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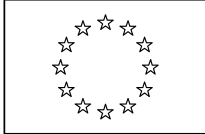

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COMMISSION STAFF WORKING PAPER

Guidance Paper on state aid-compliant financing, restructuring and privatisation of State-owned enterprises

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1. INTRODUCTION

It has become apparent in the context of the current economic and financial crisis that some State-owned enterprises ("SOE") are loss-making and/or have accumulated significant amounts of debt, which makes their economic viability uncertain. In order to address the problems that SOE encounter, several Member States are taking measures in the form of financing (e.g. capital injections, writing off of debts), restructuring and/or privatisation of SOE, which may potentially involve state aid. A measure constituting state aid shall not be implemented before it has been approved by the Commission. The compatibility of state aid measures needs to be assessed on the basis of the Treaty on the Functioning of the European Union ("TFEU").

The purpose of this Guidance Paper is to raise awareness in all Member States of EU state aid rules, which must be complied with when carrying out financing, restructuring and/or privatisation of SOE, and to provide clarifications on the way the Commission applies the main state aid principles. This Guidance Paper exclusively refers to existing rules and individual cases will be assessed on their own merits.

The Guidance Paper also aims at clarifying the impact that state aid rules could have on the policies and decisions of Member States undergoing economic adjustment programmes, which have committed to reducing the strain on public finances among others by restructuring and/or privatising SOE. Very particularly, the Commission encourages Member States that are implementing large privatisation programmes to closely liaise with it in order to ensure that any state aid issue that may appear during the implementation of the programme is satisfactorily addressed in a timely fashion. This will help to ensure to the maximum possible extent legal certainty and will most likely avoid litigation that could hinder the privatisation process.

This Guidance Paper is a European Commission staff working document for information purposes. It does not represent an official position of the Commission on this issue, nor does it anticipate such a position. It is not intended to constitute a statement of the law and is without prejudice to the interpretation of the Treaty provisions on state aid by the Court of Justice or the General Court of the European Union. Save otherwise mentioned, the principles referred to in this Guidance Paper are applicable not only to SOE, totally or partially owned by the State, but more generally to any stake or participation that a public authority may hold in a company, independently of whether the public authority effectively exercises control or not over it.

2. BASIC PRINCIPLES

When does a measure constitute state aid?

Article 107(1) TFEU provides a general definition of state aid, which is composed of the four cumulative elements defined below:

(1) The measure must be granted by a Member State or through **State resources**.

Under state aid rules, the State is not only the central administration but all levels of government (e.g. regions, municipalities, etc). Special attention should be paid to public undertakings, since their actions can in many cases be considered imputable to the State and State resources could be involved.

The measure can take the form of a positive transfer of State resources (e.g. a loan or a grant), but also of a negative transfer, that is when the State foregoes revenue it would normally have received (e.g. through a tax exemption or a debt waiver).

(2) There must be a **selective advantage** (it must favour certain undertakings, the production of certain goods or the provision of certain services).

The recipient of the measure must be an undertaking. Under state aid rules, this is a functional criterion: what matters is the economic nature of the activity and whether the beneficiary provides a good or service on the market, rather than its legal form or whether it is run for profit or not.

Article 107 TFEU *et seq*. on state aid apply indifferently to both private and public undertakings. This results from Article 345 TFEU, which enshrines the principle of neutrality with regard to the system of property ownership, as well as from the case-law of the EU Courts, which have also recognised the principle of equality between public and private undertakings,

A measure gives an advantage to the beneficiary undertaking when it provides a financial or commercial benefit that this undertaking would not have been able to secure on the market (typically because the State provided the benefit for free or against insufficient remuneration). Normal market behaviour is the benchmark used in assessing all kinds of economic transactions entered into by public authorities. In order to identify what constitutes normal market behaviour, the Commission applies the Market Economy Investor Principle test, which is further explained in section D.

The advantage must also be selective, i.e. it must favour certain undertakings, regions and/or economic activities in detriment of others. Note that a measure which is formally neutral (i.e. on paper it is open to all) can be *de facto* selective if in practice it applies only to certain undertakings.

(3) There must be a (potential for) **distortion of competition**.

If a measure provided by the State reinforces (or would be capable of reinforcing) the competitive situation of the beneficiary undertaking compared to that of its competitors, then competition is considered to be distorted. According to the TFEU, which establishes that the measure must distort or threaten to distort competition, no actual distortion of competition is required.

