Association des Avocats Pratiquant le Droit de la Concurrence

Reply to the consultation relating to the draft Commission Notice on the notion of State aid pursuant to Article 107(1) TFEU

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1 INTRODUCTION

1. The APDC welcomes the Commission's initiative to provide guidance on the definition of the notion of State aid. The Treaty only succinctly defines this notion and after more than 50 years of application by both the Community Courts and the European Commission, the notion of State aid has become far-reaching. In fact, State aid law now frequently concerns the daily economic activity of many undertakings operating in the European Union. However, both the case-law from the courts and the decisional practice of the European Commission ("**the Commission**") may, from time to time, lack clarity or prove complex, if not contradictory[1]. In that regard, the envisaged Notice on the notion of State aid could become crucially important. In describing the position that the Commission adopts on key issues, it could greatly enhance legal certainty in the field of State aid.

2. Providing public authorities and economic operators in the EU with as much clarity as possible on the definition of State aid is essential in light of the potentially drastic consequences of non-compliance with the standstill provision of the Treaty, which typically include recovery of unlawful State aid and may go as far as the liquidation of the beneficiary of the aid. In the words of Advocate-General Darmon, *"the doubts with which some undertakings may be assailed, when faced with 'atypical' forms of aid, as to whether notification is necessary should not be made light of"*[2]. Allaying such practical doubts to the extent possible, subject to the Union Court's ultimate review, should be a priority for the Draft Notice and would be fully in line with the objectives pursued by the Commission in its State aid modernisation initiative.

3. Clarifying the Commission's position on certain aspects of State aid definition is in practice indispensable since (*i*) its exclusive competence to apply Article 107, paragraph 2 and 3, TFEU confer upon it a central responsibility in the application of State aid law in the European Union; (*ii*) it has a margin of discretion with regard to the various economic assessments that are frequent in State aid law. Such clarification would also be particularly useful for national jurisdiction faced with issues of State aid. In that light, the envisaged Notice would be a welcome addition to the Commission notice on the enforcement of State aid law by national courts[3].

4. Accordingly, the APDC welcomes the opportunity given to third parties to comment on the Draft Notice on the notion of State aid ("**the Draft Notice**"). It will detail in the present reply the main points on which, from a practitioner's perspective, the drafting of the Notice could be perfected.

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[1] As a proxy to evaluate such complexity, it may be pointed out that there are currently [50-60] cases pending before the European courts on the notion at State aid.

[2] ECJ, 20 September 1990, *Commission / Germany*, case C-5/89, ECR I-3437.

[3] OJ C 85, 9.4.2009, p. 1.

5. Before so doing, the APDC would like to formulate a few preliminary comments on the Draft Notice as it stands.

6. Firstly, at this stage, the Draft Notice provides a useful compilation of the relevant case law on the issue of characterisation of measures as State aid. However, the Commission does not always provide enough convincing precedents to support its positions. Several excerpts of the Draft Notice are totally devoid of reference to applicable case-law, rely upon an interpretation of the case-law that seems to go beyond the wording of the relevant judgments or is based on judgements from the General Court that are currently subject to an appeal. In this regard, paragraph 4 of the Draft Notice, which points out that "*the primary reference for interpreting the notion of aid is always the case-law of the Union Courts*", is crucially important for the APDC and should be maintained in the final version of the Notice.

7. Secondly, the Draft Notice could be more useful if the Commission systematically gave examples (either fictitious or - even better - based on real-life cases) of how it applies the legal notions it describes. The Commission has done so for example in the Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements[4] and this has in practice proved essential to their success. Examples should include cases where State aid is present and when it is not.

8. Thirdly, as far as the global equilibrium of the Draft Notice is concerned, it currently seems to delve into details for some of its aspects (*e.g.*, selectivity) whereas it barely touches upon other aspects crucial to the notion of State aid (*e.g.*, distortion of competition and impact on intra-EU trade). Since the added-value of the Draft Notice would be to explain the Commission's practical approach to all aspects of the notion of State aid, the same degree of details throughout the Draft Notice would ensure its success.

