in satisfactory terms and under conditions (such as price, objective quality characteristics, continuity and access to the service) consistent with the public interest, as defined by the State. Therefore, in areas where private investors have already invested in broadband network infrastructure (or are in the process of expanding that infrastructure further) and are already providing competitive broadband services with adequate coverage, the setting up, with public funds, of a competing broadband infrastructure should not be considered as an SGEI (see Communication on compensation granted for the provision of SGEIs, paras. 48 and 49).

The General Court provided some guidance on the relevance of the market failure test—i.e., whether or not competing services similar to those provided by the undertaking entrusted with an SGEI exist—for the purposes of characterizing the establishment and use of a very high-speed broadband network as an SGEI in Cases T-79/10, *Colt Télécommunications France/Commission*, ECLI:EU:T:2013:463, para. 158 et seq.; T-258/10, *Orange/Commission*, ECLI:EU:T:2013:471, para. 148 et seq.; and T-325/10, *Iliad a.o./Commission*, ECLI:EU:T:2013:472, para. 149 et seq. It defined market failure as an objective concept, the appraisal of which is based on an analysis of the actual situation of the market. It follows from the objective nature of the assessment of the existence of market failure that the reasons for the absence of a private initiative have no relevance for the purposes of that assessment. The Court concluded that it cannot be inferred from a particular cause of the failure found that the creation of an SGEI was precluded. The Court also pointed out that the market-failure test is not only taken into account in assessing the compatibility of aid with the internal market, but also plays a part in the determination of the actual existence of aid or, to the contrary, of an SGEI. It took the view that, as it follows from the relevant rules, assessment of the existence of a market failure constitutes a precondition for classification of an activity as an SGEI

it can be demonstrated that within the following 3 years private investors might not be able to provide adequate broadband coverage to all citizens or users, the State will be able to grant compensation for public service obligations to an undertaking entrusted with the provision of an SGEI, provided that the conditions laid down in the Commission Communication on a European Union framework for State aid in the form of public service compensation⁴⁶ are met. In addition, the deployment and operation of a broadband infrastructure can qualify as an SGEI only if such infrastructure provides universal connectivity to all users in a given geographical area, including residential users.⁴⁷ Moreover, the compulsory nature of the SGEI mission implies that the provider of the network to be deployed will not be able to refuse wholesale access to the infrastructure on a discretionary and/or discriminatory basis (because, for example, the supply of access services to a given area may be commercially unprofitable).

The Commission puts special emphasis on the following principle: the possibility of creating a network subsidized by public funding in the context of an SGEI must be available to all interested operators and, therefore, the infrastructure provided must be passive, neutral and open. Such a network should provide access seekers with all possible forms of access and allow effective competition at the retail level, ensuring the provision of competitive and affordable services to end users. Therefore, as a matter of principle, the SGEI mission may only cover the deployment of a broadband network providing universal connectivity—i.e. residential and business users alike—and the provision of the related wholesale access services, though without including retail communication services. Where the operator entrusted with the SGEI mission is also a vertically integrated broadband operator, it will be necessary to put in place adequate safeguards to avoid any conflict of interest, undue

and thus for finding that there is no State aid. Moreover, that assessment must be carried out at the time when the service intended to compensate for the failure found is put in place. The assessment must also include a prospective analysis of the market situation for the entire duration of the SGEI, during which the market failure must also be established.

⁴⁶OJ 2012, C 8/15. In the *Colt*, *Orange* and *Iliad* cases as per note 45 above, the General Court also examined the problem of compensation for the costs incurred in discharging the public service obligations. Recalling that such compensation cannot exceed what is necessary to cover all or part of those costs, taking into account the associated revenues and a reasonable profit for discharging the obligations in question, the Court held that, while the compensation must cover only the costs of using the infrastructure in unprofitable areas, the revenues generated by the commercial use of the infrastructure in profitable areas may be assigned to the financing of the SGEI in the unprofitable areas. Accordingly, the coverage of the profitable areas does not necessarily mean that the subsidy granted is excessive, since it is the source of revenues that may serve to finance the coverage of unprofitable areas and, thus, allow for a reduction of the amount of the subsidy granted.

⁴⁷See Decision of 10 July 2007 (C(2007) 3235 final), State aid N 890/2006—France, Aid to Sicoval for a broadband network http://ec.europa.eu/competition/state_aid/cases/218142/218142_723454_30_2.pdf (the Commission emphasized that the notified measure concerned support for the provision of broadband connections solely for business parks and public sector organizations in a part of the city of Toulouse and that the residential sector remained excluded. The project also concerned only a part of the region. The Commission therefore ruled out that the measure could be assessed on the basis of the SGEI rules).

discrimination and hidden indirect advantages. Finally, the Commission recalls that, because the market for electronic communications is fully liberalized, an SGEI mission for the deployment of broadband cannot be based on awarding the provider of the SGEI a special or exclusive right within the meaning of *ex* Article 106 (1) TFEU.⁴⁸

3.2 *Compatibility Requirements*

The purpose of aid control in the broadband sector is to ensure that aid measures result in a higher level, or a faster rate, of broadband coverage and penetration than would be the case without aid, while supporting higher quality, more affordable services and pro-competitive investment.⁴⁹

In accordance with general principles of State aid law, the positive effects of an aid measure in terms of its compatibility with Article 107(3)(c) must outweigh its negative effects in terms of distortion of competition. The Commission conducts its evaluation in two steps. First, it assesses whether the notified measure meets the conditions set out below, which are cumulative in nature. If all of these conditions are met, it balances the positive effects of the measure against the potentially negative ones.⁵⁰

Regardless of its form or legal basis, the public intervention must:

- (1) aim to achieve the objectives of common interest identified in the DAE, and, ultimately, social equity objectives;
- (2) deal with a situation of market failure, in which the market is incapable of providing an adequate broadband service. In the telecommunications sector, market failure usually occurs where positive externalities exist, i.e. investments of a commercial operator positively affect others (whether commercial operators or consumers) that do not share the costs incurred by the former. Since the investing commercial operator does not directly enjoy the benefits of the others, it will not have sufficient incentive to invest. According to the Commission, such a situation of market failure generally occurs in geographic areas with a low population density, where the high fixed costs of investment are not balanced by an equally high and concentrated demand for services. In 2007 the Commission approved a measure in support of broadband connections for Alto Adige,⁵¹ where Alpine territory above 1000 m represents 85.9% of the total region. Because the costs of investment in mountain areas are

⁴⁸2013 Guidelines, paras. 19–25.

⁴⁹*Ibid.*, para. 6.

⁵⁰*Ibid.*, paras. 32–34.

⁵¹Decision of 10 October 2007 (C(2007) 4538 final), State aid N 473/2007—Italy, Broadband connections for Alto Adige, http://ec.europa.eu/competition/state_aid/cases/221635/221635_736768_23_2.pdf.

higher than those in densely populated areas, there was insufficient private investment in ADSL connections, with no prospects for coverage under market conditions in the immediate or medium term. When the Autonomous Province of Bolzano decided to intervene with its own resources, its intervention was therefore assessed as compatible with the internal market⁵²;

- (3) be appropriate to remedy the problem of limited availability of broadband network connections. It is noteworthy that national authorities may rely on instruments other than State aid to stimulate the deployment of broadband and/or NGA networks, including *ex ante* regulation by the competent authorities (in Italy, the Competition Authority (AGCM) and the Communications Authority (AgCom)). In this regard, the 2013 Guidelines call on Member States to consult their respective regulatory authorities both in order to define wholesale infrastructure access prices and conditions and to solve disputes between access seekers and the operators of the subsidized infrastructure. The Commission also calls on national authorities to issue guidelines that include recommendations concerning the analysis of the market, wholesale access products and tariffs as well as pricing principles. For this purpose, the AgCom recently adopted guidelines concerning the conditions for wholesale access to very high-speed broadband networks that receive public funds.⁵³ In particular, the twofold purpose of these guidelines is to clarify the range of wholesale access services that the beneficiary of the public support will have to make available, as well as to define the pricing systems of such services, taking into account the costs of the subsidized infrastructure net of the aid received. In this respect, the AgCom took the view that subsidized operators will be required to provide a wider range of services for wholesale access than that provided by operators with significant market power⁵⁴;
- (4) have an incentive effect, in the sense of changing the behaviour of the undertakings, inducing the beneficiary of State aid to undertake operations and investment that it would not have started in the absence of the State support. However, this incentive effect is considered to be absent where the regulations in force require private operators to provide network coverage in the areas concerned, given that in such a scenario the operators, pursuant to such obligations, would still have made the investment in question;
- (5) be proportionate, i.e. limit the amount of aid to the minimum necessary to achieve the intended objective;

⁵²The aid described in the text, in the amount of €6.9 million, was completed by a second grant (€7 million) the following year: Decision of 2 July 2008 (C(2008)3176 final), http://ec.europa.eu/competition/state_aid/cases/225725/225725_879230_19_1.pdf.

⁵³Resolution of 7 April 2016, No. 120/16/CONS, <http://www.agcom.it/documents/10179/4364847/Delibera+120-16-CONS/1dbb2af3-b4ea-4cbb-b833-686dc801ac33?version=1.2>. See *infra*, note 90.

⁵⁴Based on the rules in force concerning the obligations of the operator with significant market power, prices for access services to active and passive fibre infrastructure must be related to the cost and established on the basis of a bottom-up type Long Run Incremental Cost methodology (LRIC).

- (6) minimize the distortion of competition and effect on intra-Community trade. In relation to the granting of State aid to former incumbent operators that still hold a dominant position on the market, the Commission refers, in particular, to the so-called “crowding-out effect”, consisting in a reduction of competing operators’ potential investment and, in the worst case, even their exit from the market;
- (7) guarantee maximum transparency towards competitors not benefiting from aid as well as towards consumers.

3.3 Balancing of the Positive and Negative Effects of the Measure Under Examination

The 2013 Guidelines establish that the overall effects of the measures under examination must in all cases (no matter whether the area concerned is white, grey or black: see below) show a “step change” in the subsidized infrastructure.⁵⁵ In other words, the improvement in the deployment of broadband and/or NGA networks must entail significant new investments in the sector—simply upgrading existing networks is, thus, not considered a step change⁵⁶—and the subsidized project must create new market capacity, as much in terms of availability of services for consumers as in terms of transmission and speed (for example, enabling the transition from broadband to NGA networks).⁵⁷ In areas where broadband networks are already present, the application of the step-change criterion should ensure that the use of State aid does not lead to mere duplication of the existing infrastructure.

⁵⁵The notion of “step change”—which the Commission first elaborated in its decision of 20 November 2012 (C(2012) 8223 final), SA.33671—United Kingdom, *National Broadband scheme for the UK – Broadband delivery UK* (http://ec.europa.eu/competition/state_aid/cases/243212/243212_1387832_172_1.pdf)—was later enshrined in the 2013 Guidelines, §§ 49–51. A “step change” can be demonstrated if, as a result of the public intervention, the selected bidder makes significant new investments in the broadband network and the subsidized infrastructure brings significant new capabilities to the market in terms of service availability and capacity, speed and competition. The step change shall be compared to that of existing as well as concretely planned network roll-outs.

⁵⁶Similarly, although certain technologies enhancing copper components (e.g., vectoring) may increase the capabilities of the existing networks, they do not require significant investment in new infrastructure and, therefore, should not be eligible for State aid. See note 78 below for further information related to Commission assessment of vectoring.

⁵⁷Also, certain upgrades of an NGA network (such as the extension of fibre connections brought nearer to the end user) may constitute a step change.

3.4 *Classification of the Areas of Intervention*

The compatibility assessment of State support measures must take into account the digital divide, a special feature of the broadband and/or NGA network sector compared to the other electronic telecommunications sectors.⁵⁸ Based on this consideration, the 2013 Guidelines (like the 2009 Guidelines) distinguish between three categories of deployment areas (white, grey and black) and, in relation to each category, indicate the probability of the compatibility of the public intervention in question (a similar classification is provided, *mutatis mutandis*, with regard to NGA networks).

White areas correspond to areas where infrastructure does not exist and it is unlikely that it will be deployed over the next three years. The absence of infrastructure and investment by private operators shows that market forces alone are unable to achieve the objectives set out by the Commission. Therefore, where a situation of market failure exists, it is highly likely that State intervention constitutes a genuine measure of support for the objectives of cohesion and economic development. This consideration—in combination with the limited effect of aid on competition, given the lack of private investment—results in public support measures in white areas usually being considered compatible with the internal market.⁵⁹

Conversely, black areas are those where there are at least two operators competing with each other, or where there will be within the next 3 years. The presence of several players rules out the existence of a market failure; therefore, State intervention is unnecessary, if not counterproductive, in that it risks creating disincentives for existing and potential investment by private operators.⁶⁰

⁵⁸See note 8.

⁵⁹2013 Guidelines, para. 66. But see Koenig and Bache (2012), p. 261 (arguing that “the lack of infrastructure investment is not a market failure, but the result of a perfectly functioning market. The market is transparently indicating the limits of an efficient allocation of societies’ resources for broadband infrastructure, and at the same time warning the potential investors that the return on investment would fall short of (at least full) cost coverage. The provision of public funding is not aimed at remedying a market failure, but to furthering a political goal, that is the provision of broadband services as a universal service policy in disguise without fulfilling the appropriate – especially legislative (Art. 114 TFEU) – requirements. . . . The political promise of broadband service provision in lightly populated rural areas can only be kept by subsidizing the service providers with public funds. In essence, the public funds compensate undertakings for making non-viable economic decisions, a mechanism commonly associated with compensation for the provision of services of general economic interest. This means either the Altmark-criteria as defined by the ECJ have to be met for the measure to be excluded from the scope of Art. 107 (1) TFEU or the prerequisites of Art. 106 (2) TFEU have to be fulfilled in order for the measure to be deemed compatible with the common market”).

⁶⁰*Ibid.*, para. 72. See Commission Decision of 19 July 2006 on measure No C 35/2005, which the Netherlands are planning to implement concerning a broadband infrastructure in Appingedam (OJ 2007, L 86/1). The Commission declared a public financing measure for a new broadband FTTH network in the Dutch town of Appingedam incompatible with the internal market pursuant to Article 107(3)(c) TFEU (before initiation of the infrastructure’s construction). Appingedam is in a black area already served by competing networks at prices similar to those of other regions, and

Grey areas intuitively represent the intermediate category, characterized by the presence of a single network operator. However, the existence of a *de facto* monopoly does not automatically mean that a market failure exists.⁶¹ The conclusion that State support for the deployment of a broadband network is compatible requires, in such a case, that it also be established that market conditions (prices and services offered) are inadequate and barriers to entry exist.⁶²

It is useful to clarify that the responsibility for the mapping of the national territory in white, grey and black areas for the purpose of the 2013 Guidelines lies with the Member States. This also implies their obligation to verify reliably that no private operator is planning to invest in broadband and/or NGA networks over the next 3 years. To this end, national authorities must not only give adequate publicity to aid projects, so that any interested parties can potentially submit an expression of interest, but also, where an interested private investor exists, request that it take on certain commitments before a State intervention plan is abandoned.⁶³

3.5 *Conditions to Minimize the Impact on Competition*

In relation to limiting the distortion of competition, Member States are required to demonstrate how a “step change” is achieved (irrespective of whether the area of intervention is white, grey or black). In this regard, the Commission sets out a number of conditions that, where satisfied, demonstrate the proportionality of the measure being assessed. Failure to meet even one of these conditions may render an in-depth assessment necessary, which may result in finding that the aid examined is

therefore there is no evidence of market failure or of unaffordable prices of the related services. The Commission noted that the competitive forces of the specific market were not duly taken into account and, in particular, that the Dutch broadband market was one of the most advanced in Europe in terms of coverage, innovation and competition. In addition, providers of electronic communications services, including cable operators and Internet service providers, were in the process of introducing very high-capacity broadband services to the national market without any State support. According to the Commission, the proposed aid would distort competition and negatively affect private investment to an extent exceeding the benefits of the project.

⁶¹The competitive situation is assessed according to the number of existing infrastructure operators. See Commission Decision of 19 October 2011, State aid N 330/10 – *France, Programme national Très Haut Débit*, http://ec.europa.eu/competition/state_aid/cases/237100/237100_1268935_107_2.pdf (the existence of several retail providers on one network (including an unbundled local network: Local Loop Unbundling, LLU) does not turn the area into a black area; the territory remains a “grey area” as only one infrastructure exists. At the same time, the existence of competing operators (at the retail level) will be considered an indication that, albeit grey, the area in question may not be problematic in terms of presence of a market failure. Convincing proof of access problems or poor quality of service will have to be supplied).

⁶²2013 Guidelines, paras. 67–71.

⁶³*Ibid.*, paras. 63–65.

incompatible with the internal market.⁶⁴ Among these conditions, the principles of publicity and transparency may be distinguished from the criteria drawn from sectoral regulations.

Publicity and Transparency

First, Member States are required to give adequate publicity to aid that they intend to grant, clearly indicating the main features of the project and the geographic areas covered, in order to involve the operators in the sector to the maximum extent possible. In addition, in order to minimize the competitive advantage and the selective nature of the aid, the selection of the beneficiaries of the aid must take place in accordance with the principles relating to public tenders set out in the EU Public Procurement Directives,⁶⁵ in particular according to the award criterion of the most economically advantageous tender.⁶⁶ National support schemes for the deployment of broadband and/or NGA networks must be published on dedicated websites. In addition, national authorities must submit a detailed report to the Commission containing the key information on the project. This must be submitted every other year for the entire duration of the aid.⁶⁷ To this end, the 2013 Guidelines provide for the establishment in each Member State of a centralized database of the broadband infrastructure existing in the national territory, in which all of the information is collected, subject to disclosure and transparency requirements.

The requirements of transparency and publicity, which have been established primarily with a view to minimizing the impact of State interventions on competition, are believed to generate important secondary effects: the increased circulation of information on State support measures for the deployment of broadband and/or

⁶⁴Ibid., para. 78 et seq.

⁶⁵Directive of the European Parliament and of the Council of 26 February 2014, 2014/24/EU, on public procurement and repealing Directive 2004/18/EC (OJ L 94/65) and 2014/25/EU on procurement by entities operating in the water, energy, transport and postal services sectors and repealing Directive 2004/17/EC (OJ L 94/243).

⁶⁶The situation is different where the public authority decides to deploy and manage the network directly (or through a wholly owned entity), like in the case of State Aid N 330/10 (see note 59 or in case SA.46731/16, Austria—Aid to fast broadband infrastructure in rural areas in Lower Austria, Decision of 3 April 2017). In the case of publicly subsidized networks, the operators of publicly owned networks must confine their activity to the predefined areas and shall not expand to other commercially attractive regions. This is in order to safeguard the level of competition that has been achieved since the liberalization of the electronic communications sector in the EU, in particular the competition that exists today in the retail broadband market. Furthermore, the public authority must limit its activity to maintaining the passive infrastructure and granting access to it, and cannot engage in competition with retail commercial operators. Finally, it must put in place an accounting system that separates the funds used for the operation of the networks and the other funds at its disposal. See also decision of 6 June 2017, State aid SA.41065/2016, Croatia—*National Programme for broadband aggregation infrastructure*, http://ec.europa.eu/competition/state_aid/cases/267611/267611_1911559_256_2.pdf, paras. 29–31.

⁶⁷2013 Guidelines, paras. 53 and 78(k). The latter provision was introduced *ex novo*.

NGA networks improves the quality of the planned measures as well as that of the related authorization procedures. This reduces, among other things, the number of complaints filed by competitors and the administrative investigation activities triggered by such complaints.⁶⁸

Criteria Inferred from Sectoral Regulations

As observed in the literature,⁶⁹ the Commission has been transposing to this matter certain principles concerning the protection of competition—such as the principles of technological neutrality, wholesale access and control by the competent national regulatory authorities—which it had developed following its prior experience in the context of telecommunications regulation.