(4) There must be **an effect on trade** between Member States.

This criterion has also been broadly interpreted by the EU Courts. Indeed, it is sufficient that the beneficiary undertaking trades a good or service which could be traded between Member States. Within this meaning, a measure may also affect trade even if the recipient undertaking is not involved in intra-EU trade.

In case a measure fulfils all four cumulative criteria, then it constitutes state aid, which is in principle prohibited by Article 107(1) TFEU. However, Articles 107(2) and (3) TFEU lay down a number of conditions under which a state aid shall or may be considered compatible with the internal market and could thus be authorised by the Commission (which has the exclusive competence to declare state aid compatible with the internal market). On the basis

of these Articles the Commission has issued detailed instruments and guidance documents in order to clarify the criteria it applies when assessing the compatibility of state aid.[1]

Highlights of state aid procedures before the Commission

- All state aid measures (individual measures and aid schemes) have to be notified to the Commission for approval and must not be put into effect before the Commission has taken a decision authorising them ("standstill obligation").[2] All aid implemented before approval of the Commission is considered unlawful aid and may have to be recovered from the recipient with interests.

- Once a measure is notified, the Commission has to take a decision within two months. This time-limit starts to count once the notification is complete and the Commission has at its disposal all necessary information.

- When the notification is complete, the Commission may decide (i) that the measure is no aid, (ii) that it is aid but compatible with the internal market (and is therefore authorised), or (iii) that it has doubts that the aid is compatible with the internal market and decides to open a formal investigation procedure.

- If the Commission decides to open a formal investigation procedure, it will carry out a detailed assessment of the measure and the possible grounds for compatibility. The opening of the formal investigation procedure does not prejudge the final decision of the Commission. There is no binding time-limit for the formal investigation procedure, although the Commission shall as far as possible endeavour to adopt a decision within a period of 18 months from the opening of the procedure.[3]

- A formal investigation is closed by a final Commission decision establishing (i) whether the measure is state aid, and if so, (ii) whether it is compatible with the internal market and can be safely implemented, or (iii) whether it is incompatible and must not be implemented (if already implemented, the Commission will normally order the Member State to recover the aid from the beneficiary).

The Commission will moreover consider complaints by competitors, citizens, etc., on potential state aid issues and can also initiate an investigation on its own initiative. Thus, if a support measure is not notified to the Commission for approval before granting it, there is a clear risk of litigation and potential problems in the implementation of the measure given that it could constitute unlawful state aid. It must also be noted that a national court called upon

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[1] All rules can be found at http://ec.europa.eu/competition/state_aid/legislation/legislation.html.

[2] There are nonetheless some exceptions to the obligation of prior notification. See for instance Council Regulation (EC) No 994/98 of 7 May 1998 on the application of Articles 92 and 93 of the Treaty establishing the European Community to certain categories of horizontal State aid (OJ L 142, 14.5.1998, p. 1), and Commission Regulation (EC) 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, 9.8.2008, p. 3).

[3] See Article 7(6) of Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 93 of the EC Treaty (OJ L 83, 27.3.1999, p. 1). This time limit may be extended by common agreement between the Commission and the Member State concerned.

(for example, by a competitor) to assess whether a measure constitutes state aid may order the measure to be annulled or suspended, and the aid to be recovered.[4]

The Commission has also put in place a **specific pre-notification procedure**, which aims at assisting Member States in an informal way to prepare their notifications. This procedure can also be used by Member States seeking advice to determine whether a measure should be considered state aid or not. Pre-notifications are carried out **informally** while duly respecting **confidentiality**.

3. FINANCING OF SOE

Public authorities may decide to provide funding to SOE in the context of restructuring/privatisation processes. In this eventuality, measures provided on market terms and against a return that would be satisfactory for a private owner/investor in the same industry do not constitute state aid and need not be notified. This would not be the case where fresh capital is contributed in circumstances that would not be acceptable to a private investor operating under prevailing market conditions. For example, (i) where the financial position of the company, and particularly the structure and volume of its debt, is such that a normal return (in dividends or capital gains) cannot be expected within a reasonable time from the capital invested; (ii) where, because of its inadequate cash flow or for any other reason, the company would be unable to raise the funds needed for an investment programme on the capital markets; (iii) where the holding is a short-term one, with duration and selling price fixed in advance, so that the return to the provider of capital is considerably less than he could have expected from a capital market investment for a similar period; or (iv) where the public authorities' holding involves the taking over or the continuation of all or part of the non-viable operations of an ailing company through the formation of a new legal entity.