9. Fourthly, several elements of substance that would be key to a truly useful and fully operational notice appear to be altogether missing from the Draft Notice:

   - With the exception of a few indications in specific sections, the Draft Notice does not contain a clear description of the rules of evidence, including the rules relating to the burden of proof[5] and to the standard of proof. The Commission could in particular describe issues such as what types of evidence would be admissible, whether the Commission would give more weight to certain types of

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4 OJ C 11, 14.1.2011, p. 1

5 Such issues may arise in particular when applying the market economy operator test to privatisation of undertakings at a negative price: should the State or the Commission bear the burden of establishing the liquidation costs of the concerned undertaking.

evidence etc[6]. Clarifying such rules (in the light of the Commission's decisional practice and the Court's case law) would be essential to allow EU public authorities and economic operators to make a realistic assessment of the risk that a measure may be considered as State aid.

➢ The Draft Notice does not envisage any thresholds of materiality for the application of State aid control. In particular, the APDC regrets that the Notice does not go further by defining stricter tests and criteria, safe harbours and thresholds that would complement the Commission's *de minimis* regulation[7] and exclude with as much legal certainty as possible certain measures from State aid control. The European Union is the only judicial system where such a control exists and the Commission needs to ensure that it is not excessively overstretched and that its existing rules and procedures do not for instance compel the Commission or local authorities to dedicate resources to the examination of local measures of no material importance. This goes against the very objectives of the State Aid Modernisation, *i.e.* foster growth in a strengthened, dynamic and competitive internal market and focus enforcement on cases with the biggest impact on the internal market. In that regard, it could in particular be envisaged to create two sets of evidentiary rules, to ensure that smaller cases can be expedited efficiently and more important cases assessed thoroughly in all their complexity.

➢ The Draft Notice does not address the question of aid quantification. Whereas existing texts precisely define how to calculate the aid amount for some instruments[8], there is at present no global guidance on this issue. In that regard, the Draft Notice should include a general statement confirming that the amount of aid <u>cannot be greater than the advantage awarded to the undertaking</u>. For instance, taking into consideration the nominal amount of a measure would in many cases be inconsistent with Article 107, paragraph 1 TFEU, which uses the key concept of *"advantage"* to define the notion of State aid. Only an accurate valuation of such advantage should guide the quantification of State aid.

➢ The Commission, in its Draft Notice, does not provide any procedural guidance on how it can be approached in cases where a novel and complex question

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[6] In that regard, the Commission's powers of investigation have been further developed by Council 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, 31.07.2013, p. 15. Guidance on how the Commission will make use of such powers of investigation when determining whether a given measure contains elements of State aid would be a welcome enhancement of the Draft Notice.

[7] Commission 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, 24.12.2013, p. 1.

[8] For instance, see the Commission Notice on the application of Articles 87 and 88 of the EC Treaty to State aid in the form of guarantees, OJ C 155 of 20.06.2008, p. 10.

relating to the notion of State aid appear. In many cases, issues surrounding the characterisation of a measure as State aid appear unclear, and the Draft Notice precisely seeks to address this issue. Since it cannot possibly cover all situations likely to arise in the course of its application, the creation of an informal procedure to obtain the Commission's view in certain situations, short of a formal notification, appears as an imperative, in particular should such avenue be available to Member States and to potential beneficiaries themselves. Such elements would be extremely useful since a potential beneficiary and a State may have diverging views on the characterisation of a measure.

10. As a final note, the APDC fully shares and approves the objectives that the Commission assigns to the Draft Notice: "*contributing to an easier, more transparent and more consistent application of [the notion of State aid] across Europe*". This objective is indeed key to ensuring legal certainty, thus allowing economic operators (and their counsel) to plan accordingly. At this stage, one could wonder whether the Draft Notice may in practice reach these objectives. The suggestions below seek to ensure that the text finally adopted is closer to such objectives.

2 NOTION OF UNDERTAKING AND ECONOMIC ACTIVITY

11. The Section of the Draft Notice on the notion of undertaking and economic activity is largely inspired by the SGEI Communication.[9] The Commission could however enhance this section by providing clearer and more precise guidance, without affecting the consistency in the application of EU State aid rules.

2.1 The Notion of Economic Unit

12. Paragraph 11 of the Draft Notice states that "*two separate legal entities may be considered to form one economic unit for the purposes of the application of State aid rules. That economic unit is then considered to be the relevant undertaking. In this respect, the Court of Justice considers the existence of a controlling share and other functional, economic and organic links*."