In accordance with the principle of technological neutrality, Member States are obliged to treat all possible technological solutions offered by potential aid beneficiaries in a non-discriminatory manner. Indeed, if all investments of public funds for the deployment of broadband and/or NGA networks converged in a single technology—if, for example, a State imposed a particular technology in calls for tenders for the assignment of incentives for the deployment of broadband—any encouragement of innovation would be seriously compromised.⁷⁰ For this reason, as established in the 2013 Guidelines, the decision to subsidize a particular technology should be based on objective criteria, in order to prioritize the most suitable solution for the specific needs to be satisfied, on a case-by-case basis.⁷¹

In accordance with the wholesale access principle, the aid beneficiary that builds and manages a broadband or NGA network infrastructure is obliged to ensure effective access to the subsidized network for all third parties concerned, as soon as the network becomes operational, for a minimum period of 7 years.⁷²

Lastly, the 2013 Guidelines expressly give national regulatory authorities the power to control the implementation of the subsidized broadband and/or NGA network projects. In addition, they provide, in more innovative terms than the 2009 Guidelines, for a system to monitor the evolution of the profitability of the projects financed with public resources as well as a mechanism (the so-called

⁶⁸Chirico and Gaál (2014), p. 37.

⁶⁹Ibid., p. 32.

⁷⁰Kliemann and Stehmann (2013), p. 495.

⁷¹2013 Guidelines, para. 78(e). Please note that in older cases the Commission did not interpret technological neutrality as an imperative: see decision of 22 November 2006, State aid N 222/2006—Italy, *Aid to bridge the digital divide in Sardinia* (C(2006)5480 final), (http://ec.europa.eu/competition/state_aid/cases/204665/204665_652791_31_1.pdf). In this Decision the Commission accepted an exception to technological neutrality on a purely economic basis, i.e., the fact that alternative solutions would entail higher costs, and held that the public funding of an ADSL network, albeit inconsistent with technological neutrality, was nonetheless compatible with the internal market (paras. 14 and 45).

⁷²Ibid., para. 78(g).

clawback mechanism) for the reinvestment of excess profits.⁷³ An example of the implementation of this mechanism is provided by the case of the aid granted in 2006 by the Sardinia Region to former monopoly operator Telecom Italia for the construction of fibre-based infrastructure in the regional territory.⁷⁴ In particular, the measure in question provided for a monitoring system and, where a market deficiency (making the measure legitimate) lower than that initially expected was detected, it set out an obligation on the part of the company to pay back a directly proportional part of the subsidy received.

4 “Ultra-Fast” NGA Networks

In light of the rapid progress characterizing the technology sector, the 2013 Guidelines contain an additional section (3.6) compared to the 2009 Guidelines. This is dedicated to aid earmarked for ultra-fast broadband networks, which are a subcategory of NGA networks, allowing a transmission rate well above 100 Mbps.

NGA black areas are those in which the presence of more than one operator would normally make State intervention incompatible. By way of derogation, the 2013 Guidelines also provide for the possibility of investing public funds for the deployment of ultra-fast networks in NGA black areas, on the condition that the support measure will ensure a step change under the terms described above⁷⁵ (see *supra*, note 50 above and accompanying text).

At a time when the 2009 Guidelines were still in force, the Commission authorized (without even opening an *inter partes* formal investigation) a measure of approximately €6 million to support the construction of an ultra-fast NGA network in the city of Birmingham—in an urban area classified as grey, therefore theoretically profitable for private operators in the sector.⁷⁶ The fact that this decision was challenged in court by certain network service providers operating in the same municipal territory⁷⁷ seems to support the view that the derogation introduced by

⁷³Ibid., para. 78(i).

⁷⁴See note 70.

⁷⁵And in compliance with the requirements of para. 83(a) to (c) of the 2013 Guidelines.

⁷⁶Decision of 12 June 2012 (C(2012) 3763 final), SA.33540—United Kingdom, *City of Birmingham/Digital District NGA Network*. See also Commission press release IP/12/596, State aid: Commission clears state aid to an ultra-fast broadband network in Birmingham.

⁷⁷See Case T-456/12 *British Telecommunications/Commission* (OJ 2012, C 379/27); the applicant criticized, in particular: the Commission’s failure to examine whether the objective of the aid was clearly defined and the proportionality of the proposed measure; its failure to initiate the formal investigation procedure even though the proposed aid would produce effects on markets other than the NGA, in which there was no market failure, effects that the Commission did not analyse; the Commission’s removal of the incentive effect, by requiring that the selected operator would have to allow all of the different types of network access that might be requested by the operators; and its approval of the use of the aid for the duplication of networks of leased lines existing in the target area. See also pending case T-460/12, *Virgin Media/Commission* (OJ 2012, C 379/28); the applicant

the 2013 Guidelines with regard to ultra-fast NGA networks will raise critical issues⁷⁸—all the more so since only three out of more than 150 decisions adopted by the Commission in the sector of aid for the deployment of broadband and/or NGA networks have been challenged by competitors of the aid beneficiaries, by bringing actions for their annulment.⁷⁹

In addition to meeting the conditions of compatibility applicable to measures for the deployment of basic broadband, measures to support the deployment of NGA networks must ensure: effective wholesale access, under fair and non-discriminatory conditions, for all third-party operators that request it, including the possibility of full unbundling, as well as the offer of competitive and affordable services to end users by competing operators, again under fair and non-discriminatory terms.⁸⁰

criticized, in particular: the Commission's failure to rebut the presumption against the lawfulness of the aid in an area of residential broadband services in competitive conditions; its failure to identify a market failure (in particular, the Commission's failure to define the allegedly failed reference market, and to adduce meaningful evidence to find a failure on the basis of price alone); its failure to carry out an adequate market consultation as well as to assess the aid's impact on competition in the relevant markets. In both cases proceedings were later discontinued at the applicants' request following the Municipality of Birmingham's decision not to implement the project (see President of the Fourth Chamber of the General Court, orders of removal from the register of 10 June 2016).

⁷⁸Kliemann and Stehmann (2013), p. 500.

⁷⁹Chirico and Gaál (2014), pp. 35 and 36.

⁸⁰2013 Guidelines, para. 80. See Decision of 15 June 2015 (C(2015) 4116 final), SA.38348—Germany, *NGA Germany*, http://ec.europa.eu/competition/state_aid/cases/251861/251861_1670916_80_2.pdf, paras. 31, 32 and 74. The national support scheme for the deployment of NGA infrastructures notified to the Commission included among its elements the vectoring technology (see *supra*, note 58), which is applied over the existing copper network and allows the connection speed to be increased further with a modest additional investment. However, as a side effect of the scheme, a large number of households had to be aggregated to be served from a single provider, with the result that competitors could not gain physical access to individual subscribers. The Commission was concerned by the potential anticompetitive effects of vectoring in so far as it did not ensure open access to the infrastructure as prescribed in the 2013 Guidelines and thus authorized the scheme at issue on condition that an adequate virtual unbundled local access (VULA) product able to replace the physical access lost due to the use of vectoring was made available. In September 2016, the German authorities notified to the Commission three VULA products proposed by three network operators for the respective broadband roll-out projects under the abovementioned scheme. The Commission thoroughly examined the notified VULA products and found that they complied with the open access conditions of the 2013 Guidelines since they provided data traffic at similar conditions to those that competitors would have enjoyed with physical access to copper lines (decision of 11 August 2017, SA.38438, *VULA Product (Follow up NGA Germany)*, http://ec.europa.eu/competition/state_aid/cases/270346/270346_1923571_208_6.pdf). See also Decision of 26 May 2016, SA.40720—United Kingdom, *National Broadband Scheme for the UK for 2016-2020*, as reported in Commission press release IP/16/1904, *State aid: Commission endorses UK National Broadband Scheme for 2016-2020*, http://ec.europa.eu/competition/elojade/iseff/case_details.cfm?proc_code=3_SA_40720.

5 The Deployment of Broadband in Italy

In December 2014, broadband network coverage in Italy accounted for 99% of the national territory (above the EU average of 97%), whereas NGA network coverage was 36% (compared to an EU average of 68%).⁸¹ As mentioned above, the 2013 Guidelines call on Member States to develop national frameworks that must contain general guidelines for the benefit, among others, of municipalities and regions, in order to ensure greater coherence in the use of public funds, reduce the administrative burden on local authorities and accelerate the granting of individual aid measures.⁸² To this end, the Italian Government has adopted the strategic plans for the deployment of broadband and NGA networks, described below.

5.1 *The National Broadband Plan*

As envisaged in Article 1 of Law No. 69 of 18 June 2009 (laying down “Measures for economic development, simplification, competitiveness as well as in matters of civil procedure”), the Italian Government identified “a program for intervention in infrastructure in under-deployed areas necessary to facilitate the adaptation of public and private electronic communications networks to technological evolution and the provision of advanced information and communications services in the country”. The Ministry of Economic Development (the MISE) was entrusted with the coordination of all interventions undertaken in the national territory in the context of the so-called national plan for the deployment of broadband (the “National Broadband Plan”),⁸³ whereas an in-house company of the MISE, Infratel Italia S.p.A., was entrusted with the National Broadband Plan’s implementation.

The DAE’s target of bringing basic broadband to all Europeans by 2013, which represented the main goal of the National Broadband Plan, was almost fully achieved, access to broadband having been secured in white areas, where the costs of deployment could not be borne by the market in light of its insufficient profitability. The draft National Broadband Plan was notified to the Commission in

⁸¹Commission staff working document, Implementation of the EU regulatory framework for electronic communication—2015, SWD(2015) 126 final, 19 June 2015, <http://ec.europa.eu/transparency/regdoc/rep/10102/2015/EN/10102-2015-126-EN-F1-1.PDF>, p. 169. The percentage of NGA networks’ penetration indicated in the main text placed Italy in the second last position in the ranking of the 28 Member States, followed by Greece.

⁸²2013 Guidelines, para. 41.

⁸³See the report on the National Broadband Plan’s features and modes of implementation (Oct. 2011), <http://www.sviluppoeconomico.gov.it/images/stories/documenti/adi/TESTO-INTEGRALE-PIANO-NAZIONALE-BANDA-LARGA.pdf>.

October 2011 and the Commission authorized it seven months later without raising objections.⁸⁴

The National Broadband Plan provided for the following types of public intervention:

- (i) the deployment of publicly owned passive network infrastructure;
- (ii) the financing of an investment project submitted by private investors for the spreading of broadband services in the territories affected by the digital divide, with particular reference to the so-called last mile;
- (iii) financial support measures for private users for the purchase of special terminals, provided that the geomorphological conditions of the relevant territory and the low population density did not permit the deployment of network infrastructure.

5.2 The Strategic Plan for Very High-Speed Broadband

The second, and more challenging, objective of the DAE requires bringing connectivity to Internet services at a speed above 30 Mbps for all European citizens, and above 100 Mbps for at least 50% of households, by 2020. After the approval in December 2012 of the *Piano digitale banda ultralarga* (Very high-speed broadband digital plan, the “Plan”), drawn up by the MISE on the basis of Article 30 of Decree Law No. 98/2011,⁸⁵ the Italian government approved a new strategy in this matter in March 2015.⁸⁶ To make up for delays in the telecommunications sector, the Strategic Plan has the ambitious aim of maximizing coverage beyond 100 Mbps.⁸⁷ Under the Strategic Plan, the national territory is divided into homogeneous areas, with each

⁸⁴Decision of 24 May 2012 (C(2012) 3488 final), State aid SA.33807 (2011/N)—Italy, *Piano nazionale banda larga Italia*, http://ec.europa.eu/competition/state_aid/cases/242381/242381_1352102_93_2.pdf.

⁸⁵Laying down urgent measures for financial stabilization; converted into law, with amendments, by Law No. 111 of 15 July 2011. See Decision of 18 December 2012 (C(2012) 9833 final), State aid SA.34199—Italy, *Piano digitale – Banda ultra larga*, http://ec.europa.eu/competition/state_aid/cases/244965/244965_1400328_95_2.pdf.

⁸⁶*Strategia Italiana per la banda ultralarga* (Strategic plan for very high-speed broadband; the “Strategic Plan”), http://www.infratelitalia.it/wp-content/uploads/2015/03/bul_4_marzodef_0.pdf.

⁸⁷Note, however, that neither the Strategic Plan nor the CIPE Resolution No. 65 of 6 August 2015 (Development and Cohesion Fund 2014–2020: investment plan for the spreading of very high-speed broadband) characterize the interventions they respectively set out as aimed at the provision of an SGEI. The abovementioned CIPE resolution—which approved the plan’s operational program and allocated €2.2 billion in funds from the resources of the Fund for development and cohesion (FSC) 2014–2020 to interventions to be implemented immediately—was registered by the Court of Auditors on 2 October 2015. Further resources of €4.9 billion may be made available by virtue of future regulatory measures: <http://www.governo.it/approfondimento/banda-ultralarga-e-crescita-digitale-approvati-i-piani-nazionali/2860> (7 October 2015). Please note that CIPE is the acronym for *Comitato interministeriale per la programmazione economica* (Interministerial Committee for Economic Planning).

area grouped into four clusters, i.e. categories with similar features as well as similar and growing infrastructure costs and complexity. The aim of the Strategic Plan is to bring connections of:

- at least 100 Mbps in areas (comprising 85% of the population) within cluster A (black areas where, even without incentives, there would be at least one private NGA network with connections of above 30 Mbps) or cluster B (grey areas where, without public incentives, networks of private operators would provide connections at 30 Mbps, but not at 100 Mbps); and
- at least 30 Mbps in areas that fall within cluster C or cluster D (white areas in which the conditions for private investment could—but would not necessarily—exist only in the presence of public incentives).

To this end, Infratel Italia is in charge of selecting the successful bidders from the tenders on the basis of a so-called “auction on time”,⁸⁸ which rewards the tender that provides for the earliest completion date for the works.

The Strategic Plan also provides for the use of State resources from the EU (ERDF and EAFRD)⁸⁹ in the form of tax relief, soft loans and other types of preferential financing conditions for the construction of NGA network infrastructure. The starting point for the realization of such works, in compliance with Directive 2014/61/EU (the “Directive”),⁹⁰ is the re-use of existing infrastructure.⁹¹ It provides

⁸⁸Strategic Plan, p. 9.

⁸⁹I.e., the European Regional Development Fund and the European Agricultural Fund for Rural Development, respectively. See notes 16 and 82 and accompanying text.

⁹⁰Directive 2014/61/EU of the European Parliament and of the Council of 15 May 2014 on measures to reduce the cost of deploying high-speed electronic communications networks (OJ L 155/1). The directive, implemented in Italy through Legislative Decree No. 33 of 15 February 2016, obliges “every network operator” (including undertakings providing or authorized to provide public communications networks or undertakings that provide a physical infrastructure intended to provide electricity) to “meet all reasonable requests for access to its physical infrastructure under fair and reasonable terms and conditions, including price, with a view to deploying elements of high-speed electronic communications networks”. This obligation is triggered “upon written request of an undertaking providing or authorized to provide public communications networks” (Article 3(2)).

⁹¹Cf. 2013 Guidelines, para. 78.f: “Since the reusability of existing infrastructure is one of the main determinants for the cost of broadband roll-out, Member States should encourage bidders to have recourse to any available existing infrastructure so as to avoid unnecessary and wasteful duplication of resources and to reduce the amount of public funding. Any operator which owns or controls infrastructure (irrespective of whether it is actually used) in the target area and which wishes to participate in the tender, should fulfil the following conditions: (i) to inform the aid granting authority and the NRA about that infrastructure during the public consultation; (ii) to provide all relevant information to other bidders at a point in time which would allow the latter to include such infrastructure in their bid. Member States should setup a national database on the availability of existing infrastructures that could be reused for broadband roll-out”. See, with regard to Italy, Decree Law No. 133 of 12 September 2014, converted into law, with amendments, by Law No. 164 of 11 November 2014 (laying down urgent measures for the opening of the work sites, the construction of public works, the digitization of the country, bureaucratic simplification, the hydrogeological disruption emergency, and the resumption of production), Article 6-bis, concerning the planned establishment by the MISE of a federated national information system on infrastructure; as well as the MISE press release of 5 November 2015, concerning the

for four State intervention models, three of which coincide with the aid schemes defined in the National Broadband Plan approved by the Commission in December 2012.⁹²

The first model (direct intervention)⁹³ provides for the construction of the passive part of the access infrastructure, financed entirely from public funds. The works are intended, as a priority, for connections for offices of the public administration (such as schools, hospitals and courts) as well as for private users. Responsibility for the works and, later, the management of the infrastructure, which will remain State owned, will be entrusted through competitive tendering procedures. The concessionaire will have to offer multi-annual network access to, and indefeasible rights of use of, physical infrastructure to any interested operators under fair and non-discriminatory conditions set out by the AgCom before the invitation to

(then expected as forthcoming) ministerial decree implementing the relevant provisions of said Decree Law No. 133/2014 (<http://www.sviluppoeconomico.gov.it/index.php/it/per-i-media/comunicati-stampa/2033577-nasce-il-catasto-nazionale-delle-infrastrutture-giacomelli-se-ne-parla-da-molto-anni-ora-si-fa>). See also Decree Law No. 145 of 23 December 2013 converted into law, with amendments, by Law No. 9 of 21 February 2014, Article 6(5bis) concerning the implementation by AgCom of a database of all the existing (public and private) internet access networks in the national territory. This database, available online since July 2017 (<https://agcom.maps.arcgis.com/apps/MapSeries/index.html?appid=91d590dbb3fb4993934f26460c8d3265>), is complementary and interoperable with the above mentioned federated national information system on infrastructure.

⁹²See note 80. Please note that the first and the third model of public intervention envisaged in the Plan are very similar, respectively, to the second and the first model of public intervention envisaged in the 2016 AgCom Guidelines concerning the conditions for wholesale access to very high-speed broadband networks that receive public funds (see *supra*, note 48 and accompanying text).

⁹³In areas falling within the D cluster, with 4,300 municipalities and 15% of the Italian population.

tender.⁹⁴ This model comprises the typical interventions 2 and 4 envisaged in Annex I of the 2013 Guidelines.⁹⁵

The second model⁹⁶ provides for a partnership between a State entity and one or more private operators that define the amount of their respective participation and co-invest in the construction and management of a network infrastructure, to be owned by an autonomous legal entity (which may be the partnership itself). In this case, pursuant to general State aid rules,⁹⁷ the choice of the private partner(s) must

⁹⁴The successful tenderers entrusted with the operation of the broadband or very high-speed broadband networks will be subject to several specific obligations regarding the technical and economic conditions of supply, also pursuant to the relevant EU rules, with which tender notices should comply, as well as the so-called symmetrical sectoral regulation, which is imposed on all providers of electronic communications networks regardless of whether they are found to hold significant market power. In particular, under Commission Regulation (EU) No. 651/2014 as per note 39 above (and within the time limits set out in the CIPE Resolution No. 65/2015 as per note 87 above), operators of networks subsidized by State aid must offer active and passive wholesale access to the largest extent possible, under fair and non-discriminatory conditions to be established by the AgCom. Under Article 52(1) of the said Regulation, investment aid to the deployment of broadband networks shall be compatible with the internal market and exempted from the obligation of prior notification, provided that certain requirements are met, including regarding the conditions for the provision of network access services. First, the operator of the subsidized network must offer the widest possible “active and passive wholesale access ... under fair and non-discriminatory conditions, including physical unbundling in the case of NGA networks. Such wholesale access shall be granted for at least seven years and the right of access to ducts or poles shall not be limited in time. In the case of aid for the construction of ducts, the ducts shall be large enough to cater for several cable networks and different network topologies” (Article 52(5)). Furthermore, wholesale access prices must be based on the pricing principles set by the national regulatory authorities and on benchmarks prevailing in other comparable, more competitive areas of the Member State concerned or the EU, taking into account the aid received by the network operator (Article 52 (6)). To this end, the said CIPE Resolution designates the AgCom as the body in charge of regulating the economic and technical conditions of supply (Articles 1.2 and 1.3.v). The 2013 Guidelines add that, in the absence of published prices, or of prices already set or approved by the AgCom for the markets and services concerned to be benchmarked against, the economic conditions of supply must be established otherwise, in accordance with the principles of cost orientation and following the methodology established in the sectoral regulation (2013 Guidelines, Article 78 (h)).

⁹⁵*Ibid.*, Annex I, nos. 2 (support in kind) and 4 (broadband network, managed by a concessionary).

⁹⁶In areas falling within the B or the C cluster, with 3800 municipalities and 68% of the Italian population.