For those support measures fulfilling the necessary conditions for being considered state aid, there are a number of grounds on which the aid can be considered compatible with the internal market. It is beyond the scope of this Guidance Paper to summarize the numerous compatibility grounds, although the following ones appear potentially valid in the context of the economic adjustment programmes: rescue and restructuring aid,[5] regional aid,[6] training aid,[7] aid for research and development and innovation,[8] etc. Where those compatibility grounds are not met, the financing of SOE will in principle entail incompatible state aid.

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4 See Commission Notice on the enforcement of state aid law by national courts, OJ C 85, 9.4.2009, p. 1. The Notice gives guidance on possible remedies against violations of the standstill obligation, such as the repayment of unlawful aid, damages claims, interim measures or interest payments. It also establishes two consultation mechanisms for national courts, which can ask the Commission for information in its possession and/or for its opinion on the application of state aid rules.

5 See the Community Guidelines on state aid for rescuing and restructuring firms in difficulty, OJ C 244, 1.10.2004, p. 2.

6 See in particular the Guidelines on national regional aid for 2007-2013, OJ C 54, 4.3.2006, p. 13.

7 See the Communication from the Commission on the criteria for the analysis of the compatibility of State aid for training subject to individual notification, OJ C 188, 11.8.2009, p. 1.

8 See the Community framework for state aid for research and development and innovation, OJ C 323, 30.12.2006, p. 1.

Particular rules apply to the financing of public services, identified in the Treaties as services of general economic interest ("SGEI"). The SGEI are economic activities that public authorities identify as being of particular importance to citizens and that would not be supplied (or would be supplied under different conditions) if there was no public intervention.[9] The Court of Justice detailed in its *Altmark* judgment the cumulative conditions under which compensation for the provision of SGEI does not constitute state aid.[10] The new SGEI Package, adopted by the Commission on 20 December 2011, clarifies the conditions under which state aid in the form of public service compensation can be considered compatible with the EU rules.[11]

In order for the presence or absence of overcompensation to be established, the Transparency Directive[12] provides that companies receiving compensation and operating both on public services and other markets must keep separate accounts for their different activities. In the case of public undertakings – defined in the Transparency Directive as undertakings over which the public authorities may exercise directly or directly a dominant influence – Member States must ensure transparency as to the public funds made available to such undertakings and the use to which these funds are actually put. This transparency requirement applies in particular to the setting off of operating losses, the provision of capital, non-refundable grants, or loans on privileged terms, the foregoing of a normal return on public funds used and compensation of financial burdens imposed by the public authorities.

4. RESTRUCTURING OF SOE

In certain cases, Member States may seek to maximise the proceeds resulting from privatisation through prior restructuring of the target company, in order to raise the interest with potential buyers. Therefore, a short summary of the main rules on restructuring aid appears appropriate in the context of SOE privatisation.

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9 SGEI range from large commercial services (network industries such as postal services, energy supply, electronic communication services or public transport services) to a wide range of health and social services (e.g. care services for elderly and disabled).

10 Judgment of the Court of Justice of 24.7.2003 in case C-280/00, *Altmark Trans GmbH* [2003] ECR I-7747. Compensation for the provision of SGEI does not amount to state aid due to the absence of advantage – and is therefore not subject to prior notification to and approval by the Commission – if four cumulative conditions are met: (i) the beneficiary must be entrusted with a clearly defined public service mission; (ii) the parameters for calculating the compensation payments must be established in advance in an objective and transparent manner; (iii) the compensation must not exceed the cost incurred in the discharge of the public service minus the revenues earned with providing the service plus a reasonable profit; and (iv) the beneficiary is chosen in a public tender or compensation does not exceed the costs of a well-run undertaking that is adequately equipped with the means to provide the public service.

11 See the Communication from the Commission on the application of the European Union State aid rules to compensation granted for the provision of services of general economic interest, OJ C 8, 11.1.2012, p. 4; the Commission Decision 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, OJ L 7, 11.1.2012, p. 3; and the Communication from the Commission – European Union framework for State aid in the form of public service compensation, OJ C 8, 11.1.2012, p. 15.