13. A further clarification regarding the situations where separate legal entities must be considered to form one economic unit would be useful. While the reference to the Court's case law already provides for some guidance, the Commission should define certain criteria for the application of the notion of *"one economic unit"*. It would in particular be useful to consider the situation where an aid granted to a company may also benefit to its subsidiaries (and vice versa).

14. The Commission already looked into this issue in previous cases[10] which could be set out in the Draft Notice. The Commission seems to use a range of criteria to assess whether various companies belong to one economic unit. It has for instance applied the following criteria, however quite inconsistently:

- The representation of one company in the board of director or executive committee of the other;
- The business relations between the two companies (*e.g.* the existence of exclusivity agreements or overlaps in their relation with customers and/or suppliers);

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9 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 (th "SGEI Communication"), OJ [2012], C8/4.

10 See case C-480/09, judgment of December 16, 2010 *AceaElectrabel Produzione SpA c. Commission*, ECR I-13355 point 54 ; Case C51/2005, Commission Decision of July 16, 2008, *IFP*, OJ [2009] L53/13, point 128 ; Case C41/2001, Commission Decision of December 23, 2002, *Klausner Nordic Timber, Mecklembourg* , OJ [2003] L 337/1 points 69 and 89; Case C27/2000, Commission Decision of October 17, 2001, *Deckel Maho Seebach*, OJ [2002] L 126/14, point 6; Case C 8/2005, Commission Decision of June 7, 2006, *Nordbrandenburger UmesterungsWerke*, OJ [2006] L353/60, point 57.

- The centralization of the IT structure, management control, Human resources or marketing and the common use of transports or buildings;
- The fact that the companies' activities are on the same market;
- The customers' and competitors' perception;
- The fact that the gains and losses of one company are directly transferred to the other.

15. The Draft Notice should provide a list of such criteria.

16. The Draft Notice should also make clear that two undertakings cannot form a single economic unit when they enjoy a legal, commercial, economic and financial autonomy from one another.

2.2 Ancillary activities

17. The Commission should, in the Draft Notice, provide consistent treatment to economic activities that are ancillary to non-economic activities.

18. In this respect, the Draft Notice's provisions regarding the exercise of public powers, health care and infrastructures[11] are based on the same idea that economic activities that are purely ancillary to non-economic ones should also fall outside the scope of State aid rules. However, each of these provisions contain slightly different wording in this regard. The Commission's wording should be harmonized and expanded to any economic activity that is purely ancillary to non-economic ones. This solution would be in line with the case law. For example, the Court already applied *FENIN* to the activities of Eurocontrol and concluded that *"when determining whether or not a given activity is economic, to dissociate the activity of purchasing goods from the subsequent use to which they are put and that the nature of the purchasing activity must therefore be determined according to whether or not the subsequent use of the purchased goods amounts to an economic activity"*[12].

19. The Draft Notice should therefore include a general statement to that end in Section 2.1 on General Principles.

2.3 Development Banks

20. Recent years have shown the need for clearer rules relating to the banking sector. In particular, a clarification would be useful as to the rules applicable to development

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[11] Points 19, 26 and 40 of the Draft Notice.

[12] Case C-113/07 P, judgment of march 26, 2009, *SELEX v. Eurocontrol*, ECR I2207, paragraph 102

banks, or special credit institutions, *i.e.* institutions established to pursue certain public policy objectives. The activities of special credit institutions typically aim at supporting the structural, economic and social policies and the public tasks of public authorities, in accordance with their public mission.

21. The Commission used these notions in several recent decisions[13] and found that such institutions, when fulfilling public policy objectives, "can be considered as a mere conduit through which an advantage is passed on from the State to the final beneficiaries (…), mainly in the form of lower interest rates than would be available in the market." The Commission therefore usually concludes that State measures benefiting to such institutions (e.g. a recapitalization or a guaranty) do not constitute State aids. The underlying reasoning seems to be that these institutions do not offer their services on the market, because they merely supplement the commercial banking sector, by providing loans to beneficiaries that would face difficulties in obtaining funding from the later. This should be clearly stated in the Draft Notice.

22. The Draft Notice should also provide clear rule relating to the separation of the development activities of these institutions and economic activities that they may also conduct. This would limit the risk that State measures adopted in favour of the development activities of an institution also benefit its commercial activities if it has any.