⁹⁷See Commission Notice on the notion of State aid, paras. 89–96; Decision of 25 July 2012 (to initiate the formal investigation procedure; C(2012) 5051 final), State Aid 33063, *Italy – Trentino NGA*, http://ec.europa.eu/competition/state_aid/cases/245530/245530_1361493_35_5.pdf, para. 73; and Joined Cases C-214/12 P, C-215/12 P and C-223/12 P, *Land Burgenland a.o./Commission*, ECLI:EU:C:2013:682, para. 93. Moreover, in the absence of a competitive tendering procedure and depending on the context, there are also other ways of proving that a public investment was made under market conditions, i.e., on conditions sufficiently profitable, for example (in order of importance): (i) proving that the transaction was carried out on the same terms and conditions (*pari passu*) and, therefore, with the same level of risk and remuneration for public bodies and private operators that were in a comparable situation; (ii) providing contemporaneous economic expert reports on the transaction adequate to convince a rational private operator

take place through an open tender procedure that is transparent, sufficiently well-publicized, non-discriminatory and unconditional, in accordance with the principles enshrined in the public procurement directives. The partnership must also offer third-party access to the infrastructure on fair and non-discriminatory conditions, to be established by the AgCom.

The third model, which may also be used in areas falling within the B or the C cluster, provides for the granting by the State to a private operator selected by a competitive tendering procedure and investing own resources covering at least 30% of the project, of an incentive (in the form of a non-repayable grant or a tax incentive) for the completion of the NGA network in underserved areas. Ownership of the network will remain with the beneficiary of the incentive, which will nevertheless be bound by the wholesale supply conditions to be established *ex ante* by the AgCom. This model is, in general, the typical intervention most frequently used by Member States.⁹⁸

Finally, the fourth model (demand-aggregation intervention) is not actually a new and further model of State intervention, but rather a hybrid of the three models described above, which uses parts of them to aggregate demand for 100-Mbps connectivity in certain restricted areas, such as industrial zones.⁹⁹

In April 2016 the Italian authorities notified the Commission of a scheme having as its object the deployment of a passive access infrastructure enabling the development of an NGA network in white areas falling within the abovementioned cluster C or cluster D. The State measure, financed entirely from public funds with a budget of €4 billion, aims to increase the coverage of high-speed broadband by 31 December 2022. The Commission found that the scheme:

- (i) targets only white NGA areas (where currently no NGA networks exist) identified by the Italian authorities through a public consultation and a detailed mapping;
- (ii) addresses a market failure (digital divide) that could not be prevented with alternative instruments to state intervention;
- (iii) encourages the beneficiaries of public resources (which shall be selected through public tenders awarded on the basis of the most economically advantageous offer) to use existing infrastructures to the maximum extent possible, providing them with relevant information on the existing infrastructures;

(with similar characteristics to the public investor) of the investment's profitability and its related economic advantages; and/or (iii) by benchmarking or other commonly accepted evaluation methods.

⁹⁸2013 Guidelines, Annex. I, No.1 (Monetary allocation (gap funding)).

⁹⁹Further support measures are envisaged in the form of tax credits for structural interventions, State guarantees on loans, or bonds issued to finance the Strategic Plan's projects or incentives to demand, according to procedures to be defined by subsequent regulatory measures (areas within cluster A, with the 15 main Italian cities and 15% of the Italian population). It should be noted that the Plan approved in 2012 was implemented exclusively through direct interventions and incentives.

- (iv) fosters competition among operators in so far as the newly built infrastructures shall grant open access to all operators on equal footing. On this basis, in June 2016 the Commission adopted a decision declaring the aid compliant with the 2013 Guidelines and compatible with the internal market pursuant to Article 107(3)(c) TFEU.¹⁰⁰

6 Conclusions

Fast and widely accessible broadband is a key ingredient of Europe's quest for growth and prosperity. Broadband connectivity is of strategic importance for innovation in all economic sectors and for social and territorial cohesion. However, a significant number of citizens and undertakings in rural areas do not have sufficiently fast broadband due to market failures.¹⁰¹ Promoting inclusive access to high-speed broadband networks thus represents a key priority for the EU.

Whereas most of the funds for the realization of broadband connectivity projects in urban and highly populated areas come from private investment, public support is often needed to attain this objective, particularly as concerns rural and less populated areas that are unattractive to private investors.¹⁰² With this goal in mind, the EU institutions allocated almost €10 billion from EU funds for investment in high-speed broadband.¹⁰³

Public funding represents an important action at the EU level to stimulate investment.¹⁰⁴ However, according to one of the fundamental principles of EU

¹⁰⁰Decision of 30 June 2016, SA.41647, Italy—*Strategia Banda Ultralarga*, http://ec.europa.eu/competition/state_aid/cases/264095/264095_1764969_101_2.pdf.

¹⁰¹In 2016 only 40% of rural areas were covered by NGA networks, compared to 76% EU wide: see Commission staff working document accompanying the *Report from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on the Mid-Term Review on the implementation of the Digital Single Market Strategy: A Connected Digital Single Market for All* (COM(2017)228 final, May 10, 2017; <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52017SC0155&from=EN>).

¹⁰²Commission staff working document accompanying the Commission's Report on Competition Policy 2016 (SWD(2017) 175 final, May 31, 2017; <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52017SC0175&from=EN>), p. 49.

¹⁰³In particular, €6 billion will come from the European Structural and Investment Funds, and approx. €3.2 billion from the European Fund for Strategic Investments and the Connecting Europe Facility. Moreover, in December 2016 the Commission and the European Investment Bank launched the Connecting Europe Broadband Fund, i.e., a fund for broadband infrastructure across underserved areas of Europe: see Commission press release IP/16/4351, Commission and European Investment Bank announce a fund for broadband infrastructure open to participation of National Promotional Banks and Institutions and of private investors. See also *A Connected Digital Single Market for All*, p. 5.

¹⁰⁴All Member States have adopted national or regional broadband strategies, which in most cases include the use of public funds (see Commission staff working document accompanying the Report on Competition Policy 2016, p. 49).

State aid law, the risk of excluding or substituting private investments, of altering commercial investment incentives and, ultimately, of distorting competition must be limited as much as possible. Applying this principle to the deployment of broadband infrastructure requires that public support measures must address market failures, and that the positive effects of State intervention must outweigh its potential negative impact on unfettered competition in the internal market.

The Commission's policy in this area has proved successful in developing a relatively stable and consistently applied analytical framework, strengthening legal certainty for the benefit of Member State authorities, private investors and operators of broadband networks.¹⁰⁵

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¹⁰⁵ Stehman and Hobbelen (2017), pp. 552 and 553, stating that key issues in the Commission's analysis "have included, and will likely continue to include, whether the public aid is targeted at areas with a genuine market failure (requiring a detailed mapping and coverage analysis); the acceptance that certain broadband products can be an SGEI; consistent compatibility criteria such as the need in principle for open tenders, access conditions, technological neutrality (with some exceptions like in Sardinia), and, since 2013, the 'step change' requirement". However, the authors also note that "[a] continued mix of technological, legal and economic expertise in the future is clearly vital to ensure high-quality State aid control," and emphasize that an in-depth understanding of the available technological options, the economic plans of operators, as well as the social and economic needs of the population is crucial to the successful use of the detailed mapping and coverage analysis. Hence the necessity and the ensuing challenge for Member State authorities to fully grasp the technology involved and its complexities.

State Aids, Social Services and Healthcare in EU Law

Daniele Gallo

1 The Definition and Regulation of Social Services and Healthcare Under EU Law

Social services and healthcare, generally (but not always) referred to as ‘social services of general interest’ (SSGIs), have been at the heart of several soft law acts adopted by the European Commission in the last 20 years, raising issues of competition law, State aid, the internal market and fundamental rights.¹ Neither primary and secondary law nor the case law of the CJEU provide a clear definition of what SSGIs are as the content and extent of this notion have varied over the years²: there is neither an exhaustive list of such activities nor a set of public service obligations attached to their operation. The one principal element shared is that they play a crucial role in the organization of welfare policies in the 28 Member States of the EU

¹See Commission (EC), ‘Services of general interest’ (Communication) COM (96) 281/03, 26 September 1996; Commission (EC), ‘Services of general interest in Europe’ (Communication) COM (01) 17/04, 19 January 2001; Commission (EC), ‘Green Paper on services of general interest’ (Green Paper) COM (03) 270 final, 21 May 2003; Commission (EC), ‘White Paper on services of general interest’ (White Paper) COM (04) 374 final, 12 May 2004; Commission (EC), ‘Implementing the Community Lisbon programme: Social services of general interest in the European Union’ (Communication) COM (06) 177 final, 26 April 2006; Commission (EC), ‘Accompanying the Communication on “A single market for 21st century Europe” Services of general interest, including social services of general interest: a new European commitment’ (Communication) COM(07) 725 final, 20 November 2007; Commission (EU), ‘A Quality Framework for Services of General Interest in Europe’ (Communication) COM(11) 900 final, 20 December 2011. See Neergaard et al. (2013), p. 4.

²On the notion of SSGI, see van de Gronden (2011), p. 123.

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because they deliver ‘public goods’ to the users/citizens, involve social policy objectives and are inspired by solidarity considerations. SSGIs may be economic or non-economic in nature depending on the legal regulatory framework set up by national authorities.³ When they are economic, they fall under the notion of ‘services of general economic interest’ (SGEI) as ‘economic social services of general interest’ (ESSGIs) and EU law, including Articles 107–108 TFEU, will apply to them, with the *caveat* that Article 14 TFEU, Article 106(2) TFEU and Protocol No. 26 on Services of general interest may apply should they comply with the requirements prescribed therein.⁴ When SSGIs are non-economic, the economic character of the activity is such that it is negligible or the performance of non-economic activities cannot be separated from that of economic activities, the EU treaties as well as secondary law will not apply.⁵

The assessment of whether a social service is economic or not is, therefore, crucial in order to identify the scope and extent of EU law: only after it has been determined that the service is economic in nature can State aid rules come into play.⁶ However, to prevent Member States from granting *ex ante* exemption from EU law to general interest sectors, the CJEU has relied on a wide and flexible notion of economic activity, adopting a functional and objective⁷—rather than institutional and subjective⁸—interpretation of the concept under EU competition law.⁹ Thus, in determining whether a service is economic or not, the Court will in principle consider the following factors irrelevant: the legal status of the entity (public or private); its structure and organization; the way in which it is financed and the origin (public or private) of that financing; and the absence of a lucrative (for-profit) purpose.¹⁰ The rationale behind the functional approach is that the task of defining the meaning and scope of the concept of economic activity must not be left to the Member States. Otherwise, said States would be free to restrict the scope of that concept, on a discretionary basis, so as to exclude as many activities as possible from the application of competition and market rules—and this would put into question both the effectiveness of EU law and its uniform application within the Member States. The result is a significant widening of the scope of the Treaties, as can be

³Baquero Cruz (2013), p. 294.

⁴On SGEIs, see the chapter by Szyszczak, this volume, and Gallo (2010).

⁵With the exception of principles, such as non-discrimination, that apply also *vis-à-vis* non-economic services.

⁶In the Commission Staff Working Paper, of 23 March 2011, ‘The Application of EU State Aid rules on Services of General Economic Interest since 2005 and the Outcome of the Public Consultation’, SEC(2011) 397, p. 34, it is stated that “[t]he most relevant criterion used in this context is whether there is a market for the services concerned”.

⁷See, among others, Louri (2002), p. 143; Odudu (2006), pp. 23–56; Sauter and Schepel (2009), pp. 75–83.

⁸Odudu (2006), p. 25.

⁹On the divergences in the interpretation of this concept in the SSGI sector, between competition law, free movement and State aid, see Gallo (2011).

¹⁰See, in particular, Case C-41/90, *Höfner*, ECLI:EU:C:1991:161, paras. 21–22.

inferred from the fact that, at present, only a limited number of sectors, comprising SSGIs, are deemed to be exempt *ab initio* from EU law.¹¹

Despite the presence of gaps in EU secondary law and in the case law of the CJEU, it seems possible to say that the concept of ‘economic activity’ usually has one constitutive element, namely the offer of goods or services. This implies that there must be a market, and that the activity is remunerated.¹² In light of this, the EU institutions have identified a number of aspects to describe the economic or non-economic character of two types of SSGI in particular, namely social security and healthcare. As to the former, in most of its case law, the CJEU, starting from the assumption that “EU law does not detract from the powers of the Member States to organize their social security systems”,¹³ has regarded as non-economic activities of a purely social nature the services provided by national organizations charged with the management of a social security scheme. At the core of the CJEU’s reasoning lies the principle of solidarity¹⁴: only if the Member State concerned sets up a scheme which operates in accordance with that principle is the activity in question considered to be non-economic.¹⁵ Both the Court of Justice (CJ) and the General Court (GC) have relied on several criteria to characterize an activity as solidarity-based and, therefore, non-economic. These include: compulsory affiliation with the social security scheme in question¹⁶; exclusively social purpose of the scheme¹⁷; statutory benefits determined irrespective of the amount of contributions¹⁸; non-profit character of the scheme¹⁹; non-proportionality of the benefits to the insured persons’ earnings²⁰; and supervision of the scheme by the State.²¹ With regard to this last factor, where social security bodies enjoy a degree of latitude in determining the amount of contributions and benefits and said degree of latitude is established and strictly delimited by law, the activity of those bodies is non-economic, even though they can fix the minimum or maximum amount of the contributions. On the other hand, the CJEU has used the following criteria to establish the economic nature of a social security scheme: dependency of entitlements on the contributions paid and the

¹¹In the 2007 Communication, above fn. 1, for instance, it is established that “an increasing number of activities performed daily by social services are now falling under the scope of EC law to the extent they are considered as economic in nature”, para. 2.3, p. 8.

¹²See Gallo (2014), pp. 1807–1810.

¹³See *inter alia*, Case C-350/07, *Kattner*, ECLI:EU:C:2009:127, para. 37.

¹⁴See *ex multis*, Case C-67/96, *Albany*, ECLI:EU:C:1999:430, para. 86.

¹⁵For some general observations on the principle of solidarity under EU competition law, see Boeger (2007).

¹⁶See Case C-159-161/91, *Poucet et Pistre*, ECLI:EU:C:1993:63, para. 13.

¹⁷See Case C-218/00, *Cisal*, ECLI:EU:C:2002:36, para. 45.

¹⁸See Case C-159-161/91, *Poucet et Pistre*, ECLI:EU:C:1993:63, paras. 15–18.

¹⁹See Joined Cases C-264/01, C-306/01, C-354/01 and C-355/01, *AOK*, ECLI:EU:C:2004:150, paras. 47–55.

²⁰See Case C-218/00, *Cisal*, ECLI:EU:C:2002:36, para. 40.

²¹See Case C-350/07, *Kattner*, ECLI:EU:C:2009:127, para. 43.

financial results of the scheme (principle of capitalization)²²; optional membership²³; for-profit character of the scheme²⁴; the provision of entitlements which are supplementary to those under a basic scheme.²⁵ Needless to say, whether a given scheme is to be classified as economic or non-economic, whether another scheme combines elements from both categories, and whether an economic scheme may fall under Article 106(2) TFEU (and escape the application of EU rules) will depend on how each scheme is regulated at a national level.²⁶

A Decision of the European Commission of 15 October 2014 provides a recent example of how the criteria discussed above have been used by the EU institutions. In reviewing a complaint concerning alleged State aid measures and the organization of the Slovak system of compulsory health insurance, the Commission concluded that no State aid was involved, because State-owned health insurers in Slovakia were not undertakings and, therefore, did not carry out an economic activity within the meaning of the EU rules.²⁷ In its assessment, the Commission took into account that a limited degree of competition and profit-orientation had been introduced into the Slovak system with respect to the quality of the services, but not with regard to contributions. At the same time, the Commission emphasized the social and collective nature of that system, noting that participation was compulsory for most of the Slovak population, that contributions were fixed by law and proportional to the income of the insured, that all the insured were guaranteed the same minimum level of benefits, and that the value of the latter was unrelated to the individual contribution paid.

As to the healthcare sector, as is well known, there are many differences between Member States as to the national laws and regulations governing this sector. In some countries, hospitals are public: they form an integral part of the national health system and operate according to the principle of solidarity. This means that they are funded by social security contributions or other State resources and provide services free of charge to all patients on the basis of universal coverage. In other countries, by contrast, hospitals and other healthcare organizations offer their services for remuneration, to be paid directly by patients or by their insurance. In such systems, therefore, there is competition between healthcare providers and the activity is to be considered economic. The same holds true for pharmacies, independent doctors and,

²²See Case C-244/94, *FFSA*, ECLI:EU:C:1995:392, paras. 17–20; Joined Cases C-115/97 to C-117/97, *Brentjens*, ECLI:EU:C:1999:434, paras. 81–85; Case C-219/97, *Drijvende Bokken*, ECLI:EU:C:1999:437, paras. 71–75.

²³See Case C-67/96, *Albany*, ECLI:EU:C:1999:430, paras. 80–87.

²⁴See Joined Cases C-115/97 to C-117/97, *Brentjens*, ECLI:EU:C:1999:434, para. 74.

²⁵See Joined Cases C-180/98 to C-184/98, *Pavlov*, ECLI:EU:C:2000:428, paras. 78–81.

²⁶See Case C-67/96, *Albany*, ECLI:EU:C:1999:430, paras. 88–123.

²⁷Decision on the measures SA.23008—2013/C (ex 2013/NN), C (2014) 7277 final. For a discussion of this case from the perspective of State aid law, see Sect. 4 of this chapter.

more generally, private practitioners providing health services for remuneration at their own risk.²⁸

The focus on the concept of economic activity is at the core of the Commission's Decision of 19 December 2012 on an Italian scheme concerning the municipal real-estate tax exemption granted to real estate used by non-commercial entities for specific purposes, including social assistance, welfare, health, cultural, educational, recreational, accommodation, sport, religious and cult activities.²⁹ This Decision comes after a previous Decision of formal investigation of 12 October 2010, undertaken under Article 108(2) TFEU,³⁰ in which the Commission came to the conclusion that it was not possible to exclude that the measures in question may constitute State aid schemes. The 2012 Decision is very interesting because the Commission, with regard to the so-called IMU, that is, the new municipal real-estate tax replacing the old one (ICI), in assessing whether the exemption complies with State aid rules, observed, in general terms, that the interpretation of the notion of economic activity depends "on the specific circumstances, the way the activity is organized by the State, and the context in which it is organized".³¹ What can be inferred is, therefore, an attenuation of the functional approach, combined with the reaffirmation of the core elements that have to be present in order for the activities to be considered non-economic:

1. they are not profit making;
2. by their nature they are not in competition with other market operators that are profit making; and
3. they put into practice the principle of solidarity and subsidiarity.³²

This reasoning led the Commission to deny the economic character of the SSGIs performed by non-commercial entities and thus to exclude the qualification of the national tax exemption as State aid under Article 107 TFEU.³³ This approach is very similar to the one adopted in the *FENIN* ruling of 10 November 2005, in which the CJ stated that the purchase of medical goods from private undertakings by public organizations managing a national health system was not to be regarded as economic activity and that it would be incorrect, when determining the nature of the upstream activity, to dissociate the activity of purchasing goods from the subsequent use to which the purchased goods are put. Indeed, that service can be regarded as economic on condition that the downstream activity amounts to an economic activity as well.

²⁸See the analysis by Hervey and McHale (2015), pp. 211–226.

²⁹Commission Decision (EU) on State aid SA.20829 (C 26/2010, ex NN 43/2010 (ex CP 71/2006)) (2012) 9461 final. See also *above*, para. 5, for further considerations from a purely State aid perspective.

³⁰Commission Decision (EU) on State aid C 26/2010 (ex NN 43/2010 (ex CP 71/2006)), (2010) 8960 final—Italy. See also *above*, Sect. 3 of this chapter, for further considerations from a purely State aid perspective.

³¹Para. 163.

³²Para. 166.

³³Paras. 169–177.