12 Commission Directive 2006/111/EC of 16 November 2006 on the transparency of financial relations between Member States and public undertakings as well as on financial transparency within certain undertakings, OJ L 318, 17.11.2006, p. 17.

As a general principle, state aid can be ruled out in the context of restructuring if the measures are provided at market conditions, i.e. if the measures would have been commercially rational for private owners/creditors of the firm in similar circumstances. If state aid cannot be ruled out clearly, then notification to and prior approval of the Commission are necessary before the restructuring is implemented. The Commission assesses compatibility of the measure on the basis of the Community guidelines on state aid for rescuing and restructuring firms in difficulty ("R&R Guidelines").[13]

In order to be eligible for restructuring aid, the beneficiary firm must be a "**firm in difficulty**" in the sense of points 9 to 13 of the R&R Guidelines. In short, a company in difficulty is a company that is unable, whether through its own resources or with the funds it is able to obtain from its owner/shareholders or creditors, to stem losses which without outside intervention by public authorities will almost certainly condemn it to go out of business in the short or medium term.

The aid must be conditional on implementation of a restructuring plan aimed at **restoring the long-term viability** of the beneficiary on the basis of realistic assumptions and within a reasonable time-frame. The beneficiary undertaking must abandon those activities which would remain structurally loss-making even after restructuring. The Commission must authorise the restructuring plan before it is implemented.

The aid must also be **limited to the minimum** necessary. The beneficiary will be expected to provide a significant contribution to the restructuring from its own resources or from external financing at market conditions. Such contribution must be real, i.e. actual, excluding all future expected profits such as cash flow, and must be as high as possible. The extent of own contribution for large firms should normally amount to at least 50% of the restructuring costs.[14]

Importantly, **compensatory measures** will also be required in order to ensure that competition is distorted to the least possible extent by the fact that the aid allows the firm to remain in business. These measures may include divestment of assets, reduction in capacity or market presence, reduction of entry barriers on the market, etc.[15], depending on the specific case at hand and the identified competition distortions. However, this condition will not normally apply to small enterprises, since it can be assumed that *ad hoc* aid to small enterprises does not normally distort competition to an extent contrary to the common interest.[16] Write-offs and closure of loss-making activities that would at any rate be necessary to restore viability do not qualify as compensatory measures.

Finally, also the "**one time, last time**" principle must be respected: restructuring aid cannot be provided to an undertaking which has benefited from restructuring aid in the previous 10 years.

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[13] Cf. footnote 5. Albeit under the R&R Guidelines rescue aid (in the form of a temporary and reversible assistance) is also possible, it appears unlikely that it will be particularly relevant for SOE.

[14] For small enterprises it should be at least 25%, and for medium-sized enterprises at least 40%. For all types of undertakings, the Commission may accept a lower contribution in exceptional circumstances and in cases of particular hardship, which must be demonstrated by the Member State.

[15] In areas eligible for regional aid under Articles 107(3)(a) and (c) TFEU, the conditions for authorising aid may be less stringent as regards the implementation of compensatory measures and the size of the beneficiary's own contribution. See points 55 and 56 of the R&R Guidelines.

[16] See point 41 of the R&R Guidelines.

A sale of a SOE may contribute to make restructuring aid compatible, provided that the acquiring party provides new financing to the company. Such funding may demonstrate the confidence of the market on the restoration of the long-term viability of the company. It can normally be considered as "real contribution" in the sense of point 43 of the R&R Guidelines.

Although the general principles of restructuring aid apply across the board to all sectors of the economy, particular rules and conditions apply to restructuring of undertakings in the agricultural,[17] fisheries,[18] financial,[19] and transport sectors.[20]

5. PRIVATISATION OF SOE

As explained above, normal market behaviour is the benchmark used for assessing the action of public authorities when involved in economic transactions. This general principle also applies to privatisations: for privatisations not to entail state aid, public authorities must ensure that they are done on market terms and that no advantage (typically in the form of foregone revenues) is given to the buyer and/or the sold undertaking. This is particularly the case for highly indebted companies, for which liquidation is a plausible option.