2.4 Social Security

23. Paragraphs 20 to 23 set out rules applicable to social security activities, without providing a formal definition of what the Commission means by "social security." This notion typically covers health insurance and pension. Other types of insurance could however be included, such as natural disaster insurance. A definition of the notion of "social security" would therefore be useful.

2.5 Infrastructures

24. The Commission seems to confirm that State aid rules would only apply to the financing of infrastructures when the construction and operation of the infrastructure constitute a general measure of public policy and not an economic activity. The Commission however does not set out the criteria used to distinguish measures of public policy from economic activities. For example, the Guidelines do not really clarify whether the operation of a video surveillance system which can be used both for public or private surveillance of a site is an economic activity. The references to

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13 See Case NN 60/2009 – Latvia – Recapitalization of "The Mortgage and Land Bank of Latvia", Commission Decision of November 19, 2009 and Case N179/04 – Finland – Finnish municipal guarantees; Commission Decision of June 16, 2004.

Aéroport de Paris and Leipzig/Halle constitute relevant examples of the reasoning the Commission should adopt; they however do not set useful criteria that could be applied in other cases.

25. The Draft Notice does not address either the situation where the construction and the operation of the infrastructure are conducted by different operators. It only seems to consider the situation where the construction and the operation of the infrastructure is either entirely in the hand of a private operator, or entirely nationalized. The State aid rules need to remain neutral as regards the law governing concessions and infrastructure management and Member States should be free to choose how to manage their infrastructures. They should in particular be able to maintain the ownership of their infrastructure while delegating its operation to the private sector. The Draft Notice should explicitly address this situation.

3 STATE ORIGIN

26. The Draft Notice provides guidance as to whether the advantage granted can be considered as being of a State origin. The Commission begins its explanation of State origin by recalling the cumulative conditions for State aid to exist, namely imputability and then State resources.

27. However, developments regarding the State resources should come before the developments on imputability. As proposed by Judge Bo Vesterdorf[14], the test for the State resource criterias should involve four logical steps: (*i*) the source of the funds, (*ii*) State control of thoses funds, (*iii*) imputability and (*iv*) application of other exemptions (e.g. SGEI). This rational is confirmed by the reasoning of the Court itself which tends to assess the State resources' condition before the notion of imputability[15].

3.1 Imputability

28. A few points would need to be deepened.

29. First, in contrast with the notions of undertaking and of economic activity which are detailed and clearly explained[16], the notion of State is absent from the Draft Notice. It would be useful to introduce a short development on the concept of State before explaining how to assess the situations in which aid is granted by public undertakings. In particular, it should be reminded that the notion of State has been given a large

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14 Bo Vesterdorf, *A further comment on the new state aid concept as this concept continues to be reshaped*, EStAL, 3-2005, p. 393.

15 See in particular the *Stardust* case where the Court discussed the State resources condition from para 32 to 43 before examining the concept of imputability.

16 See paras 7 to 40 of the Draft Commission Notice.

interpretation and encompasses (*i*) all local, regional, central and governmental authorities[17], (*ii*) all other legally dependent or independent public institutions ("public authorities")[18] and (*iii*) any undertakings upon which the public authority can exercise a controlling influence ("public undertakings").

30. Also, the last sentence of paragraph 48 stating that "*measures that are adopted jointly by several Member States are imputable to all the Member States concerned pursuant to article 107(1) TFEU*" should be pointed out. As this sentence does not refer to situations in which Member States have a duty under Union law but rather to the situation where several Member States decide to grant an advantage, this concept may be more relevant in part 3.1 referring to imputability in general.

31. Continuing on the notion of State, paragraph 44 of the Draft Commission Notice recalls the reasoning used by the Court to reach its conclusion in the *Stardust* case. However, the Commission does not explicitly indicate that it bears the burden of proving the imputability. Quite the contrary, the Commission uses language that could be used to introduce a presumption that a decision of a State-owned company is in fact always attributable to the State. Such presumption appears to be unsupported by existing case law and would unduly shift the burden of proof to the State or to the beneficiary to demonstrate that the decision does not in fact constitute State aid.