Consequently, an organization which purchases goods—even in great quantity—not for the purpose of offering goods and services as part of an economic activity, but in order to use them in the context of a different activity, such as one of a purely social nature, does not act as an undertaking simply because it is a purchaser in a given market. According to the CJ, the medical services provided to patients by public bodies did not constitute economic activities because they operated in accordance with the principle of solidarity, that is, they were funded by social security contributions and other State funding and delivered free of charge to their members on the basis of universal cover.³⁴ As a consequence, whilst an entity may wield very considerable economic power, it nevertheless remains the case that, if the activity for which that entity purchases goods is not an economic activity, this entity is not acting as an undertaking for the purposes of EU law and is therefore not subject to EU rules. Here we have a relatively ‘relaxed’ application of the functional approach on the part of EU judges, who chose to ground their reasoning on the public origin of the financing, resulting in the decision to regard the activity as non-economic instead of considering it as economic and, then, apply the derogation laid down in Article 106(2) TFEU. Now, under a strictly functional approach, public funding would have been regarded as remuneration, since the way in which a service is financed must in principle be considered irrelevant to the application of EU rules.³⁵

However, it is not possible to draw a clear line of thought as both the Commission and EU judges opted, in a number of decisions and judgments, for a different approach and thus found the health service concerned to be economic. In *Ambulanz Glöckner*, for instance,³⁶ the CJ observed that medical aid organizations entrusted by public authorities with the task of providing the public ambulance service carry out economic activities, mainly because they receive remuneration from users.³⁷ In its judgment, the CJ did not depart from a functional approach since the public nature of the funding system led EU judges not to deny the economic character of the activity, but to apply Article 106(2) TFEU. This is confirmed by a relatively recent ruling of the GC in a case concerning compensation granted by Belgian authorities to a group of public hospitals based in Brussels.³⁸ The GC made a distinction between, on the one hand, national health systems—which are managed by ministries and other bodies and operate according to the principle of solidarity—and, on the other hand, management bodies responsible for the provision of hospital care against remuneration in a competitive environment. Here, public funding was not regarded as a factor indicating that the service in question was not an economic activity (and, therefore, that the service provider was not an undertaking within the meaning of Article 107(1) TFEU). Moreover, based on the private investor test, the

³⁴Paras. 25–29.

³⁵Case C-205/03P, *FENIN*, ECLI:EU:C:2006:453.

³⁶Case C-475/99, *Ambulanz Glöckner*, ECLI:EU:C:2001:577.

³⁷Paras. 18–22.

³⁸Case T-137/10, *Coordination bruxelloise d’institutions sociales et de santé (CBI)*, ECLI:EU:T:2012:584. On the State aid implications see *above*, Sect. 5 of this chapter.

Commission—in the investigation procedure launched on 1 October 2014 under Article 108(2) TFEU in the aftermath of the GC’s judgment³⁹—noted that the hospital activities were also provided by other types of bodies or entities, in particular clinics, private hospitals and other specialized centres.

The Member States enjoy a wide margin of discretion in defining and regulating SSGIs. If the service is a non-economic activity, national authorities are not subject to the EU law rules on internal market and competition. On the other hand, in the case of an economic activity and, therefore, of an ESSGI, the control exercised by the EU institutions is limited to manifest errors of assessment on the part of Member States’ authorities, as repeatedly explained by the EU judges in several rulings, including that delivered in the famous *BUPA* case.⁴⁰

In its 2004 White Paper on SGIs, the European Commission proposed “a systematic approach in order to identify and recognize the specific characteristics of social and health services of general interest and to clarify the framework in which they operate and can be modernised”.⁴¹ However, even though no systematic approach has been adopted yet at the level of secondary law, the Commission has tried to provide a clearer definition of SSGIs in a number of non-binding legal acts, most notably in the 2006 Communication on SGIs, cited above, which was conceived as a follow-up to the White Paper.

Four points of the 2006 Communication are especially relevant to our discussion. First of all, the Commission stated that the distribution of competences between the EU and Member States in the regulation of SSGIs is governed by the principle of subsidiarity, with the result that Member States are free to define what they mean by SSGIs, subject to *ex post* supervision by EU institutions.⁴² Secondly, the Commission focused on the content of SSGI, identifying three main categories: health services (not directly covered by the Communication); statutory and complementary social security schemes, organized as mutual or occupational organizations, covering the main risks of life, such as those linked to health, ageing, occupational accidents, unemployment, retirement and disability; all other essential services provided directly to the person, including:

- a) assistance for persons faced by personal challenges or crises (such as debt, unemployment, drug addiction);
- b) reintegration of citizens into society (through rehabilitation, language training) and the labour market (through occupational training);
- c) integration of persons with long-term health or disability problems;
- d) social housing, that is, provision of housing for disadvantaged citizens or socially less advantaged groups.⁴³

³⁹Commission Decision (EU) on the public financing of Brussels public IRIS hospitals SA.19864 (2014/C) (ex NN 54/2009)—Belgium, C(2014) 6833 final. See *above*, Sect. 3 of this chapter.

⁴⁰See Case T-289/03, *BUPA*, ECLI:EU:T:2008:29.

⁴¹See para. 4.4, p. 17.

⁴²See para. 2.1, pp. 6–7.

⁴³See para. 1.1, pp. 4–5.

To those listed above we should add, of course, education activities, which (oddly enough) were not mentioned by the Communication. Thirdly, the Commission observed that SSGIs frequently present one or more of these characteristics: they operate on the basis of the solidarity principle; they are intended to protect the most vulnerable sectors of the population; they are not for profit; they often involve voluntary workers; and they are rooted in local cultural traditions.⁴⁴ Fourthly, the Commission identified some aspects of the process of modernization of SSGIs which was and is still taking place in the Member States of the EU: introduction of benchmarking methods and quality assurance; decentralization of the organization of the services to regional/local level; outsourcing of public sector tasks to the private sector; and use of public-private partnerships.⁴⁵

Much of the recent policy and legal discussion on the two notions of economic activity and SSGI has focused on whether it is possible and/or desirable, for the sake of legal certainty, to draw up a list of activities that can be considered non-economic, that is, capable of being exempted from Treaty rules, including State aid provisions.⁴⁶ As noted by the European Commission, the public authorities and the operators in the field of SSGIs perceive the constant evolution of the CJEU's jurisprudence as a source of uncertainty.⁴⁷ Having said this, the idea of drawing up—at the level of EU secondary law—an exhaustive list of NESSGIs and ESSGIs does not seem to be an adequate solution, or even a feasible one, since what is economic or non-economic, as well as what is meant by ESSGI, depends on the way in which public authorities regulate an activity rather than on its intrinsic nature. Both unity and diversity exist within all areas of SSGIs⁴⁸; therefore, it would be difficult to enforce an act of the EU horizontally, not least because there is no clear competence, at the EU level, in the majority of these sectors. Inevitably, then, the content and scope of the concept of economic activity, as well as the criteria to be applied with regard to Article 106(2) TFEU, cannot be identified *a priori*, but, rather, must be determined by EU institutions on a case-by-case basis. This is not to say, however, that it would be impossible or undesirable to adopt separate framework directives covering the different (sub-)categories of ESSGI. Indeed, framework directives could lay down the common rules applicable to each specific class of services and, therefore, provide answers to the questions raised by Member States' public authorities, citizens/users, service providers, civil society organizations and other stakeholders regarding the application of the EU rules to SSGIs.

⁴⁴See para. 1.1, p. 5.

⁴⁵See para. 1.2, p. 5.

⁴⁶On this topic, see Baquero Cruz (2013), p. 294; Schiek (2013), pp. 73–94.

⁴⁷See the 2006 Communication on SGIs, above fn. 1, para. 2.1, p. 7.

⁴⁸Bauby (2013), p. 50.

2 The Financing of SSGIs According to the ‘Almunia Package’

In order to clarify the scope, content and extent of EU law on SGEIs, including ESSGIs, as much as possible, the Commission and the CJEU, as is known, have focused over the years on whether and to what extent the public funding to undertakings entrusted with the operation of public services was to be considered as State aid in accordance with Article 107 TFEU and, possibly, as a compensation justified in light of Article 106(2) TFEU.⁴⁹

In 2009 the Member States were asked to report on the implementation of the ‘Monti-Kroes Package’, of 2005, named after the then Commissioners for Competition.⁵⁰ This Package, which remained in force until November 2011, made a distinction between public measures that were not to be considered State aid *ab origine*, State aid measures that were permitted *ex se* under Article 106(2) TFEU and were not subject to notification, and State aids potentially compatible with the common market pursuant to Article 106(2) TFEU and to be notified to the Commission.⁵¹ As far as SSGIs are concerned, a reading of the Package, which consisted of a Decision, a Communication Framework and a Directive, reveals that it allowed Member States to grant compensation to small-scale public services, hospitals and social housing without notifying the Commission.⁵² The consultation launched by the Commission lasted for a few months and was closed on 10 September 2010 with the launch of a report on the application of the Package based on the responses received from Member States,⁵³ then the adoption, on 23 March 2011, of a Communication entitled ‘Reform of the EU State Aid Rules on SGEIs’,⁵⁴ and finally, on 20 December 2011, the finalization of an umbrella Communication on A Quality Framework for SGEIs in Europe,⁵⁵ following an initial draft published in September

⁴⁹See the chapter by Szyszczak, this volume; see also Gallo (2015), pp. 183–200.

⁵⁰Mario Monti held office between 1999 and 2004, Neelie Kroes between 2004 and 2010.

⁵¹Besides Article 106(2) TFEU, there are other State aid derogations applicable to SSGIs. They are: Article 107(2)(a) on social aids granted to individuals; Article 107(3)(c) TFEU on aids facilitating the development of certain economic activities and areas; and the Commission Regulation (EU) 651/2014 of 17 June 2014 declaring certain categories of aid compatible with the internal market in application of Arts. 107 and 108 TFEU [2014] OJ L187/1, the so-called General Block Exemption Regulation (GBER). On this topic see Gallo (2016).

⁵²Commission Decision (EC) 2005/842 of 28 November 2005 on the application of Article 86(2) of the EC Treaty to State aid in the form of public service compensation granted to certain undertakings entrusted with the operation of services of general economic interest, [2005] OJ L312/67; Commission Directive (EC) 2005/81 of 28 November 2005 amending Commission Directive (EEC) 80/723 on the transparency of financial relations between Member States and public undertakings as well as on financial transparency within certain undertakings, [1980] OJ L312/47.

⁵³On this point, see Szyszczak (2013), pp. 32–33.

⁵⁴COM/2011/0146.

⁵⁵COM/2011/0900.

2011.⁵⁶ This Communication forms the origins of the new reform package on State aid rules for SGEIs, the ‘Almunia Package’, named after the then Vice-President of the Commission and Commissioner responsible for competition policy.⁵⁷ With the adoption of the ‘Almunia Package’, the Commission provided a general framework in the field of SGEIs and State aid⁵⁸ and, in line with the ‘Monti-Kroes Package’, placed greater emphasis on Article 106(2) TFEU. The Package⁵⁹ consists of the following acts: two Communications⁶⁰; one Decision, which was adopted on 20 December 2011 and entered into force on 31 January 2012⁶¹; and one Regulation, which was adopted on 25 April 2012 and entered into force on 29 April 2012.⁶² All these acts are supplemented by the Commission Staff Working Document’s Guide to the application of the European Union rules on State aid, public procurement and the internal market to SGEIs, and in particular to SSGIs (2013 SGEI Guide), as amended on 29 April 2013.⁶³

The Package simplifies the law for actors entrusted with the provision of ESSGIs, as well as for small local operators which often deliver ESSGIs, in addition to non-economic SSGIs. At the same time, however, it tightens the rules for large operators entrusted with the performance of ESSGIs by limiting the autonomy of Member States’ autonomy *vis-à-vis* their financing (beyond cases of possible over-compensation).⁶⁴ The Package provides diversified rules in order to ensure diversity between SGEIs and, by so doing, extends the list of ESSGIs that are exempt from prior scrutiny by the Commission.⁶⁵ In this respect, the Commission intends to respond, above all, to the economic and financial crisis by stressing the importance

⁵⁶On the different stages of this consultative process, see Kamaris (2012), pp. 55–58.

⁵⁷See the chapter by Szyszczak, this volume.

⁵⁸For an overview of the Package, with an emphasis also on the ESSGIs’ peculiarities, see Buendia Sierra and Muñoz de Juan (2012), Geradin (2012), Maxian Rusche (2013), Righini (2012), Rodrigues (2013), Sauter (2012) and Szyszczak (2012).

⁵⁹See also Member States’ reports available at http://ec.europa.eu/competition/state_aid/overview/public_services_en.html#reports.

⁶⁰Commission (EU), ‘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’ (Communication) COM [2012] OJ C8/4; Commission (EU) ‘Communication from the Commission, European Union framework for State aid in the form of public service compensation’ (Communication) COM [2012] OJ C8/15.

⁶¹Commission Decision (EU) 2012/21 of 20 December 2011 on the application of Article 106(2) of the Treaty on the Functioning of the European Union to State aid in the form of public service compensation granted to certain undertakings entrusted with the operation of services of general economic interest [2012] OJ L7/10.

⁶²Commission Regulation (EU) 2012/360 of 25 April 2012 on the application of Articles 107 and 108 of the Treaty on the Functioning of the European Union to *de minimis* aid granted to undertakings providing services of general economic interest [2012] OJ L114/8.

⁶³Commission SWD (2013) 53 final/2.

⁶⁴Szyszczak (2013), p. 27.

⁶⁵On this point see, amongst others, Merola and Ubaldi (2012), p. 19.

of guaranteeing access to essential high-quality ESSGIs as more and more people become dependent on the supply of those services.⁶⁶

In light of the above, it is important to understand which measure of the Package may apply to public funding granted to an undertaking entrusted with the provision of an ESSGI. The possible cases are as follows: if the compensation complies with the requirements contained in the *de minimis* Regulation, it cannot constitute State aid; if the funding cannot be included within the scope of the *de minimis* Regulation, it may nevertheless comply with the *Altmark* conditions, as clarified in Communication 8/02, in which case it will not be regarded as aid⁶⁷; if one or more *Altmark* conditions are not fulfilled, the public financing may come under the scope of (Article 106(2) TFEU and therefore of) the Decision as being a State aid exempt from the notification obligation, provided that the undertaking is one of those listed therein; if one or more *Altmark* conditions are not fulfilled and the public financing does not fall under the scope of the Decision, the compensation may be subject to prior notification in accordance with the Framework Communication as State aid compatible with Article 106(2) TFEU.

Before examining the Decision, which deals extensively with ESSGIs, some remarks must be made on Communication 8/02 and the *de minimis* Regulation included in the Package, as they may cover also but not only ESSGIs.⁶⁸

Communication 8/02 reiterates that State aid provisions only apply to economic services. The Commission offers specific rules for four sectors: exercise of public powers,⁶⁹ social security,⁷⁰ healthcare,⁷¹ and education.⁷² The last three fall under the notion of SSGL. In this respect, the SGEI 2013 Guide clarifies that Communication 8/02 does not aim to provide an exhaustive list of economic and non-economic services, but, rather, some examples of the key factors that must be taken into account when determining what an economic activity is.⁷³ And, as noted above, it

⁶⁶Righini (2012), p. 3.

⁶⁷See Case C-280/00, *Altmark*, ECLI:EU:C:2003:415, paras. 78–95, in which the Court stated that public service compensation does not constitute State aid when four cumulative conditions are met: the recipient undertaking must have public service obligations and the obligations must be clearly defined; the parameters for calculating the compensation must be objective, transparent and established in advance; the compensation cannot exceed what is necessary to cover all or part of the costs incurred in the discharge of the public service obligations, taking into account the relevant receipts and a reasonable profit; where the undertaking which is to discharge public service obligations is not chosen pursuant to a public procurement procedure (that would allow for the selection of the 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 of a typical well-run company.

⁶⁸On the interplay between procurement rules, ESSGIs and State aids, and the relevant legal framework, see Manunza and Berends (2013), p. 348; Gallo (2016).

⁶⁹See para. 2.1.2, pt. 16.

⁷⁰See para. 2.1.3, pts. 17–20.

⁷¹See para. 2.1.4, pts. 21–25.

⁷²See para. 2.1.6, pts. 26–29.

⁷³See para. 3.2.1, pts. 29–30.

could not be otherwise,⁷⁴ since the concept of economic activity changes over time because of the Member States' policy decisions on the organization of SSGIs and as a result of market developments. Also relevant to our discussion is the question of the impact of public service compensation on trade between Member States. In the Communication it is stated that, in order to fall under Article 107 TFEU, this type of financing must affect or threaten to affect intra-EU trade. This means that there must be a market, and that there is a market also when it has been reserved for a single undertaking, including an in-house provider (public or private). Indeed, the 2013 SGEI Guide specifies that, even if there is only one operator within a region or local community providing a specific SGEI (as in the case of specialized medical care or ambulance services), the possibility for operators from other Member States being interested in providing the same service cannot be ruled out: the potential impact on trade is still there. Distortions of competition may also occur and trade is affected when the actor which receives the aid is active not only in liberalized markets but also in non-liberalized markets.⁷⁵ Moreover, aid measures may be regarded as having an effect on trade also where the recipient undertaking does not itself participate in cross-border activities. In such cases, indeed, domestic supply may be increased, with the result that the opportunities for undertakings established in other Member States to offer their services in that Member State would be reduced.⁷⁶ Furthermore, there is no threshold or percentage below which trade between Member States is not to be deemed as affected *per se*. Even a small amount of aid can potentially boost the service(s) supplied by a provider, with the consequence of making it more difficult for other European operators to deliver the same service (s) on the local market.⁷⁷ The same holds true for the size of the recipient undertaking: the fact that it is a small company to be publicly financed does not prevent that financing from being caught by Article 107 TFEU.⁷⁸ Of course, ESSGIs could be more easily affected than other SGEIs by this approach, which is intended to limit the Member States' discretion in financing essential services. At the same time, Communication 8/02 classifies certain services of a purely local character as activities that do not affect trade between Member States. These services include, for instance, local hospitals aimed exclusively at the local population.⁷⁹ In this case, as in that of the notion of economic activity, the Commission simply aims to provide a non-exhaustive list of examples.

Of course, ESSGIs are much more likely to fall under the scope of the *de minimis* Regulation than other SGEIs. This is due to their local character, as well as to the amount, normally relatively small, of aid granted by the State—which, if below the threshold of €500,000 (over any period of three fiscal years per undertaking), will

⁷⁴See para. 1.

⁷⁵See para. 2.3, pt. 37.

⁷⁶See para. 2.3, pt. 38.

⁷⁷See para. 3.2.1, pt. 36 of the 2013 SGEI Guide.

⁷⁸See para. 2.3, pt. 39.

⁷⁹See para. 2.3, pt. 40.

fall outside the definition of ‘aid’ under Article 107(1) TFEU because it will be regarded as not capable of affecting trade between Member States and/or distorting or threatening to distort competition.⁸⁰ The threshold is higher than the one set out in the general *de minimis* Regulation 1998/2006, which provides that aid measures not exceeding €200,000 do not fall under Article 107(1) TFEU.⁸¹ As observed by the Commission in its 2013 SGEI Guide, the *de minimis* Regulation is based on the principle that a higher threshold is justified because at least part of the amount is granted as compensation for additional costs incurred in connection with the provision of the SGEI. The potential advantage for the public service provider is thus lower than the compensation amount actually granted, while under the general *de minimis* Regulation the advantage from the same amount would be higher. Therefore, the ceiling up to which there is no impact on competition and trade between Member States is higher for compensation for an SGEI.

The 2012 SGEI Decision is the most controversial document in the Package. It aims to simplify the law and provides for a more flexible approach to ESSGIs than was the case under the ‘Monti-Kroes Package’. Indeed, the Decision, if compared to the 2005 SGEI Decision, extends the exemption from notification to a wide range of services ensuring the fulfilment of social needs, in addition to hospital services and social housing.⁸² Besides the funding granted to bodies entrusted with the operation of services not falling under the notion of SSGIs,⁸³ Article 2(1) lists the following categories of aids granted to ESSGIs providers:

- a) compensation for public service tasks performed by hospitals providing medical care, including, where applicable, emergency services⁸⁴;
- b) compensation for services meeting social needs as regards health and long-term care, childcare, access to and reintegration into the labour market, social housing, and the care for and social inclusion of vulnerable groups.⁸⁵

Moreover, the aforesaid exemption applies to compensations of up to €15 million per annum for the provision of services in areas other than transport and transport infrastructure, including ESSGIs. This is an important novelty since the previous threshold in the ‘Monti-Kroes Package’ was €30 million. Given the development of intra-Union trade in the provision of public services, the Commission deemed it appropriate to set a lower limit for the amount of compensation which can be exempted.⁸⁶ In the (quite common) case of a body entrusted with the provision of an ESSGI that also engages in non-economic activities which are not subject to EU

⁸⁰Article 2.