In order to identify or exclude the presence of state aid, the Commission relies on the so-called Market Economy Investor Principle (MEIP) test. In order to determine whether an advantage was provided and its extent, one should compare the action of the public authorities with what a normal market operator would have done under the same circumstances.[21] For the purposes of the MEIP assessment, only those costs that would have been borne by a private operator placed in the same situation will be considered and not the costs or losses that the State would bear as a public authority.[22]

If the test shows that a normal market operator would have done the same as the State, then the presence of an advantage can be excluded and thus no state aid is involved. When the State invests in a company jointly (concomitantly) with a private investor in comparable circumstances and under the same terms and conditions, this provides strong evidence that the MEIP test is met. It is however necessary that the private operator's investment be significant and that its behaviour is not influenced by the State's conduct.

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[17] See in particular chapter 5 of the R&R Guidelines as well as the Community Guidelines for state aid in the agriculture and forestry sector – 2007 to 2013, OJ C 319, 27.12.2006, p. 1.

[18] Guidelines for the examination of State aid to fisheries and aquaculture, OJ C 84, 3.4.2008, p. 10.

[19] See in particular the Commission Communication on the return to viability and the assessment of restructuring measures in the financial sector in the current crisis under the State aid rules, OJ C 095, 19.8.2009, p. 9. Note that this Communication, as well as the rest of communications adopted for the financial sector in response to the economic and financial crisis, constitute temporary rules and have a different legal basis from the R&R Guidelines, namely Article 107(3)(b) TFEU.

[20] See for instance the Community Guidelines on State aid for railway undertakings, OJ C 184, 22.7.2008, p. 13, or the 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, 10.12.1994, p. 5.

[21] Note that the presence or absence of a dysfunctional market or market failure (e.g. temporarily depressed prices due to negative externalities and excessive risk aversion) is irrelevant for determining the presence or absence of aid. However, market failures or other potential aid justifications can be taken into account when deciding on the compatibility of the aid.

[22] The potential positive externalities of the measure are not relevant for the assessment of the presence of aid (which focuses on the presence of a selective advantage to the firm). They may however be considered in the subsequent compatibility assessment of the aid.

In a privatisation context, the MEIP translates into the Market Economy Vendor Principle (MEVP), i.e. the assumption that a private vendor that intends to sell his company would do so for the highest possible price and without imposing conditions that would be liable to depress the price. When selling (assets of) a publicly-owned company, the Member State – in order to exclude the presence of state aid – must in principle likewise behave as a market economy vendor, seeking to maximise the revenues (or minimise the loss) from the sale. If the Member State behaves differently, the privatisation may involve a foregoing of State resources to the benefit of the buyer or the privatised company, which presumably constitutes state aid.

Preparatory measures to facilitate the subsequent privatisation of SOE

In order to make the company more interesting for potential buyers, Member States may decide to 'clean' or restructure the asset side and/or liability side of the company's balance sheet. These preparatory measures for the privatisation of SOE will in many instances entail state aid, possibly in the form of restructuring aid (see section 4) or as pure financial measures without any accompanying changes to the firm's business or corporate governance model (see section 3). In particular, write-off of State debt, debt-to-equity/asset conversion and capital increases before privatisation will constitute state aid if they do not adhere to the MEIP as explained above.

However, it cannot be excluded from the outset that public authorities provide support on market terms, thereby ruling out state aid as the MEIP test would be met. For instance, in the case of privatisation by Initial Public Offering ("IPO") or sale of shares on the stock exchange, debt may be written off or reduced without this giving rise to state aid in the specific case where the proceeds of the flotation exceed the reduction in debt.

The Commission decision on the measures implemented by Poland for *PZL Hydral* (C 40/2008) features an example of debt arrangement and privatisation.

The measures included a settlement of old debts by public creditors under the condition of the orderly sale of the assets of PZL Hydral, where the Commission was called to apply *ex post* the Market Economy Creditor Principle.[23] After examining the counterfactual scenario of ordinary bankruptcy, taking into account the ranking and the collateral of the public creditors, the Commission concluded that "*each public creditor […] is better-off in case of the sale of all PZL Hydral assets, i.e. recuperates a higher proportion of his outstanding liabilities, than in a bankruptcy scenario leading to liquidation*".

Furthermore, PZL Wroclaw, an associated undertaking, was granted loans by its public owner. With the undertaking's difficulties making the repayment uncertain, the owner/creditor decided to swap the loans into equity, with the aim to privatise the company and recover part of the debt. Taking into account the price obtained by the sale of the undertaking, the Commission concluded that the creditor "*could not reasonably expect to recover more of his claims under bankruptcy proceedings*". Therefore the debt-to-equity swap was considered market-conform.