32. Finally, the Draft Notice states that "*it is necessary to determine whether the public authorities can be regarded as having been involved, <u>in one way or another,</u> in adopting the measure*" (paragraph 43) (emphasis added). Such statement creates uncertainty regarding the level of involvement and the type of conduct required on the part of public authority for the Commission to find the measure imputable to the State[19]. Indeed, are positive and negative actions to be regarded as equivalent involvement? For example, is the mere knowledge by the public entity of the public undertaking's decision and subsequent inaction imputable to the State?

3.1.1 Indicators for imputability

33. Considering the indicators of imputability listed by the Commission (§46), few improvements would be welcomed.

34. Firstly, even though the Commission specifies that the list is not exhaustive and refers to the Opinion of Advocate General Jacobs, some non negligible indicators of

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[17] ECJ, *Germany v Commission*, case C-248/84 of 14 October 1987, para 17.

[18] ECJ, *Steinike v Commission*, case C-78/76 of 22 March 1977, para 21.

[19] See for example Case C-345/02 of 15 July 2004, *Pearle BV, Hans Prijs Optiek Franchise BV and Rinck Opticiëns BV v Hoofdbedrijfschap Ambachten* where the Court found an absence of imputability because the State only entrusted binding legal powers to the trade association but was not involved in the advantage granted.

imputability are missing. Indeed, in its Opinion, Advocate General Jacobs also referred to the following indicators, in particular: (i) a general practice of using the undertaking in question for ends other than commercial ones or of influencing its decisions, evidence that the measure in question was taken at the instigation of Member States and (ii) circumstantial evidence such as press release[20]. The reference to such factors would not be worthless considering that in the *ABX Logistics* case[21] the Commission inferred imputability of the measures to the Belgian State from circumstantial evidence, namely a press release.

35. Secondly, it is possible to distinguish between direct and indirect indicators of imputability, such distinction being absent from the Draft Notice. For example, direct evidence of imputability would be authorisation by the State and more generally any indicator directly referring to the alleged State aid measure and establishing the State involvement in the adoption of the measure[22]. Indirect evidence would be evidence not linked to the State involvement in the adoption of the alleged State measure but referring to the more general involvement of the State in the operation of the intermediary body. These could be indicators such as organic links (*e.g.* control of shares, belonging to the public administration, appointment of board members) and rules regarding the control on the activity of the undertaking (*e.g.* like prior approval of the public authorities)[23].

36. It is also unclear whether indirect indicators could be sufficient to establish State imputability. Indeed, the question could be raised as to whether indirect indicators are sufficient in themselves to prove imputability or if they only support direct indicators.

37. The purpose of the Draft Notice being to provide guidance for States and undertakings, the Commission should provide examples about how these indicators are to be applied in both circumstances where the imputability is found and is not found.

38. Finally, a particular situation is absent from the section 3.1.1 of the Draft Notice, namely the benefit granted by the intermediary of a private undertaking in which the State owns 50% of the capital.

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[20] Opinion of Advocate General Jacobs, Case C-482/99 of 13 December 2001, *France v Commission (Stardust)*, paras 67 and 68.

[21] Commission Decision of 21.01.2003 in case N 769/2002, *Rescue Aid for ABX Logistics*; Commission Decision of 07.12.2005 in case C 53/03, *restructuring aid for ABX Logistics*.

[22] See for example Case T-613/97 of 7 June 2006, *Union Française de l'express (UFEX) v Commission*, where the Tribunal ruled that the free transfer of Postadex service from La Poste (parent company) to SFMI (subsidiary of La Poste) was imputable to the French State as the transfer followed an order from the French Ministry of Posts and telecommunications.

[23] See for example Commission Decision C 53/2002 of 17 September, *CR53/02 - Space Park Bremen*.

3.1.2 Imputability and obligations under Union law

39. Considering imputability and obligations under union law (paragraph 47), the Commission does not address the issue of structural funds for the joint financing of project by the EC and Member States, a mechanism provided by regulation 1260/1999.

3.2 State resources

3.2.1 General principles

40. The definition provided at paragraph 50 is too general and does not provide any actual guidance on the origin of State resources for the purpose of defining the notion of State aid. It should therefore be made clear that this is an illustration of what State resources can be and not a definition of what State resources are.

41. The Commission states as a general principle that "*resources of public undertakings also constitute State resources within the meaning of Article 107(1) TFEU because the State is capable of directing the use of these resources*" (paragraph 51). However, the notion of "public undertaking" is insufficiently precise and does not give the necessary guidance to Member States and concerned undertakings.