⁸¹Commission Regulation (EC) 1998/2006 of 15 December 2006 on the application of Articles 87 and 88 of the Treaty to *de minimis* aid, [2006] OJ L 379/5.

⁸²See generally van de Gronden and Rusu (2013) and Hancher and Sauter (2013).

⁸³Article 2(1)(d) and (e).

⁸⁴Article 2(1)(b).

⁸⁵Article 2(1)(c).

⁸⁶Article 2(1)(a).

market and competition rules, in order to demonstrate the specific costs incurred in connection with that ESSGI and thus establish the amount of compensation and the absence of overcompensation, the undertaking must keep separate accounts. Furthermore, the Commission specifies, on the one hand, that the aid must respect relevant sector-specific EU law and, on the other, that the Decision only applies where the period for which the undertaking is entrusted with the operation of the service does not exceed 10 years. To sum up, under the Decision:

1. certain compensation measures granted to ESSGI providers are to be considered aid *per se* compatible with EU law, regardless of the amount of the compensation, including where said amount exceeds €15 million, if they concern the specific sectors listed in Article 2⁸⁷ and are therefore exempt from notification; whereas,
2. other measures concerning different ESSGI sectors from those listed in Article 2 by which compensation exceeds €15 million must be notified to the Commission, regardless of the nature of the activity involved.

Indeed, since the latter measures concern services not included within the scope of the Decision, the presumption of compatibility with the Treaty does not apply.

Uncertainty may arise as to whether the *Altmark* judgment or the Decision applies in relation to a compensation granted to an ESSGI provider. In this connection, the 2013 SGEI Guide clarifies that, while the fourth *Altmark* criterion is fulfilled if the compensation is not set above the level that would be required by an efficient undertaking (capable of winning a tender or identified through a benchmarking exercise), the Decision does not set efficiency requirements. This means that the amount of the compensation does not necessarily have to be determined through a public procurement procedure, or by comparison with the costs of a typical well-run undertaking.⁸⁸ Therefore, as long as the public authority proves that the compensation is equivalent to the net costs estimated on the basis of the precisely defined parameters contained in the act of entrustment and that there is no overcompensation, it is deemed to fall under the scope of the Decision as compatible State aid.

An important issue concerns the meaning of “hospital providing medical care” (Article 2(1)(b)) and service “meeting social needs” (Article 2(1)(c)). As to the former, the Decision provides no clear definition of the term ‘hospital’; it seems plausible, however, to assume that both public and private hospitals could benefit from the exemption. Moreover, Article 2(1)(b) provides that the pursuit of ancillary activities directly related to the main service offered by a hospital does not prevent the application of the Decision in respect of non-general-interest economic activities carried out by that hospital. These include research, as explicitly stated in the provision, as well as other activities of a purely economic nature (restaurant, taxi services etc.). Article 2(1)(c), on the other hand, makes no reference to ancillary activities, but this does not mean that services meeting social needs are treated less favourably than hospitals. Rather, the silence of Article 2(1)(c) merely means that

⁸⁷ Article 2(1)(b)–(e).

⁸⁸ See para. 3.4.2.1, pt. 110, 2013 SGEI Guide.

social service providers can carry out other activities that are more than just ancillary and continue to be exempt from notification under the Decision. Besides, the Commission itself has acknowledged that national authorities would benefit from greater discretion with regard to services meeting social needs.⁸⁹ Finally, it is absolutely clear that the expression “meeting social needs” does not aim to restrict the nature of the services that can be regarded as ESSGIs. The 2013 SGEI Guide, for instance, specifies that the Decision can be applied to all categories of services listed in Article 2(1)(c), and not only to those provided to citizens with financial difficulties.⁹⁰

The Decision provides no clear definition or description of the various services mentioned in Article 2(1)(c). The 2013 SGEI Guide, on the other hand, sheds some light on “childcare”, “care and social inclusion of vulnerable groups” and “access to and reintegration into the labour market”.⁹¹ While “childcare” is certainly not obscure, the meaning of “inclusion of vulnerable groups” may be problematic: what can be affirmed is that the concept is very broad and covers a variety of social integration services, such as those provided for immigrants, people with disabilities, parenting support services, and many others. As to the term “access to and reintegration into the labour market”, it refers to a range of services aimed at enhancing employability, including professional training for unemployed people.⁹² It seems likely that aid to social enterprises exercising market activities may fall under the scope of the Decision, since said enterprises normally offer job opportunities to disadvantaged workers with the aim of facilitating both their access to or reintegration into the labour market and their social inclusion.

It is quite significant that, in identifying the social services covered in Article 2(1)(c), the Commission did not fully rely on its own definition of ESSGI. The result is that no social security scheme (having an economic character), such as supplementary pension or health care schemes, or education services (when paid mainly by students or their parents and thus constituting an economic activity) are mentioned in the Decision. Some of the sectors that have been left out could still fall under the scope of the Decision if one adopted a broad interpretation of the concepts set out in Article 2(1)(c), as in the case of (some forms of) social security, which could be regarded as a form of health and long-term care. This seems scarcely possible, however, for other sectors, such as education, which thus appear to be excluded from the favourable treatment provided thereunder. The complexity of the issue should not be underestimated, especially considering that, as noted in the 2013 SGEI Guide, the European Commission regards the list contained in Article 2(1)(c) as

⁸⁹See para. 3.4.1.2, pt. 92, 2013 SGEI Guide.

⁹⁰See para. 3.4.1.2, pt. 97.

⁹¹See para. 3.4.1.2, pt. 96.

⁹²For those who are already employed the 2013 SGEI Guide states, however, that State aid for professional training can be granted under the conditions set out in Arts. 38 and 39 of Commission Regulation (EC) 800/2008 of 6 August 2008 (General block exemption Regulation), at that time in force, declaring certain categories of aid compatible with the common market in application of Arts. 87 and 88 of the Treaty (General block exemption Regulation), L 241/3 (para. 3.4.1.2, pt. 99).

exhaustive.⁹³ This means that Member States can specify in greater detail the services to be provided in the act of entrustment, but they cannot widen the range of services listed in Article 2(1)(c)—not to mention the fact that the instrument in question is a Decision, and thus directly applicable and binding in its entirety, rather than a directive to be implemented by the Member States.

Unlike Communication 8/02 and the Framework Communication, the Decision does not focus extensively on the content and extent of the entrustment act. From a joint reading of the Decision and Communication 8/02, we can infer, first of all, that the application of the Decision is normally limited to periods of entrustment not exceeding 10 years, unless longer periods are needed in order to undertake significant investments, which may often be the case as far as ESSGIs are concerned.⁹⁴ Whether an investment can be considered ‘significant’ depends both on the absolute value and on the relative value of the investment that needs to be amortized over a period longer than 10 years compared to the value(s) of other assets needed for the provision of the service.⁹⁵ Secondly, since an authorization to perform a certain activity is a different act from the act of entrustment, *per se* not relevant from a State aid point of view, a national authority can authorize a provider for more than 10 years, even for an unlimited period of time. Thirdly, Article 4 of the Decision, on the one hand, provides that the form of the entrustment act may be determined by each Member State and, on the other hand, specifies the essential elements of the act. These are as follows: the content and duration of the public service obligations; the undertaking and, where applicable, the territory concerned; the nature of any exclusive or special rights assigned to the undertaking by the granting authority; a description of the compensation mechanism and the parameters for calculating, controlling and reviewing the compensation; the arrangements for avoiding and recovering any overcompensation; and a reference to this Decision. Therefore, it is only through acts which expressly entrust specific undertakings with providing services and, at the same time, contain the information required under the Decision that States and undertakings will be able to qualify for the exemption from notification. Now, this approach (explicit entrustment of a specific undertaking) needs to be reconciled with the case law of the CJEU, which has sometimes implicitly inferred the existence of an entrustment act from the obligations imposed on all operators. For instance, in the *BUPA* case, concerning an Irish supplementary health care scheme,⁹⁶ the entrustment act did not specify the individual operators concerned but, rather, mentioned all private operators active on the health-insurance market, and according to the GC there was no requirement that each of those operators be separately entrusted by an individual act.⁹⁷ Fourthly, if ESSGI providers are

⁹³See para. 3.4.1.2, pt. 94.

⁹⁴See recital 12 of the Decision.

⁹⁵See para. 3.4.1.3, pt. 101, SGEI (2013) Guide.

⁹⁶See Case T-289/03, *BUPA*, ECLI:EU:T:2008:29; on the ruling see, *ex multis*, Bartosch (2008), p. 211; de Vries (2011), p. 295.

⁹⁷See *BUPA*, paras. 177–184.

entrusted with the operation of a variety of social services, it is not necessary for the public authority concerned to adopt a specific act for each specific ESSGI, but the act of entrustment must identify the nature, duration and other necessary details of each public service obligation imposed on each operator. Fifthly, public authorities can specify additional criteria to those set out in the entrustment act for the purpose of improving the performance of the undertakings entrusted with ESSGIs. Finally, it must be emphasized that with regard to ESSGIs, the Decision takes a different approach from that adopted in the Directive on services in the internal market of 12 December 2006, cited above. Indeed, by virtue of its Article 2(2)(j), the Directive excluded from its scope a number of activities that essentially correspond to those set out in Article 2(1)(c) of the Decision, that is, “social services relating to social housing, childcare and support of families and persons permanently or temporarily in need”, but only if “provided by the State, by providers mandated by the State or by charities recognized as such by the State”. In this respect it is worth mentioning that Article 2 of the Directive does not use the term “entrustment” but, rather, words that do not have the exact same meaning, such as ‘provision’, ‘mandate’ and ‘recognition’.

In conclusion, it can be inferred from the considerations above that the ‘Almunia Package’ is at once more flexible and stricter than its predecessor.⁹⁸ It is more flexible because it increases the number of situations in which Member States are exempted from notification; it is stricter because it reduces the thresholds of *ex ante* legitimate aid. This means, on the one hand, that more measures on the financing of ESSGIs—at least those which do not have a significant impact on the internal market—will probably fall within the scope of the *de minimis* Regulation or the Decision and, on the other, that ESSGIs will be subject to more stringent rules with regard to compensation where an individual notification will continue to apply, given the distortive effects on competition that public funding may produce. Moreover, the enhanced flexibility provided in both the Decision and the *de minimis* Regulation with respect to certain social and health services, low compensations and small undertakings, must be warmly welcomed. By providing this special treatment for welfare services, the European Commission, despite some critical aspects and uncertainties that still exist, seems to have successfully consolidated the social market economy principles on which the EU is (and should always be) founded.

3 Recent Developments on State Aid and Healthcare

EU recent practice in the aftermath of both the ‘Monti-Kroes’ and ‘Almunia’ Packages on financing ESSGIs has been significant in relation to the following three sectors: healthcare provided by hospitals and other entities operating in the

⁹⁸In these terms Buendia Sierra and Muñoz de Juan (2012), p. 69.

frame of national health systems of universal cover; social security, with an emphasis on health insurance and occupational pension schemes; and social housing.⁹⁹

Most of the cases concerning the provision of medical services by hospitals, which includes the acquisition and use of medical equipment from private suppliers, involve Belgium, Germany, Finland and Czech Republic.¹⁰⁰ Another case concerns Italy and is not directly related to hospitals, but to public entities providing health services within the framework of the national health system.

- a) Starting with Belgium, on 7 September 2005, the *Coordination bruxelloise d'institutions sociales et de santé* (CBI), an association constituted under Belgian law grouping together nine private hospitals, along with the *Association bruxelloise des institutions de soins privées* (Brussels Association of Private Care Homes) (ABISP), lodged a complaint with the Commission concerning an alleged State aid granted by the Belgian authorities with regard to the financing of the IRIS (*Interhospitalière régionale des infrastructures de soins*) hospitals, in particular the portion of aid granted only to public hospitals, whereas no criticism was raised against the larger portion of the aid, which had been granted to both public and private hospitals. With its Decision of 28 October 2009,¹⁰¹ the Commission decided not to raise any objections to the measures adopted by the State at the end of the preliminary investigation procedure laid down in Article 108(3) TFEU, having found them to be compatible with Article 106 (2) TFEU, that is, with the 'Monti-Kroes Package' then in force. The Commission, therefore, did not accept the plaintiffs' claim that there were no justifiable public service obligations specific to the IRIS hospitals and stated that the only obligation that existed was imposed by the Belgian Law on Hospitals of 7 August 1987,¹⁰² which applied to all hospitals without distinction, regardless of their public or private status, emergency care and elective treatment. Moreover, the complaint had focused on the fact that at federal level the system was the same for public and private hospitals, whereas at local and regional levels subsidies were reserved only for public hospitals, which left private hospitals at a comparative disadvantage that forced them to reduce their capacity or even to close down.¹⁰³ The Commission rejected these arguments and clarified that all public funding granted to the IRIS hospitals had to be taken into account, including aids aimed at covering the costs necessary for the provision of hospital public service missions, the hospital deficits, the expenses for the restructuring of the Brussels public hospitals in 1995 and the costs for non-hospital public

⁹⁹On social security and social housing see *above*, Sects. 4 and 5 of this chapter respectively.

¹⁰⁰For an early important decision of the Commission in this field (concerning Ireland) see Case N 543/01—Ireland—Capital allowances for hospitals, OJ C 154/4.

¹⁰¹Decision on State aid NN 54/09, C 74/1.

¹⁰²'Loi sur les hôpitaux coordonnée, Moniteur Belge' (7 October 1987) *Belgian Official Journal*, in force from 17 October 1987.

¹⁰³See Hancher and Sauter (2013), p. 258.

service missions.¹⁰⁴ Then, the Commission stressed that the same services were provided also by private hospitals. The solidarity aspects of the system did not change this assessment.¹⁰⁵ As to the *Altmark* test,¹⁰⁶ the Commission found that the fourth *Altmark* condition—that is, the need to rely on a public procurement procedure or, alternatively, an analysis of the costs of a typical undertaking, well run and adequately equipped—was not satisfied.¹⁰⁷ Accordingly, the measure in question constituted State aid. However, the Commission, relying on the 2005 SGEI Framework and 2005 SGEI Decision in light of the principles of necessity and proportionality, pointed out that the aid was to be deemed compatible with Article 106(2) TFEU. Indeed, according to the Commission: the services performed by the hospitals were clearly defined; the entrustment act contained all information prescribed by EU law; the compensation parameters were established *ex ante*; the procedures for preventing and correcting any overcompensation had been put in place by public authorities; the compensation was necessary to cover the costs incurred in discharging the public service obligations; there were separate accounts for public service missions and other costs; cross-subsidization was not present; the activity of the IRIS hospitals was subject to control of overcompensation; and the financing system was in compliance with the requirements of the Directive on the transparency of financial relations between Member States and public undertakings.¹⁰⁸ The Decision was appealed by CBI in accordance with Article 263(4) TFEU. CBI alleged the existence of serious difficulties in the preliminary examination of the aid that should have led the Commission to undertake a more detailed analysis, in light of the serious doubts regarding the compatibility of the measure with EU law. The GC rendered its judgment on 7 November 2012, which has not been appealed.¹⁰⁹

First of all, the GC recalled that the formal investigation procedure under Article 108(2) TFEU is essential whenever the Commission has serious difficulties in determining whether the aid is compatible with the Treaty. The Commission may therefore confine itself to the preliminary examination under Article 108(3) TFEU only when there are no doubts on such compatibility; otherwise, the Commission is under a duty to obtain all the requisite opinions and for that purpose to initiate the procedure provided for in Article 108(2) TFEU. In this respect, the GC observed that the applicant's arguments relating to the content of the contested decision showed that the Commission should have noted the presence of serious difficulties in the examination at issue.

¹⁰⁴Paras. 99–102.

¹⁰⁵But see *above*, Sect. 1 of this chapter, on *FENIN* and on the notion of economic activity in the field of healthcare.

¹⁰⁶See Case C-280/00, *Altmark*, ECLI:EU:C:2003:415, paras. 78–95.

¹⁰⁷Paras. 159–163.

¹⁰⁸Paras. 164–218.

¹⁰⁹Case T-137/10, *CBI*, ECLI:EU:T:2012:584.

In particular, the applicant provided consistent evidence raising serious doubts with regard to the existence of a clearly defined mandate relating to the hospital and social public service missions specific to the IRIS hospitals, the presence of previously established compensation parameters, and the existence of procedures for avoiding overcompensation in the funding of the public service missions.¹¹⁰ Moreover, the GC noted that, from the documents produced during the proceedings, it could be inferred that the Commission had conducted an inadequate analysis of the relevant evidence and that certain assessments made in the contested decision were inconsistent.¹¹¹ Finally, the GC observed that even if the evidence of serious difficulties adduced by the applicant did not necessarily affect all the aspects of the funding of the services provided by the IRIS hospitals, nevertheless, the analysis carried out in the Decision should be called into question by the existence of such difficulties.¹¹² Therefore, the GC concluded that the Commission was required to initiate the formal investigation procedure, in order to collect any relevant information for verifying the compatibility of all the aid measures at issue with the internal market, and to allow the applicants and the other interested parties to present their observations in connection with that procedure. Since the Commission had failed to do so, the Decision was annulled by the GC.

Following the judgment, the Commission was under a duty to initiate the formal investigation proceedings under Article 108(2) TFEU. Therefore, on 1 October 2014 it opened an investigation into part of the public financing of the Brussels IRIS hospitals, in order to ascertain whether the aid granted to public hospitals and not to private hospitals was in compliance with EU State aid rules. As pointed out by the Commission in the letter with which, pursuant to Article 108(2) TFEU, it informed the Belgian authorities about the beginning of the procedure,¹¹³ the opening of an in-depth investigation obviously gave the State's authorities, the complainants and other interested third parties an opportunity to submit their comments, without prejudging the final outcome of the investigation. Unlike the Decision of 2009 (where the Commission had relied on the 2005 SGEI Decision) and the judgment of 2012, the letter of 2014 emphasized that the investigation would be carried out within the framework of the SGEI 2012 Decision and would be focused on the doubts raised by the GC in its judgment, including the existence of a clear act of entrustment, the existence of clearly pre-defined compensation parameters and the existence of mechanisms for the avoidance of overcompensation and the absence of overcompensation.

In the letter, the Commission clarified, first of all, that while the management of the national health system, carried out by public bodies implementing the

¹¹⁰Paras. 168, 187, 219, 244, 265, 278 and 308.

¹¹¹Para. 309.

¹¹²Para. 311.

¹¹³See Commission SA.19864 (2014/C) (ex NN 54/2009)—Belgium. Public financing of Brussels public IRIS hospitals, C(2014) 6833 final.

prerogatives of the State for this purpose, did not constitute an economic activity, the provision of hospital care against remuneration in a competitive environment, which was at stake in the case at hand, amounted to an economic activity and, therefore, that the IRIS hospitals were to be regarded as undertakings under Article 107(1) TFEU.¹¹⁴ Secondly, the Commission stated that the fourth *Altmark* criterion had not been met and thus the measure constituted State aid according to Article 107(1) TFEU.¹¹⁵ Thirdly, the Commission noted, on the one hand, that the national measures at stake had not been subject to notification under Article 108(3) TFEU, and, on the other hand, that some of them might have been exempted pursuant to the 2005 SGEI Decision or the 2012 SGEI Decision.¹¹⁶ Fourthly, with regard to the application *ratione temporis* of EU law, the Commission identified certain categories of public funding: (a) aid measures granted before 19 December 2005—the date on which the 2005 SGEI Decision entered into force—could be found to be compatible with the internal market or exempted from notification pursuant to the 2005 SGEI Decision, since EU law does not apply retroactively. In order to be considered compatible, those measures had to fulfil all the conditions laid down in the 2012 SGEI Decision, which includes provisions on retroactive application, failing which the 2012 SGEI Framework would apply; (b) aid measures granted in the period from 19 December 2005 onwards and before 31 January 2012 (the date on which the 2012 SGEI Decision entered into force) would therefore primarily be assessed pursuant to the 2005 SGEI Decision or, alternatively, would be assessed in accordance with the 2012 SGEI Decision, without prejudice to the application of the 2012 SGEI Framework; (c) aid granted in the period from 31 January 2012 onwards would be assessed primarily on the basis of the 2012 SGEI Decision and, if one or more conditions of the latter were not fulfilled, the 2012 SGEI Framework.¹¹⁷ Fifthly, the Commission agreed with the GC on the specific character of the services delivered by public hospitals and reiterated the Court's view that the Member States are free "to organize their national health systems according to principles which they choose".¹¹⁸ The Commission further emphasized the social character of the financial aid granted to the IRIS public hospitals by connecting it to the Belgian authorities' view that the continuity and viability (*pérennité*) of the supply of public hospital services should always be ensured.¹¹⁹ Finally, on the basis of its previous considerations, the Commission identified, in light of the GC's findings, all aspects related to serious doubts as to the compatibility of the aids with the internal market and in respect of which the Belgian authorities, the complainants and any other interested parties were

¹¹⁴Paras. 40–44.