[23] The MEIP test also needs to be performed when the State acts in the capacity of a creditor and is then called the Market Economy Creditor Principle (MECP).

Sales process for entities, shares, rights, real estate, and land

The Commission's XXIII Report on Competition Policy[24] provides guidance on how the Commission interprets the conditions under which the State may be considered to behave as a market economy vendor in the context of privatisations.

When the privatisation is effected by an IPO or **sale of shares on the stock exchange**, it is generally assumed to be on market conditions (as the price will be the market price) and not to involve state aid. Therefore, there is no obligation to notify the operation to the Commission in advance. However, this method is not always applicable, and in a context of financial and economic crisis like the current one, it might lead to a low valuation of the company to be privatised.

When a company is privatised by a **trade sale**, i.e. by sale of the company as a whole or in parts to other companies **outside the stock exchange**, the following cumulative conditions should be observed in order to exclude, without further examination, the presence of state aid and thus prior notification to the Commission:

- A competitive tender must be held that is open to all comers, transparent and not conditional on the performance of other acts such as the acquisition of assets other than those bid for or the continued operation of certain businesses;

- The company / assets must be sold to the highest bidder; and

- Bidders must be given enough time and information to carry out a proper valuation of the assets as the basis for their bid.

- If the conditions above are not complied with, privatisations carried out by trade sales must be notified to the Commission. This is so in particular in case of (i) sales after negotiation with a single prospective purchaser or a number of selected bidders; (ii) sales preceded by the writing-off of debt by the State, other public enterprises or any public body, and sales preceded by the conversion of debt into equity or capital increases (see section above on preparatory measures); and (iii) sales on conditions that are not customary in comparable transactions between private parties.

In all cases, there must be no discrimination based on the nationality of prospective buyers of the shares or assets.

In order to minimise the risk that state aid is present, privatisations should be carried out – when possible – by **sale of shares in the stock exchange**. In the alternative, the preferred method is a **competitive tender that is open, transparent and unconditional**, where the highest bidder gets the assets/company.

The competitive tender must be sufficiently **well publicized**, i.e. it must be advertised over a reasonably long period in the national press, estate gazettes and/or other appropriate publications. If the privatisation may attract investors operating on a Europe-wide or international scale, the tender should be announced in publications which have a regular

[24] Available at http://bookshop.europa.eu/is-bin/INTERSHOP.enfinity/WFS/EU-Bookshop-Site/en_GB/-/EUR/ViewPublication-Start?PublicationKey=CM8294650.

international circulation. Such offers should also be made known through agents addressing clients on a Europe-wide or international scale.

The tender will be considered **unconditional** when any buyer, irrespective of whether or not he runs a business or of its nature, is generally free to acquire the assets or company and to use it for his own purposes. According to a well established Commission practice confirmed by the case-law,[25] attaching to the sale of a company conditions that a market operator would not impose justifies the presumption that state aid might be involved. A market economy vendor would normally sell his company for the highest price without imposing conditions that would depress the price. It will need to be demonstrated on a case-by-case basis that conditions imposed on the acquirer do not result in state aid.

For instance, conditions may be imposed to avoid purely speculative bids or to ensure swift and secure payment. The existence of such conditions is irrelevant from a state aid perspective and would not make a tender conditional. Also, conditions for the prevention of public nuisance or for reasons of environmental protection would not make a tender conditional if they merely require compliance with pre-existing obligations laid down in the law.

On the other hand, a tender will be considered conditional (and may thus entail state aid) if it deviates from best practise by artificially restricting the number of potential buyers, directing the sale in favour of any of them or discriminating between different business strategies. For instance, a tender including a condition that makes it practically impossible for a potential investor intending to follow a different industrial strategy to win the bid simply by offering the highest price will be considered conditional. The Commission will not only assess the conditions expressly referred to in the offer but will also look at *de facto* conditions.

In order to avoid state aid implications, the conditions (express or *de facto*) related to privatisation must be of such kind that **all potential buyers would be able to meet them** and **must not be liable to lead to a lower sales price**.