¹¹⁵Para. 57.

¹¹⁶Paras. 73–76.

¹¹⁷Paras. 76–79.

¹¹⁸Para. 82.

¹¹⁹Para. 102.

invited to provide all relevant information and further explanations. These aspects were as follows: whether or not the additional social services carried out by the IRIS hospitals were economic or non-economic in nature; whether or not there were pre-defined compensation parameters for the provision of the additional ESSGIs; whether or not there was overcompensation and whether or not there were mechanisms for avoiding overcompensation; the meaning of the term “*pérennité*” of public hospitals put forward by the Belgian authorities and its legal and practical implications.¹²⁰

The investigation was concluded on 5 July 2016, with a Commission Decision declaring the financing at issue to be State aid compatible with the internal market under Article 106(2) TFEU.¹²¹ Regarding the question of the existence of a clearly defined mandate related to the hospital and social public service missions specific to the IRIS hospitals, the Commission recalled, first of all, that the *Loi coordonnée sur les hôpitaux* (LCH) entrusts all Belgian hospitals, public and private, with a basic hospital mission.¹²² The question to be clarified was whether public hospitals had additional public service obligations beyond such basic hospital mission. The Commission found that, indeed, IRIS hospitals are entrusted with three additional SGEI obligations which are specific only to them. The Commission identified, first, a universal care obligation, on the basis of which IRIS hospitals must treat all patients in all circumstances, including in non-emergency situations, regardless of their ability to pay.¹²³ Such an obligation ensures that patients who are unable to pay, have no private insurance and for whom there may not be any (or only partial) reimbursement by social security receive adequate medical treatment, even in cases where the provision of care is not urgent.¹²⁴ Secondly, the Commission found that IRIS hospitals have an obligation to offer a full range of basic hospital services at multiple sites.¹²⁵ Finally, the Commission added that IRIS hospitals have an extensive social services obligation, and accordingly must operate elaborate social service departments helping patients and their families with administrative, financial, relationship and social problems.¹²⁶ The Commission concluded that the IRIS hospitals are subject to a combination of obligations guaranteeing the fulfilment of the social needs of the population in terms of hospital services, and making sure that access to high-quality hospital care is guaranteed for all, including the poorest. Only IRIS hospitals are entrusted with such additional obligations, which go beyond the minimum requirements applying to both public and private

¹²⁰Para. 103.

¹²¹Commission Decision (EU) on State Aid 19864—2014/C (ex 2009/NN54) implemented by Belgium, Public financing of Brussels public IRIS hospitals, C(2016) 4051 final.

¹²²Para. 164.

¹²³Para. 175.

¹²⁴Paras. 185, 187, 190.

¹²⁵Paras. 193–204.

¹²⁶Paras. 205–214.

hospitals.¹²⁷ The Commission considered that the combination of the general basic hospital mission and the three specific additional SGEI obligations constitutes one “social healthcare SGEI” which is specific to IRIS hospitals¹²⁸ and which generates significant costs. The funding sources available to both the public and private sector are not sufficient to cover such costs. This results in deficits for the IRIS hospitals. Public funding to cover such deficits is required in order to ensure the continuity (*pérennité*) of the public medical care.¹²⁹ Moreover, the Commission concluded that in practice no overcompensation of any of the IRIS hospitals occurred¹³⁰ and that there were sufficient mechanisms to avoid, detect and recover overcompensation.¹³¹ The measure was thus found compatible with the internal market under Article 106(2) TFEU.

- b) The regulation of public hospitals in Germany was at the heart of the GC’s Judgment of 11 July 2007 in the *Asklepios Kliniken* case.¹³² The complaint, which raises a number of procedural (rather than substantive) issues related to the financing of ESSGIs, was brought by a number of German private hospitals specialized in hospital management, according to which the granting of any aid to German public hospitals—by way of regional support mostly in the form of unlimited guarantees—was in breach of EU State aid law.¹³³ The applicants had asked the Commission in January 2003 to look into the allegedly unlawful conduct on the basis of the information they had provided, and to take measures to suspend the aid until the Commission took a final decision. The Commission refused to take action on the grounds that its position on the matter was covered by the then draft 2005 SGEI Decision. This is the reason why the complainants challenged the Commission’s findings before the GC for failure to act pursuant to Article 265 TFEU, arguing, first of all, that the Commission had delayed unreasonably in responding to their complaint, and, secondly, that the final position taken by the Commission was not legitimate. The GC, while declaring admissible a claim not only against decisions but also against refusals to take a Decision, dismissed the action. In particular, the GC clarified that the Commission’s position was not to be considered defined because the draft decision that had been adopted, followed by the (final) 2005 SGEI Decision, by laying down abstract criteria in a decision of general scope, did not by itself constitute a definition of position on a specific complaint. The GC noted that only the actual application of these criteria by the Commission to the situations complained of

¹²⁷Para. 215.

¹²⁸Para. 166.

¹²⁹Para. 215.

¹³⁰Paras. 225–245.

¹³¹Paras. 246–256.

¹³²Case T-167/04, *Asklepios*, ECLI:EU:T:2007:215.

¹³³On the case see Hancher and Sauter (2013), p. 255.

by the applicant could constitute a definition of position for the purposes of Article 265(2) TFEU.¹³⁴

Now, given that failure to act occurs when an EU institution fails to take action, the GC proceeded to determine whether the Commission, at the time when it was given formal notice, was under an obligation to act. Indeed, since the Commission is bound to conduct a diligent and impartial examination of a complaint alleging the existence of aid that is incompatible with the common market, it cannot indefinitely prolong its preliminary investigation into State measures that have been the subject of a complaint.¹³⁵ In the opinion of the GC, it was apparent from the file that “the Commission confirmed receipt of the applicant’s complaint without asking it for further information or explaining why it was unable to investigate the complaint as it stood”.¹³⁶ Since the preliminary examination of the complaint had been going on for 12 months at the time when the Commission received formal notice pursuant to Article 265 (2) TFEU, the point was to determine whether such a long period exceeded the limits of a reasonable time frame. According to the GC, the complaint concerned all public-sector hospitals in Germany, which numbered “more than 700”,¹³⁷ and criticized both the compensation by public bodies of any operational losses incurred by the hospitals and to the provision of a guarantee, without details of the aid received by each hospital concerned being provided. Therefore, having regard to the complexity of the case, that period was in any event too short for the Commission to be able to complete its preliminary examination of the compatibility of the financing contested by the applicant.¹³⁸ As a consequence, the Court held that, on the date of the letter of formal notice, the duration of the examination of the complaint did not exceed “the limits of what was reasonable”¹³⁹ and, for that reason, dismissed the application.

The German hospital system was examined by the Commission in its 21 October 2016 Decision¹⁴⁰ on alleged State aid for a publicly-owned German hospital. The contested measures were capital increases (amounting to €31 million), guarantees (for an amount of almost €63 million, of which almost €15 million was effectively used to secure loans) and shareholder loans granted by the City of Osnabrück to Klinikum Osnabrück, a hospital wholly owned by the City of Osnabrück itself. The Commission found the financing in question to be compatible with the internal market under the SGEI 2005 and 2012

¹³⁴Para. 77.

¹³⁵Paras. 62 and 81.

¹³⁶Para. 83.

¹³⁷Para. 89.

¹³⁸Para. 90.

¹³⁹Para. 91.

¹⁴⁰Commission Decision (EU) concerning SA.36798 (2016/NN)—Germany—Alleged unlawful State aid for Klinikum Osnabrück GmbH, C(2016) 6689 final. On the case see also Nicolaides (2017).

Decisions. In its assessment of the measures against the SGEI Decisions, the Commission found, first of all, that the 10-year time limit for the entrustment period established under the 2012 SGEI Decision was respected.¹⁴¹ After that, it proceeded to consider whether the measures at issue constituted compensation for a “genuine SGEI”. Klinikum Osnabrück is covered by a service guarantee which applies to the City of Osnabrück. Under the Lower Saxony Hospital Act (NKHG), cities are under an obligation to establish and maintain their own hospital. This obligation is subject to a subsidiarity clause, in that it applies “insofar hospital care is not guaranteed by other providers”.¹⁴² The fact that Klinikum Osnabrück is covered by the service guarantee means, in practice, that it is not possible to close it or to limit its services, even if the clinic operates at a loss.¹⁴³ The complainant argued that the area where Klinikum Osnabrück is located is characterized by an overcapacity of hospital services and that private hospitals in the region provide or can provide the same services as the public hospital. The German authorities replied, first, that “comprehensive full provision of hospital and emergency care is not safeguarded by the private hospitals”, whose offer of emergency care is, for example, very limited; second, that Klinikum Osnabrück operates at near full capacity. Moreover, concerning the subsidiarity clause, it is the regional government, when it drafts the hospital plan, that establishes whether this subsidiarity condition is fulfilled. As Klinikum Osnabrück has been included in the list of subsidized hospitals, it will be under an “unavoidable obligation” until the hospital plan is amended.¹⁴⁴ The Commission sided with the German authorities, noting that the fact that the private hospitals in the region provide or can provide the same services does not call into question the fact that they remain free to cut down or close services, whereas Klinikum Osnabrück is obliged to “continue to provide a full range of care and emergency services even at a loss” and “continue to operate in all circumstances”. In light of this, the Commission considered that the provision of comprehensive medical services, including emergency care, under the service guarantee constituted a genuine SGEI.¹⁴⁵ Finally, the Commission concluded that the entrustment acts met the conditions established in the two SGEI Decisions,¹⁴⁶ that compensations were determined according to the Decisions,¹⁴⁷ that separate accounts were in place,¹⁴⁸ that the requirements concerning control and recovery of overcompensation were fulfilled¹⁴⁹ and

¹⁴¹Para. 34.

¹⁴²Para. 35.

¹⁴³Paras. 35 and 37.

¹⁴⁴Para. 37.

¹⁴⁵Para. 38.

¹⁴⁶Paras. 39–49.

¹⁴⁷Para. 40.

¹⁴⁸Paras. 51–52.

¹⁴⁹Paras. 53–56.

that the transparency requirement was satisfied.¹⁵⁰ In conclusion, the measures were found to be in compliance with the 2005 and 2012 SGEI Decisions.

Finally, on 2 June 2017 the Commission decided not to raise objections to measures adopted by German authorities in relation to the conversion of an old hospital building into a nursing home, as it considered them compatible with the internal market under Article 107(3)(c) TFEU.¹⁵¹

- c) In October 2011 a complaint was made by a group of Finnish private health service providers against HUS (Hospital District of Helsinki and Uusimaa), a federation of local municipalities that runs publicly funded hospitals in the area of Finland's capital, and HYKSin Oy, its subsidiary company established to provide clinical services to private customers in Finland, the EU and third countries.¹⁵² To deliver said services, HYKSin used the facilities and professionals of HUS. The applicants claimed that the right to use the resources of a publicly funded hospital amounted to State aid and distorted competition. Indeed, HYKSin would receive State aid mainly via the beneficial tax and bankruptcy treatment granted to HUS and the performance-based pricing system applied between HUS and HYKSin. According to HUS and HYKSin, on the other hand, HYKSin did not receive any tax benefits or favourable treatment in bankruptcy situations, since it was established as a limited liability company and, as such, was subject to the same tax and bankruptcy laws as any other private company. Moreover, performance-based pricing was a common practice in the Finnish private health care market. The Commission did not find it necessary to investigate the matter any further, including in light of the 2012 SGEI Decision. It remains to be seen whether, in the future, there will be a complaint against this choice on the part of the Commission.
- d) The funding of public hospitals is also at the core of a European Commission Decision of 29 April 2015 on Czech Republic,¹⁵³ in particular on the granting of public financing to five public hospitals of the Hradec Králové Region. The Decision originated in a complaint received by the Commission on 30 September 2013. As stressed by the Commission, the main purpose of public funding, granted in different forms (e.g. investment subsidies or non-investment subsidies), was to ensure emergency medical services and to allow hospitals to obtain the equipment they need for the provision of their services. In its Decision, the Commission addresses two different issues. The first is whether the financial aid in question was to be regarded as State aid under Article 107 TFEU. In this respect, the Commission focused on examining whether the measure “affect [ed] trade between Member States” within the meaning of Article 107(1) TFEU

¹⁵⁰Paras. 57–58.

¹⁵¹Commission Decision on State Aid SA.34655 (2017/NN)—Germany Investment aid for Nursing Home and connected facilities in the City of Dahn, C(2017) 3659 final.

¹⁵²See the information on the case reported by Aalto-Setälä and Piekkala (2015), p. 453.

¹⁵³Commission Decision (EU) on State Aid 37432 (2015/NN), Funding to public hospitals in the Hradec Králové Region, C(2015) 2796 final.

(according to the Czech authorities, it did not). To this end, the Commission observed that public support could be considered capable of having an effect on intra-Union trade even if the recipient was not directly involved in cross-border trade, for instance because it might make it more difficult for operators in other Member States to enter the national market. However, the Commission clarified that a distortive effect on intra-Union trade cannot be merely hypothetical or presumed, but must be “based on the foreseeable effects of the measure”.¹⁵⁴ With regard to both emergency services and the provision of planned/scheduled healthcare services, the Commission noted, firstly, that the five hospitals concerned were not highly specialized and had no international reputation; secondly, that the proportion of patients from other Member States that were using those hospitals’ services was only 0.001% of the total number; thirdly, that the catchment area of each of the five public hospitals appeared to be purely local, since those hospitals primarily served the purpose of satisfying the need of the inhabitants of their district.¹⁵⁵ In light of all these considerations, the Commission considered that the public grants to the public hospitals of the Region were not liable to affect trade between Member States and, therefore, there was no need to examine the other cumulative conditions for the existence of State aid within the meaning of Article 107(1) TFEU (and, indeed, the Commission found that said article did not apply to the case at hand).

The second issue addressed in the Decision is whether the measure at stake was compatible with the internal market under the 2012 SGEI Decision and thus exempted from notification by virtue of Article 3 of that Decision. Now, the fact that the Commission decided to examine this second aspect, just “for the sake of completeness”,¹⁵⁶ after establishing that the public measure did not qualify as State aid, is particularly striking. In this regard, the Commission came to the conclusion that, “even if one assumed that the measures constituted State aid, they would be compatible with the internal market”,¹⁵⁷ for the following reasons: (1) the form of public support in question fell within the scope of Article 2(1)(b) of the 2012 SGEI Decision because one of the categories listed in that article included “compensation for the provision of SGEIs by hospitals providing medical care, including, where applicable, emergency services”; (2) the entrustment acts were concluded for a period of 1 year, and, therefore, did not exceed the limitation of 10 years established in the 2012 SGEI Decision; (3) the entrustment acts clearly defined the recipients of the compensation and the specific departments whose operations constituted a public service obligation; (4) the parameters for calculating, controlling and reviewing the compensation followed an analysis based, above all, on the recipient’s annual report for the previous year, the auditor’s report for the previous year and the financial

¹⁵⁴Para. 14.

¹⁵⁵Paras. 17, 21–22.

¹⁵⁶Para. 26.

¹⁵⁷Para. 30.

statement for the previous year. Moreover, the calculation was made prior to the decision determining the compensation amount; (5) arrangements were made for avoiding and recovering any overcompensation (for instance, separation of accounts).

- e) An Italian scheme regarding a municipal real-estate tax exemption granted to real estate used by non-commercial entities for specific purposes, including healthcare activities, has been the focus of the Commission's attention for many years, beginning with a letter of initial request for information sent to Italian authorities on 5 May 2006. The Decision of 19 December 2012, following the Decision of formal investigation of 12 October 2010, carried out in accordance with Article 108(2) TFEU, has already been examined in respect to the notion of economic activity, as the Commission excluded that the exemption could be qualified as State aid inasmuch as it concerned non-economic activities.¹⁵⁸

It is worth pointing out here that the Commission devoted great attention to the conditions put forward by Italian authorities in a Regulation of the Ministry of Economic Affairs and Finance of 19 November 2012 in order to state that health services provided by public entities were provided on a non-commercial basis. The Commission states that if at least one of the following conditions is met, the service is non-economic and Article 107(1) TFEU does not apply: the activities are accredited by the State and are performed under either a contract or an agreement with public authorities and they are part of or complementary to the public national health system and provide services to users free of charge or for an amount that is only a contribution to the cost of the universal service provision; should the activities not be accredited and performed under a contract or an agreement, they must be provided free of charge or for a symbolic fee “which, in any event, must not exceed half the average price for similar activities in the same geographical area on a competitive basis, also taking into account the absence of any connection with the actual cost of the service”.¹⁵⁹ According to the Commission, the non-commercial entities concerned fell under the same category and fulfilled the same statutory requirements applied to public hospitals, being an integral part of the national health system, which provides universal cover and is based on the principle of solidarity.¹⁶⁰ Such entities, therefore, did not qualify as undertakings, with the result of being exempted from the application of Article 107 TFEU.

The 2012 Decision was challenged by Mr. Ferracci, the owner of a “Bed & Breakfast” establishment, and by “Scuola Elementare Maria Montessori”, a private education institute. The resulting judgments¹⁶¹ covered a number of State aid issues: third-party standing under Article 263(4) TFEU, the question of when it can be

¹⁵⁸See *above*, para. 1.

¹⁵⁹Para. 169.

¹⁶⁰Paras. 169–171.

¹⁶¹Case T-219/13, *Ferracci v. Commission*, ECLI:EU:T:2016:485 and T-220/13, *Scuola Elementare Maria Montessori v. Commission*, ECLI:EU:T:2016:484.

concluded that it is impossible for a Member State to recover State aid, and the notion of economic activity.¹⁶² This last point is of particular relevance for present purposes. While healthcare was not the direct focus of the judgments, it nevertheless appears useful to examine the considerations that led the GC to confirm the Commission's assessment that the IMU exemption did not qualify as State aid, as the activities involved were not of an economic nature. The GC, much like the Commission, focused on the requirements contained in the Italian normative framework. In this regard, the GC stressed that the Italian Regulation expressly excluded from the scope of the exemption those activities that, by their nature, are in competition with those of other market operators which seek to make profit.¹⁶³ Moreover, in the *Montessori* judgment, the Court considered whether the symbolic fee that was permitted under the Regulation could constitute remuneration. The GC noted that, according to the Regulation, the fee is considered symbolic if it covers only a fraction of the cost of the service and bears no relationship to the cost itself. The Court stressed that the essence of remuneration lies in the fact that it constitutes consideration for the service provided, and is normally agreed upon between provider and recipient. According to the GC, this is not the case in the framework of the national public education system, by which the State fulfils its social, cultural and educational functions. This is not called into question by the fact that students may sometimes be required to contribute to the operating expenses of the system.¹⁶⁴ In its Decision, the Commission developed similar considerations concerning symbolic fees in the context of welfare and healthcare services, putting the main emphasis, in this context, on the fact that such services are not offered in competition with other market operators.¹⁶⁵ The approach adopted in these judgments has been described as "formal",¹⁶⁶ and it has been noted how the GC decided to uphold a "form-based national approach where historical attachments to principles of solidarity play a significant role in determining the line between economic and non-economic activities".¹⁶⁷

Also of interest is the Commission's 27 March 2017 decision not to raise objections adopted in response to a complaint lodged by an Italian public entity providing socio-sanitary assistance,¹⁶⁸ arguing that private providers of such services received State aid. The complaint alleged, in substance, a different treatment of

¹⁶²For a comprehensive analysis of the judgments, see Szyszczak (2016), pp. 637–641.

¹⁶³*Ferracci*, para. 140; *Montessori*, para. 137.

¹⁶⁴*Montessori*, paras. 139–143.

¹⁶⁵"Services provided free of charge do not generally constitute an economic activity. In particular, this is the case if the services are not offered in competition with other market operators, as laid down in Article 1 of the Regulation. The same holds true for services that are provided for a symbolic fee. In this respect, it is important to note that the Regulation stipulates that, for the fee to be considered symbolic, it must bear no relationship to the cost of the service", para. 171.

¹⁶⁶Szyszczak (2016), p. 640.

¹⁶⁷*Ibid.*, p. 641.

¹⁶⁸Commission Decision on State Aid SA.38825—Italy, Alleged State aid for private providers of socio-sanitary services, C(2017) 1939 final.

public and private providers of social services concerning the coverage of certain employees' costs. Having found that no selective advantage was granted, the Commission concluded that the measure did not constitute State aid under Article 107(1) TFEU.

4 Recent Developments on State Aids and Social Security

Both the Commission and the CJEU have recently dealt with a significant number of cases regarding the financing of social security services. Those concerning the health-insurance sector involve Ireland, the Netherlands, France, Slovakia and Finland. As to occupational pension schemes, there is an interesting case concerning the UK.

- a) The Irish system can be described as a mixture of a universal public health service and a voluntary private health-insurance system.¹⁶⁹ Under the tax-funded universal system, all those below a low-income level are eligible for a medical card, which allows free access to all health services, including hospital services. The remaining and larger portion of the population is entitled to hospital services on payment of a modest charge. Therefore, at present, the tax-funded universal system covers the whole population guaranteeing health care either totally free of charge or at subsidized rates. However, because of the capacity constraints of the universal system, around 50% of the population has Private Medical Insurance (PMI) in order to cover hospitalization costs in private hospitals.

Among the cases of the post-Monti-Kroes Package era, one which deserves the greatest consideration, not least because it led EU institutions to clarify the relationship between the *Altmark* test and Article 106(2) TFEU, is the judgment rendered by the GC in the *BUPA* case, already discussed above in general terms.¹⁷⁰ Here, it is important to recall the position of the Commission prior to the rendering of the Court's decision, the specific consequences of the judgment on the financing of social security services, and its effects in terms of the impact of EU law on the system of risk equalization in Ireland. As for the Commission's Decision of 13 May 2003,¹⁷¹ which was challenged before the GC, it is interesting to note that the reasoning of the Commission rested on an assessment of the so-called compensation approach,¹⁷² prior to the *Altmark* ruling, based on the early *Ferring* judgment,¹⁷³ which in its turn underwent a major

¹⁶⁹On health insurance in Ireland outside the area of State aid see Case C-82/10, *Commission v. Ireland*, ECLI:EU:C:2011:621.

¹⁷⁰See above, para. 1.

¹⁷¹Commission Decision (EU) on State aid 46/2003—Ireland, C (2003) 1322 final.

¹⁷²On such approach see above, para. 1.

¹⁷³See Sauter and van de Gronden (2011), p. 616.

jurisprudential shift in the *Altmark* case. Even though there was no explicit act of entrustment setting out the mission of general interest, the Commission derived it implicitly from the general regulatory context. Moreover, it found that the risk equalization system met the requirements of necessity and proportionality. In these respects, the GC followed the Commission's approach. The real novelty in the GC's flexible reasoning is the interpretation of the fourth *Altmark* condition on efficiency, that is, the use of a well-run company as a benchmark and its application to matters related to health-insurance financing. Indeed, it is clear that in this sector Member States retain a wide margin of appreciation and, therefore, that said *Altmark* condition cannot be strictly interpreted.¹⁷⁴ The difference between *Altmark* and *BUPA* lies in the recognition of the specificity of the social security sector *vis-à-vis* a typical case of compensation of costs incurred by undertakings entrusted with the operation of SGEIs that do not have a clear social character.¹⁷⁵ To this we should add that the contested Commission Decision was adopted before the *Altmark* judgment: thus, "it would have been odd for the GC to apply the *Altmark* criteria very strictly and rigidly to a decision taken before the judgment".¹⁷⁶ In any case, the first Commission, and then the GC, gave greater weight to social policy considerations than to economic ones.

On 17 June 2009¹⁷⁷ the Commission ruled on another scheme that was introduced after the Irish Supreme Court struck down the original risk equalization scheme approved by the Commission in 2003 and confirmed by the GC in the *BUPA* case. The new system was no longer based on a fund where risks were pooled, but on a technically less complex system of tax relief for consumers over 50, with the level of relief increasing progressively with age.¹⁷⁸ The resulting sums could only be used to pay for higher rates of private medical insurance, amounting to a subsidy for such insurance, and the tax relief was directly paid to the insurers. The scheme was thus self-financing since it was funded by a levy on all open-market health insurers.¹⁷⁹

On the question of whether the public measures at stake were State aid according to Article 107 TFEU, the Commission, while stating that overcompensation was avoided by taking the profitability of net beneficiaries of the scheme into account so that there would be no compensation beyond a reasonable profit,¹⁸⁰ found that the fourth *Altmark* condition on efficiency was not met. This means that the compensation was not the minimum necessary in order for it not to qualify as aid. The main reason was that the recipients of the

¹⁷⁴See also de Vries (2011), pp. 302–305; and Szyszczak (2009), p. 205.

¹⁷⁵Bartosch (2008), p. 211.

¹⁷⁶Baquero Cruz (2013), p. 308.

¹⁷⁷Commission Decision (EC) on State aid 582/2008 (IP/09/961)—Ireland—health insurance intergenerational solidarity relief, C (2009) 3572 final.

¹⁷⁸See Sauter and van de Gronden (2011), p. 617.

¹⁷⁹*Ibid.*

¹⁸⁰See para. 68.

compensation were not chosen pursuant to public procurement procedures and the compensation was not calculated by reference to the costs of an efficient undertaking.¹⁸¹ Once it concluded that Article 107 TFEU was applicable to the case at hand, the Commission had to examine the compatibility of the aid under Article 106(2) TFEU, the private medical insurance system being a SGEI, and in particular an ESSGI. Now, as already noted, the 2005 Decision does not expressly include social security among the sectors falling within the scope of the derogation from the EU State aid rules. Therefore, the Commission focused on the SGEI Framework. It found the criteria concerning the genuineness of the SGEI, the clarity of the definition of public service obligations and the absence of overcompensation—which mirror the first three *Altmark* conditions—to be met. However, the crucial issue to be determined was whether the condition of paragraph 12 of the SGEI Framework, which related to the act of entrustment, was met as well. According to the Commission, the answer was in the affirmative, since the relevant entrustment act contained the following information: the precise nature and the duration of the public service obligations; the undertakings and territory concerned; the parameters for calculating, controlling and reviewing the compensation; the arrangements for avoiding and repaying any overcompensation. In particular, the fact that the duration was unspecified did not raise particular issues, since it only concerned the duration of the SGEI obligation and not that of the aid scheme.¹⁸² Moreover, the parameters of the compensation were based on an objective factor, namely the number of persons in the respective age cells insured by each insurer.¹⁸³ Finally, the fact that the undertakings were entrusted by a general horizontal rule could not be sufficient to question the compatibility of the aid with EU law.¹⁸⁴ In light of the above analysis, therefore, the Commission considered that the scheme was compatible with the common market under Article 106(2) TFEU.

The Interim Scheme put in place in 2009 was replaced by a new risk equalization system (RES) in 2013, whose purpose and functioning were very similar to its predecessor's. The operation of the 2013 RES was based on the establishment of a Risk Equalization Fund administered by the Health Insurance Authority. The system operated by levying a charge against insurers in the form of a stamp duty payment based on the number of insured lives, and granting a payment to insurers in the form of a risk equalization credit for each insured person falling into certain categories. Insurers were also paid a utilization credit for each overnight stay in a hospital by an insured person. A new RES was introduced in 2016, operating in substantially the same way as the 2013 RES. Both schemes were screened by the Commission, which considered them to

¹⁸¹See para. 70.

¹⁸²See paras. 80–81.

¹⁸³See para. 81.

¹⁸⁴See para. 82.

constitute State aid compatible with the internal market under the 2012 SGEI Framework.¹⁸⁵

Finally, another chapter in the complex relationship between Ireland and the EU institutions is the letter sent by the Commission to Irish authorities on 25 July 2012¹⁸⁶ to request that they put an end to the unlimited guarantee granted in favour of the Voluntary Health Insurance Board (VHI), which was set up in 1957 as a statutory body with the aim of offering voluntary health insurance and, by virtue of this status, could not be forced into bankruptcy. The legal background is that, as a result of this special condition, VHI was able to get loans on preferential terms and its credit or commercial risks were all borne by the State. The relevant provisions remained in place after the Irish market for private medical insurance opened up to competition in 1994. In order to abolish the undue advantage over its competitors, Ireland had to do the following by 31 December 2013 at the latest (failing which, a State aid investigation would be opened): (1) proceed to the incorporation of one or several subsidiaries of VHI as private limited companies under Irish company law, which would take over all of VHI's economic activities; (2) ensure that the effective removal of the unlimited guarantee be respected. The deadline has now passed but there is no indication that the Irish Government has completed the requested legislative change.

- b) The Dutch health-insurance system, too, has been brought to the attention of (and examined by) the European Commission, which found it in compliance with EU law in its Decision of 3 May 2005. The Commission decided not to raise any objections with respect to a notified reform whose principal aim was to guarantee access to medical care for all citizens in a single market for private health insurance, without impacting on the financial sustainability of the whole healthcare system. In this way, citizens would be allowed to choose freely between different private insurance companies offering basic health insurance and prevented from differentiating premiums.¹⁸⁷ The Commission authorized under EU State aid rules the public funding of €15 billion envisaged by Dutch authorities for a plan whose key feature was a permanent risk equalization system between insurers and the granting of start-up capital to certain categories of insurers, which would be allowed to carry over their financial reserves into the new market regime. According to the Commission, said funding did not distort competition to an extent contrary to the common European interest. Since the 'Monti-Kroes Package' had not yet entered into force, the Commission relied on Article 106(2) TFEU. In particular, it took a strict interpretation of the fourth

¹⁸⁵ Commission Decision on State aid SA.34515 (2013/NN)—Ireland. Risk equalisation scheme for 2013, C(2013) 793 final corr.; Commission Decision on State Aid SA.41702 (2016/NN)—Ireland. Risk Equalisation Scheme, C(2016) 380 final.

¹⁸⁶ Commission Decision (EC) on State aid SA.18879—E 6/2006—Ireland. Unlimited guarantee in favour of the Voluntary Health Insurance Board (VHI), C(2012) 5073 final.

¹⁸⁷ Commission Decision (EC) 541/2004 e 542/2004—JOCE C/324/2005 (text of the letter only in Dutch).

Altmark condition (efficiency)—unlike the GC in the *BUPA* judgment of 2008—and found that the public grant constituted State aid within the meaning of Article 107(1) TFEU. Indeed, the Dutch scheme did not aim to compensate costs but, rather, was concerned “with tackling problems of risk”¹⁸⁸; in principle all insurers received compensation, irrespective of their efficiency, and the reserves, as well as the risk equalization scheme, were deemed to involve aid.¹⁸⁹ However, since the compensation of the costs incurred by insurers due to patients with high-risk profiles was necessary in order to guarantee open enrolment, the Commission considered the flow of funds compatible pursuant to Article 106(2) TFEU.¹⁹⁰ This is because the Commission derived a mission of general interest from the overall legal and regulatory framework, setting out general obligations, which were laid down in the Dutch Act on Health Insurance. Moreover, the Commission held that the risk equalization system was necessary in order to maintain stability in the market and guarantee universal access to affordable healthcare. The compensation involved was considered to be proportionate, since it would be limited to the necessary minimum. The retention of financial reserves was evaluated on the basis of Article 107(3) (c) TFEU, which allows aid for the development of certain types of economic activity. Indeed, the Commission held that the retention of the reserves had very limited negative effects on competition.

An annulment action against the Decision of the Commission was brought before the GC by a healthcare insurance body on 13 March 2006, on the grounds that the Commission should have initiated the formal investigation procedure set out in Article 108(2) TFEU. The claimant maintained that over an extended period of time he had been achieving less positive results than other healthcare insurance bodies due to shortcomings in the equalization system. It followed that, in interpreting and applying Article 106(2) TFEU, the Commission had committed errors of appraisal with regard to the operation of the equalization system and had inadequately investigated the matter. The proceeding, due to the withdrawal of the action by applicant, was struck out of the Court’s list of cases on 13 October 2008.¹⁹¹

On 31 May 2010, the Netherlands notified the Commission of an increase in the budget (exceeding 20%) of the existing aid scheme N 542/2004, while the other features remained the same. The Commission authorized this change on 9 July 2010, stating that it did not alter the prior conclusion of the Commission

¹⁸⁸Van de Gronden and Rusu (2013), p. 197.

¹⁸⁹Sauter and van de Gronden (2011), p. 617.

¹⁹⁰*Ibid.*

¹⁹¹Case T-84/06, *Azivo Algemeen Ziekenfonds De Volharding v. Commission*, ECLI:EU:T:2008:431.

in Case N 542/2004 that the measure constituted State aid within the meaning of Article 107(1) TFEU and that it was compatible under Article 106(2) TFEU.¹⁹²

- c) The European Commission followed a strict interpretation of the *Altmark* test, as well as of Article 106(2) TFEU in the case of French Sickness Insurance Policies (*contrats solidaires et responsables*) and Supplementary Group Insurance Policies Providing Cover for Death, Incapacity and Invalidity. In the Decision of 26 January 2011¹⁹³ the Commission had to assess whether France's plan to grant tax aid to insurers for managing certain insurance policies was compatible with the rules on State aid. The act is relevant to the application of Article 106(2) TFEU to ESSGIs, especially in the social security sector. From this perspective, the main issues concerned two kinds of exemption: the exemption from corporation tax and local business tax for management operations connected with *contrats solidaires et responsables*; and the tax deduction for equalization provisions relating to certain supplementary group insurance policies. As to the former, the Commission, first of all, recalled that, with the exception of the sectors that have been already regulated by the EU, Member States have wide discretion concerning the definition of what an SGEI is. Secondly, it observed that the tax measure in question did not contain any mechanism allowing overcompensation to be ruled out in relation to the costs of the burden incurred by the operators concerned, since the amount of the aid was not connected to the additional costs borne by insurers or the premiums paid by insured persons.¹⁹⁴ Therefore, the Commission concluded that, in any case, the measure concerned could not be declared compatible with the internal market on the basis of Article 106(2) TFEU.

As to the second type of exemption, the supplementary insurance benefits in the field of personal protection under the designation procedure can be regarded as an SGEI, in particular where affiliation to the benefit scheme is compulsory and its management is undertaken under a joint framework. The French Government, in addition, referred to the *Albany* case, cited above. The Commission, however, observed that there was a difference to *Albany*, since, in the circumstances of the case, it was not ruled out that services provided by insurers in the context of designation by the social partners could be considered an SGEI in so far as the agreement between the social partners in the context of designation was made obligatory for all undertakings in the sector concerned and covered risks which were not covered or were insufficiently covered by the public social security system. Nevertheless, "the financial measures supporting such a mechanism must be limited to what it is necessary to offset the additional costs for insurers arising from the public service obligations". Moreover, a reference was

¹⁹²Commission on State aid 214/2010—Netherlands. Risk equalization system in the Dutch Health Insurance, C (2010)/4893.

¹⁹³[2011] OJ L 143/16. See also above, para. 5, from the standpoint of State aid and Article 106(2) TFEU.

¹⁹⁴Paras. 141–145.

made to the 2005 SGEI Framework, at that time in force. In particular, “the compensation paid may not exceed the costs of providing the public service, taking into account the revenue relating to it and a reasonable profit for performing these obligations”.¹⁹⁵ In this respect, the Commission clarified that the tax saving resulting from the supplementary deductibility of allocations to the equalization provisions did not fulfil this condition as “it is not possible to establish any link at all between the amount of the tax saving and the costs relating to providing the public service”.¹⁹⁶ In conclusion, the measure was considered to be incompatible with the Treaty in this respect.

- d) On 2 July 2013 the Commission notified Slovakia of its decision to initiate the procedure laid down in Article 108(2) TFEU concerning an alleged State aid to the State-owned health insurer Spoločná zdravotná poisťovňa (SZP) and to Všeobecná zdravotná poisťovňa (VZP), a second State-owned Slovak health insurer that merged with SZP in 2010.¹⁹⁷ The Decision followed a dialogue with Slovak authorities started on 2 April 2007 when the Commission received a complaint from the privately owned Slovak health-insurance company Dôvera zdravotná poisťovňa (Dôvera). The measures at stake were: the discharge of SZP’s debt by the State-owned company Verite; a subsidy granted to SZP by the Ministry of Health; a State-financed capital increase in VZP; compensations granted to SZP and VZP from a risk equalization scheme in place in the Slovak compulsory health-insurance sector; several direct transfers to SZP/VZP of portfolios of other health-insurance companies without an open and transparent competitive procedure.

The Commission started from the premise that the Slovak compulsory health-insurance system is a mixture of economic and non-economic elements. Having said this, the Commission explained that its intention was to assess, through a formal investigation, whether the activity of such an insurance system is organized and carried out as economic or non-economic in nature. In this respect, the Commission stated that, given the information provided, the measures under assessment would promote activities of an economic character and, therefore, it would be difficult to exclude that they could involve an undue advantage to SZP/VZP. Moreover, the measures posed problems as to the fulfilment of the fourth *Altmark* condition, as well as with regard to the compatibility with Article 106(2) TFEU. In light of all the above, the Commission decided to open a formal investigation procedure and invited third parties to submit comments.

Following the in-depth investigation, the Commission adopted a Decision on 15 October 2014, cited above.¹⁹⁸ In conducting a comparative assessment of the

¹⁹⁵Paras. 183–193.

¹⁹⁶Para. 189.

¹⁹⁷Commission Decision (EU) on State aid SA 23008 (C/2013) (ex 2013/NN) Alleged State aid to Spoločná zdravotná poisťovňa, a.s (SZP) and Všeobecná zdravotná poisťovňa, a.s (VZP).

¹⁹⁸See above, para. 1, where the Decision has been examined with regard to its implications from the point of view of the notion of economic activity.

presence and relative importance of different features of the Slovak compulsory health-insurance system, the Commission observed that the system was based on compulsory membership for most Slovak citizens, with contributions fixed by law in proportion to the income of the insured person, while all insured people were guaranteed the same minimum level of benefits, the value of which was unrelated to the individual contribution paid. Hence, the Commission found that social objectives were predominant in the Slovak health-insurance system and that it was centrally based on the solidarity principle. The Commission therefore concluded that the activities concerned were not of an economic nature and that the public funding of health insurers operating in that system did not involve State aid. Since the Decision has been challenged before the GC, it remains to be seen what the position of the EU judges on the matter will be.¹⁹⁹

- e) The compatibility of UK legislation with EU rules has been examined by the Commission in the context of social security, in a case regarding an occupational pension scheme. More specifically, the Decision—rendered by the Commission on 6 July 2010—concerned the establishment of the National Employment Savings Trust (NEST), an occupational pension system for employees earning moderate income that the existing market did not serve, aimed at ensuring full access to an affordable pension scheme.²⁰⁰ The UK authorities had notified the NEST to the Commission because national legislation provided for the grant of a loan to fill the funding gap during the scheme's early years, with an estimated payback period of 20 years. Since social security does not fall within the exemptions contained in the 2005 SGEI Decision (applicable at the time) or under the scope of the 2012 SGEI Decision, the Commission focused on the 2005 Framework. In particular, the Commission found that all the conditions set out in the Framework had been met: NEST carried out an SGEI; it was entrusted by an official act detailing all the elements of the service; and there was no overcompensation for the provision of the service.²⁰¹ Central to the Commission's reasoning was the identification of the principles governing the NEST: performance of a social policy function through the provision of an ongoing public service obligation, which, as expressed in legislation, could only be amended by Parliament, combined with the establishment of public policy constraints; low costs for scheme members; payment by members for the costs of the scheme through charges; openness of the scheme to any employer wishing to use the scheme to meet their legal duty. Accordingly, the Commission decided to consider the notified measure to be compatible with Article 106 (2) TFEU.