In *Automobile Craiova* (Commission decision C 46/2007), Romania attached conditions to the privatisation of the company in the form of awarding criteria, such as maintaining a production integration level and reaching a certain production level. After opening the formal investigation procedure, the Commission concluded that "*the conditions attached [...] have lowered the sales price and deterred other potential bidders from submitting a bid. As a result, the State has forgone privatisation revenue*".

Also, in its decision 1999/720/EC on the measures granted by Germany to *Gröditzer Stahlwerke*, the Commission concluded that the privatisation procedure of the company was not unconditional. Interested parties were asked to submit a business plan in which they were to put forward detailed commitments regarding jobs to be created or saved, future investment and financing. The Commission noted in its decision that the commitments ultimately entered into influenced the purchase price

[25] See Commission Decision of 25.3.1992 in case C 29/1990 (ex NN 88/1989), *Intelhorce SA – Spain*, OJ L 176, 30.6.1992, p. 62; Commission Decision in case C 38/1992, *Alumix – Italy*, OJ C 288, 1.10.1996 p. 15; and Commission Decision of 8.9.1999 in case C 73/1997, *Stardust Marine – France*, OJ L 206, 15.8.2000, p. 6. The Court of Justice endorsed this principle in Joined cases C-278/92, C-279/92 and C-280/92, *Spain v Commission*, [1994] ECR I-4103, para.28.

negotiated. As a result, it concluded that incompatible state aid was involved and ordered recovery.

Conversely, the Commission found in its decision on the privatisation of *Tractorul* (C 41/2007) that the conditions attached to the tender were simple best-effort clauses of non-binding nature, which did not deter potential bidders and did not lower the price.

Compliance with the state aid rules and principles in the privatisation processes, in particular holding competitive tenders open to all comers, transparent and unconditional, will ensure that no aid is present and a revenue-maximising approach to privatisations.

In the special case of a **sale characterised by a negative price** (e.g. including where the State invests more to prepare the sale of the company than the proceeds obtained from privatisation), it must be noted that an open, transparent and unconditional tender is not in itself sufficient to rule out state aid. In such case, the negative price would still need to be compared to the outcome of a liquidation (or bankruptcy) of the SOE in order to ensure that the State has chosen the economically most rational option and has minimised its losses.

For the sale of publicly-owned land and buildings, when the public authorities do not intend to follow an unconditional bidding procedure, there also exists the possibility of establishing the market value of the asset sold by means of a valuation carried out by one or more independent asset valuers prior to the sale negotiations on the basis of generally accepted market indicators and valuation standards.[26]

It cannot be excluded that a procedure other than a sale of shares on the stock exchange or an open, transparent and unconditional tender could nevertheless guarantee that the MEVP is respected and that there is no advantage. Were this to be the case, the Commission would conclude that there is no state aid. In order to ensure no aid to the buyer and/or to the company, the Member State would need to make sure that the best legal option to maximize profit is pursued and that other alternatives would be sub-optimal.

6. CONCLUSIONS

- In order to safeguard the internal market, it is essential to **ensure respect of state aid rules** in all circumstances.[27] This is an obligation under the TFEU for all Member States.

- Member States are strongly encouraged to use **the pre-notification procedure** for all state aid they intend to grant to SOE. This procedure can also be used to seek advice on whether a given measure entails state aid or not.

- If notification is necessary, Member States are required to **submit notifications as complete and detailed as possible**. No state aid should be put into effect until the Commission has taken a decision authorising it (**standstill obligation**).

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[26] See Commission Communication on state aid elements in sales of land and buildings by public authorities, OJ C 209, 10.7.1997, p. 3.

[27] Compliance with state aid rules is without prejudice to the obligation to comply with other relevant EU rules, including internal market rules.

- For all types of privatisations, including the sale of land and buildings, the Commission strongly encourages Member States to follow **competitive tenders** and when possible best practice IPOs or sale of shares in the stock exchange. This will ensure a revenue-maximising approach to privatisations and legal certainty to the maximum possible extent.

- Where large-scale privatisations are envisaged, Member States are strongly encouraged to set up a **global strategy on SOE** (to be privatised or not, to be restructured or not) as soon as possible, involving all necessary levels of the public administration. This will also allow for early identification of potentially problematic cases from a state aid perspective. They should also consider establishing a **central contact point** for state aid and SOE-related issues to facilitate communication with the Commission and effective management of state aid.