¹⁹⁹ See application *Dôvera zdravotná poisťovňa v. Commission* in Case T-216/15.

²⁰⁰ Commission Decision (EC) on State aid 158/2009—United Kingdom. Establishment of the National Employment Savings Trust—NEST, C (2010) 4507 final.

²⁰¹ Paras. 117–128.

The approach adopted in the 2010 Decision was confirmed in the Decision of 25 June 2014 concerning the introduction of legislative changes to the NEST.²⁰² As stated by the British government, these changes concerned “exclusively the design of NEST” and not “the aid measure itself”.²⁰³ In particular, the UK notified to the Commission the intention to abolish the following two constraints, which would pose a risk for the fair and effective provision of the ESSGI: an annual contribution limit of maximum GBP 3600 per individual, restricting the amount of contributions that an individual could make to the scheme; a general prohibition on transfers to and from NEST. The Commission considered that the compensation granted to NEST in the form of a provision of a subsidized loan from the government to fill the costs and funding gap faced by NEST constituted State aid within the meaning of Article 107 (1) TFEU, but also that it remained compatible with EU law, since the proposed technical modifications did not affect the actual substance of the aid measure.²⁰⁴

5 Recent Developments on State Aids and Social Housing

After being ignored for decades by EU institutions, social housing—in connection with public funding and compatibility with EU rules—has come to the forefront in recent years in a number of Commission decisions and judgments rendered by EU courts. Relevant cases have involved the following five Member States: The Netherlands; Ireland; Belgium; Sweden; and France.

- a) EU institutions have been screening the Dutch legislation on the financing of social housing since the mid-2000s.²⁰⁵ The past 10 years have seen a saga on the *woningcorporaties*, the housing corporations established in the Netherlands (commonly known as ‘wocos’). They are not-for-profit bodies whose mission is to acquire, build and rent out dwellings aimed mainly at underprivileged individuals and socially disadvantaged groups, and are involved in the engagement of other activities, such as the construction and lease of apartments at higher rents, the construction of apartments for sale and the construction and lease of public purpose buildings (cultural centres, centres for the integration of immigrants etc.). We should mention, in particular: a Decision of the Commission; an application against the decision before the GC, and the corresponding judgment; an appeal against this ruling before the CJ, and the corresponding judgment; an order by the GC; a new appeal against this order before the CJ.

²⁰²Commission Decision (EU) on State aid 36410 (2014/N)—United Kingdom. Modifications to the National Employment Savings Trust—NEST, C(2014) 4071 final.

²⁰³Paras. 14–15 and 29.

²⁰⁴Paras. 30–36.

²⁰⁵For a general discussion see Sol and van der Vos (2015).

On 15 December 2009, the Commission adopted a Decision with regard to two measures.²⁰⁶ The first was aid E 2/2005, in respect of which a procedure was started following a claim brought by the Dutch Association of Institutional Investors (IVBN) to the Commission. Since the Commission found that the funding measures for wocos could be classified as existing aid, the Commission and Dutch authorities established an intense dialogue. The exchange of letters between them reveals the intention of the Commission to consider the funding as State aid under Article 107(1) TFEU, as well as its doubts concerning compatibility with Article 106(2) TFEU. In the meantime, on 16 April 2007, IVBN lodged a complaint with the Commission regarding the aid granted to wocos. As a result, the Dutch authorities included the following amendments in the general scheme for State aid paid by the Netherlands to wocos: State guarantees for loans granted by the Guarantee Fund for the construction of social housing; State aid from the Central Housing Fund, that is, project-based aid or aid for rationalization in the form of loans at preferential rates or direct subsidies; the sale by municipal authorities of land at prices below-market value; the right to obtain loans from the Dutch National Bank.

The second measure at stake was aid N 642/2009, notified by the Dutch Government on 18 November 2009, concerning the regeneration of declining urban areas, classified as a specific project-based aid intended for certain areas, which benefits wocos operating in the selected areas. This aid took the form of direct subsidies paid by the Dutch Central Housing Fund for carrying out special projects relating to the construction and lease of housing in geographically defined zones inhabited by the most disadvantaged urban communities. It was to be financed by a new tax paid by wocos which carry out their activities outside sensitive urban zones.

The Commission developed a very similar reasoning, if not identical in several passages, with regard to both aid E 2/2005 and aid N 642/2009. As to the existence and qualification of the measures as State aid within the meaning of Article 107 TFEU, the Commission's view was that the *Altmark* test was not complied with, in particular with respect to the fourth condition (efficiency),²⁰⁷ since there was no tender and no proof that the housing corporations receiving the aid were efficient companies.²⁰⁸

The assessment of the aid, in terms of its compatibility with Article 106 (2) TFEU, was carried out in light of the 2005 SGEI Decision, whose Article 2 (1)(b) covers, amongst various services, as already noted, social housing, which is therefore exempted from notification. First of all, the Commission pointed out that the definition proposed by the Dutch authorities, especially with regard to the construction and renting out of dwellings to individuals and of public

²⁰⁶Commission Decision (EC) on State aid 2/2005 and 642/2009—The Netherlands. Existing and special project aid to housing corporations, C (2009) 9963 final.

²⁰⁷Para. 14.

²⁰⁸Baquero Cruz (2013), p. 306.

purpose buildings, did not contain manifest error and could be accepted as an SGEI, namely an ESSGI, under Article 106(2) TFEU. Secondly, all elements of the entrustment act were present: the nature and duration of public service obligations; the undertakings and territory concerned; the parameters for calculating, controlling and reviewing the compensation; the arrangement for avoiding and repaying any overcompensation. The fact that the entrustment was made by way of general rules did not adversely affect compliance with the 2005 SGEI Decision. Thirdly, as to the criterion on overcompensation, the Commission noted that the wocos were obliged to keep separate accounts between aided and non-aided activities and to address this issue in their annual report, and also that they had a legal obligation not to have profits as a primary objective. Accordingly, the Commission considered that the aid for the provision of social housing, that is, the activity of construction and renting out dwellings to individuals including the building and maintenance of ancillary infrastructure, was compatible with the common market. In this respect, it is interesting to note that a significant factor in the choice made by the Commission was its acceptance of the commitments addressed to the Commission by the Dutch authorities during the investigation: the definition of social housing linked to a specified target group of disadvantaged citizens or socially less advantaged groups; the separation of any commercial activities performed by the wocos from the public service activities and their exclusion from the granting of the aid; the application of tendering procedures for construction of infrastructure and for the construction of public purpose buildings.²⁰⁹

Indeed, following the Decision, the Dutch government adjusted the system by amending the legislation, so as to include the following three commitments: definition of an explicit rent cap for social rental housing (for which State aid is allowed); allocation of at least 90% of social rental dwellings to a target group limited by a maximum income; restriction of State support through the granting of guarantees for housing associations' loans by the Social Housing Guarantee Fund to the building and management of social rental dwellings, with the restriction to allocate at least 90% to the target group. As stressed in the literature,²¹⁰ there are, however, a number of problematic issues: the restriction of the target group and allocation criteria may lead to concentrations of lower income households in the social rental sector, and thus create dangerous forms of segregation; the obligation to allocate at least 90% of the dwellings below the rent cap to the target group may increase the risk of vacancies in specific Dutch regions; and the need for affordable rental dwellings among middle-income households, for which there are insufficient opportunities on the private rental and owner-occupied market.

By application lodged at the Registry of the GC on 30 April 2010, Stichting Woonpunt and other wocos brought an action under Article 263 TFEU for

²⁰⁹Para. 73.

²¹⁰See Gruis and Elsinga (2014), pp. 465–466.

annulment of the Decision, since they challenged the impact on the Dutch legislation of the commitments made by the Dutch authorities and which the Commission had decided were necessary to make the aid schemes compatible with EU law. The GC, on 16 December 2011, dismissed the action in its entirety as inadmissible, accepting the procedural grounds advanced by the Commission.²¹¹ In particular, the Commission had argued, first, that the appellants were not individually affected, within the meaning of Article 263(4) TFEU, by the contested Decision, in that it relates to aid measure E 2/2005, and, secondly, that they did not have an interest in bringing proceedings for annulment of the Decision, because it relates to aid measure N 642/2009. As to the first aid measure, the GC held that the status of wocos was granted on the basis of objective criteria which were capable of being satisfied by an indeterminate number of operators as potential beneficiaries. As to the second aid measure, the GC took the view that the appellants could not, in the context of the examination of new aid, rely on an earlier, allegedly more favourable, situation.²¹²

The claimants appealed against the GC's order before the CJ, which delivered its ruling on 27 February 2014. In their application, the appellants claimed that the Court should set aside the order and refer the case back to the GC. Since in the judgment the CJ did not address substantive issues concerning the financing of ESSGIs, it will suffice to point out that the Court upheld two of the three pleas put forward by the appellants: the first plea, which alleged an error of law with regard to the inaccurate appraisal of the relevant facts, a failure to provide reasons and the inexistence of the interest in bringing proceedings for annulment of the contested decision (with reference to N 642/2009), was rejected; the other two, which alleged an error of law regarding the issue of the appellants' status as actual or potential beneficiaries, with reference to aid E 2/2005, were upheld. In short, the CJ held that the appellants had a legitimate interest in having the contested decision annulled and that this decision directly affected their legal position.²¹³

The GC, by its 12 May 2015 order,²¹⁴ dismissed the appeal because the action was manifestly lacking any foundation in law. On 15 March 2017, the Court of Justice set aside the order and referred the case back to the GC.²¹⁵ In the judgment, focused on procedural issues, the Court of Justice clarified the scope of judicial review of the Commission's decision approving the national commitments given in relation to the appropriate measures proposed by the Commission itself. The Court held that, contrary to the GC's assessment, such judicial review extends to the Commission's preliminary assessment that the aid scheme is incompatible with the internal market and that, as a consequence,

²¹¹Case T-203/10, *Stichting*, ECLI:EU:T:2011:766.

²¹²Paras. 34–64.

²¹³Paras. 74–75.

²¹⁴Case T-203/10 RENV, *Stichting*, ECLI:EU:T:2015:286.

²¹⁵Case C-415/15 P, *Stichting*, ECLI:EU:C:2017:216.

appropriate measures are necessary to remedy that incompatibility.²¹⁶ The Court also held that the GC erred in law when it rejected as manifestly unfounded the applicants' arguments concerning the appropriate measures considering that such measures were merely proposals and that it was the national authorities' acceptance that had made them binding.²¹⁷

- b) The Irish way of funding the social housing sector has been the subject of an investigation by the Commission, which on 26 July 2005 received, from the Irish authorities, the notification of a legislative measure on dedicated financing for social housing.²¹⁸ The measure is constituted by Section 17 of the Housing Act 2002, read in conjunction with Section 56 of the Housing Act 1966. According to the legislation, the Minister for Finance may guarantee the borrowings of the "Housing Finance Agency" (HFA), a public credit institution and financial agency, which then advances the funds borrowed to the local authorities, who in their turn use them to provide dwellings for socially disadvantaged households and other additional elements, such as roads or playgrounds. Thus, the following measures were at stake: the guarantee by the Minister of Finance for the HFA's fundraising for the purpose of making loans to the local authorities to fund ancillary infrastructure activities; and the provision of cheap guaranteed funding by the HFA to the local authorities for the purposes of their ancillary infrastructure activities. As to the former, the Commission observed that the HFA, when acting in that capacity, was not an undertaking within the meaning of Article 107(1) TFEU, but an intra-governmental funding agency. Therefore, from this perspective, the State guarantees granted to HFA did not constitute State aid.²¹⁹

As to the latter measure, the Commission found that it constituted State aid because the fourth *Altmark* condition was not fulfilled. Indeed, the municipalities which were responsible for providing infrastructural elements ancillary to social housing had not been selected through a public procurement procedure. It was thus possible, in principle, that the municipalities received a financial advantage and thus were in a more favourable position than the undertakings competing with them. For this reason, the Commission focused on whether the funding was compatible under Article 106(2) TFEU. In this respect, it stated that all requirements prescribed by the rule were fulfilled: the scheme was limited to the provision of infrastructural elements needed to ensure a good environment for social dwellings, since the promotion of social housing was a legitimate public task of the State; the entrustment act was clear; compensation was proportionate, that is, there was no overcompensation; and the aid could not

²¹⁶Paras. 29–54.

²¹⁷Paras. 59–68.

²¹⁸Commission Decision (EC) on State Aid 395/2005 of 7 December 2005. Ireland, Loan Guarantee for Social Infrastructure Schemes Funded by the Housing Agency, (2005) 4668 final.

²¹⁹Para. 391.

produce distortive effects on trade.²²⁰ For all these reasons the Irish system, like the Dutch system before it, was approved by the Commission.

- c) In Belgium, a decree of the Flemish Region of 27 March 2009 on land and buildings policy linked the transfer of property in certain Flemish municipalities to the condition that a sufficient connection existed between the prospective buyer or tenant and the municipality concerned. It also imposed obligations on developers, while providing for tax incentives and subsidy mechanisms. On 6 April 2011, the national Constitutional Court, which was dealing with the annulment of that decree together with a number of disputes, asked the CJ whether the decree was legitimate under EU law, from the standpoint of internal market freedoms and the rules on State aid and public contracts. The CJ delivered its judgment on 8 May 2013.²²¹ With regard to the interpretation and application of the EU fundamental freedoms (which is outside the scope of this chapter), it will suffice to note that the Court, while stating that there was a restriction to such freedoms, left to the national court the task of determining whether the restriction was justified by overriding reasons of public interest.²²²

As regards the tax incentives and subsidy mechanisms provided for by the land and buildings decree, as noted by Advocate General J. Mazák,²²³ they could be divided into two groups having separate aims: the first comprised measures aiming at reactivating the use of certain lands and buildings, including the tax reduction granted to a lender who concludes a renewal agreement and the reduction of the tax base for stamp duty; the second included measures aimed at compensating for the social obligation to which developers are subject, including the reduced rate of VAT (value added tax) on the sale of housing and the reduced stamp duty for the purchase of building land, the infrastructure subsidies of the land and buildings decree, and the guarantee purchase in respect of the housing developed. The question referred by the Constitutional Court with regard to these measures sought to determine whether they could be classified as State aid according to Article 107(1) TFEU and whether they should be notified to the Commission pursuant to Article 108(3) TFEU or be exempted from such notification in light of the 2012 SGEI Decision.

In connection with the possible fulfilment of all elements set out in Article 107(1) TFEU, the CJ focused, in particular, on the second condition (intervention liable to affect trade between Member States), recalling that, for the purpose of categorizing a national measure as State aid, it was necessary to examine whether that aid was liable to affect such trade and distort competition, rather than establish that the aid had a real effect on trade between Member States or

²²⁰Paras. 39–44.

²²¹Joined Cases C-197/11 and C-203/11, *Libert*, ECLI:EU:C:2013:288. For an overview see Nicolaides (2014).

²²²Paras. 67–69.

²²³Opinion of 4 October 2012, ECLI:EU:C:2012:621, para. 43.

that competition was actually being distorted.²²⁴ Then, with respect to the third condition (conferral of an advantage on the recipient), the Court observed that measures which, whatever their form, were likely to directly or indirectly favour certain undertakings or were to be regarded as an economic advantage which the recipient undertaking would not have obtained under normal market conditions, were regarded as aid, unlike where a State measure can be regarded as compensation for the services provided by the recipient undertakings in order to discharge public service obligations under the *Altmark* test. With reference to both questions raised by the Belgian Constitutional Court, the CJ explained that it was for the referring court to determine, in the light of the foregoing guidance on interpretation and by reference to all the relevant circumstances of the case, whether Article 107 TFEU should apply or not. The same approach was adopted with regard to the possible application of the 2005 SGEI Decision on the exemption of social housing from notification of the financing, should it be qualified as State aid. Now, the CJ stated that, since the conditions set out in the 2012 SGEI Decision are based on those set out in *Altmark* (in particular the first three) and the Court did not have jurisdiction to rule on the compliance of the latter with EU law in the present case, it would be up to the referring court to verify whether the act should be applied. Here, what might seem almost like a passing remark assumes greater significance when one realizes that this statement contains a concise, express comparison equating *Altmark* with Article 106 (2) TFEU, and it is striking in the way it applies in accordance with the 2012 SGEI Decision.²²⁵ Therefore, a careful reading of the judgment reveals that the CJ adopted a ‘self-restricting’ approach, according to which it left to the national court not only the definition of the public service obligations underlying SGEIs (in this case, ESSGIs), but also the task of determining whether the conditions set out in the Decision were respected. And it is in no way established that this task should be performed by national judges. Surprisingly, moreover, the CJ chose to rely on the ‘Monti-Kroes Package’ rather than the ‘Almunia Package’, even though the former would have been applicable.²²⁶ Indeed, the old Decision remains applicable for 2 years after entering into force, according to Article 10 (a) of the new SGEI Decision. However, this new Decision is also applicable, according to Article 10(b), especially in the case of an aid or aid scheme that is only compatible with the new set of rules.²²⁷

With regard to the outcome of the case at the national level, the Belgian Constitutional Court, with its Decision of 7 November 2013, nullified both the social obligations and the compensations for private residential projects. It did so by both declining the applicability of the *Altmark* conditions and denying the fulfilment of the 2012 SGEI Decision’s conditions.

²²⁴Para. 76.

²²⁵Paras. 94–102.

²²⁶See Eichler (2014), pp. 93–94.

²²⁷*Ibid.*

- d) In 2005, the Swedish private property owners association filed a complaint with the European Commission arguing that Swedish housing legislation was not in compliance with EU law. The grievance was based on a new explanation of the term ‘financial assistance’ or ‘subsidy’. In particular, although there were no direct State grants, municipal housing companies did not charge rents conforming to the market, in the sense that they were not based on a market-based rate of return on the market value of the dwellings. These below-market rents were considered to be an implicit subsidy leading to a distortion of competition. Indeed, after the complaint was lodged the Swedish authorities amended national legislation, and in 2011 the applicant withdrew their complaint. Therefore, no formal decision has been adopted by the Commission and no public statement has been issued on the Swedish social housing system.²²⁸ The new Swedish law states that municipal housing companies should act more like private companies, that is, in a ‘business-like way’. This means acting as a long-term private owner and pushing for higher rents where demand is high and also demanding a market-based rate of return on investments made.²²⁹ In this view, investments that do not bring the rate of return needed should not be made. In addition, it has been decided to link the profitability of a company to its relation to the tenants: the result is that increases in rent would not be good for a private or public company. From all of the above, it is clear that the Swedish government has taken a new, more market-oriented approach to the concept of ‘public purpose’ by placing municipal housing companies and private companies on an equal footing.
- e) On 2 July 2012, the *Union Nationale de la Propriété Immobilière* (UNPI), the French private property owners association, filed a complaint with the European Commission with the aim of restoring fair conditions in the French residential housing market. Indeed, according to the complainant, the allocation of State aid to the French public housing sector had distorted the housing market, without being able to achieve the goal of providing housing to the most vulnerable.²³⁰ An explicit reference was made to EU State aid law on SGEIs, which the granting of aid to the public residential stock had allegedly violated. This was even worse, in the opinion of UNPI, considering that the private sector was subject to high taxation pressure. No developments on the case are currently known or accessible on the Commission’s State aid register.

²²⁸ On this issue see Elsinga and Lind (2012).

²²⁹ See Gruis and Elsinga (2014), pp. 466–467.

²³⁰ On this complaint see the press release available online at http://www.unpi.org/Donnees_Client/Doc/Produit/664314.pdf.

6 Concluding Remarks

The analysis has shown that, generally, by providing and extending a special treatment for welfare services, the EU institutions, despite the existence of some critical aspects that still exist, have successfully consolidated the social market economy principles which define the EU model of society. This holds true for the ‘Almunia Package’ as well as for the European Commission’s practice and the CJEU’s case law, where EU State Aids law was found not applicable *ex ante* due to the non-economic character of the activities concerned or *ex post* on the basis of Article 106(2) TFEU.

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