42. This is in particular the case where the conditions of the existence of the presumption of a "dominant influence" are not met (because the State does not hold a majority of the subscribed capital or voting rights of the said company).

43. It would be useful to obtain guidance as to what criteria the Commission intends to use when the State holds a 50% share or less in a company. In line with the criteria of the State's ability to direct the use of the resources (cf. paragraph 51), the Commission should therefore confirm that absent a positive control – in the merger control sense – over the concerned undertaking, it considers that no State resources can be involved, for lack of "dominant influence" and therefore of "public undertaking". Also, in the case where dominant influence can be presumed because the criteria set out by the Directive (2006/111/EC) are met, it would be useful for the Commission to provide guidance on (or at least some examples of) the type of circumstances that can lead to rebutting the said presumption.

44. The Commission also underlines that the "*transfer of State resources may take many forms*" and illustrates this by declaring that "*the creation of a sufficiently concrete risk of imposing an additional burden on the State in the future [...] is sufficient for the purpose of Article 107(1)*" (paragraph 53). This conclusion is overreaching and does not accurately reflect the case law that the Commission quotes to back it up. In particular, paragraph 41 of *Ecotrade* (C-200/97) which the Commission quotes only constitutes one step of the reasoning of the Court, as is illustrated by the conjunction "*par ailleurs*" at the beginning of paragraph 42. What is more, paragraph 41 does not contain any conclusion in terms of State resources (unlike the Commission suggests)

and the ruling ultimately adopted by the Court does not either back the sweeping statement of the Commission.

45. As to *Bouygues SA, Bouygues Télécom SA / Commission* (joined cases C-399/10 P and C-401/10 P), it should be stressed that, the paragraphs quoted by the Commission refer to the fact that the State was committed and legally bound to engage State resources. It is therefore a stretch to conclude, as the Commission does, that a mere "*sufficiently concrete risk*" of use of State resources is enough; *Bouygues SA, Bouygues Télécom SA / Commission* only allows to conclude that a legally binding act by the State is enough to characterise State resources. Finally, to be thorough, according to paragraph 106 of *Bouygues SA, Bouygues Télécom SA / Commission*, "*State intervention capable of both placing the undertakings which it applies to in a more favourable position than others and creating a sufficiently concrete risk of imposing an additional burden on the State in the future, may place a burden on the resources of the State"*.

46. It is therefore very clear that, contrary to the statement of the Commission, a "*sufficiently concrete risk*" is not in itself sufficient to conclude that State resources are necessarily involved.

47. Paragraphs 54 and 55 provide examples of a State foregoing normal return on goods or services it provides and use it as an illustration of use of State resources. In these two paragraphs, the Commission states that accepting a price below market rates implies the "*granting of an advantage*". This should be deleted. First it refers to a different condition of the existence of State aid that is not the object of section 3. Second, it constitutes an erroneous application of the market economy operator test (because it is oversimplified) and is misleading. In addition, the Commission's conclusions in paragraphs 54 and 55 differ; the first example "*implies a waiver of State resources*" whereas the second "*can constitute*" foregoing State resources. In order to be totally accurate, the Commission should indicate that both examples "may constitute" foregoing State resources.

3.2.2 Controlling influence over the resources

48. Point 57 provides that *"a transfer of State resources is present if, in a given case, the public authorities do not charge the normal amount under their general system for access to the public domain or natural resources or for granting certain special or exclusive rights."* The notion of "*normal amount*" is vague and does not provide any legal certainty. The Commission does not refers to any case-law that would help understanding this concept. The Commission should therefore define what "*normal amount*" means for this purpose.

49. According to the Commission, "*the origin of the resources is not relevant provided that, before being directly or indirectly transferred to the beneficiaries, they enter under public control and are therefore available to the national authorities*" (paragraph 59). However, according to the case law, the Commission is under a duty to show that

resources are under constant public control. This is clearly stated in paragraph 50 of Ladbroke Racing quoted by the Commission itself: "*the fact that they constantly remain under public control, and therefore available to the competent national authorities, is sufficient for them to be categorised as State aid*". This was restated later in the *Stardust* case (paragraph 37). This was confirmed recently in *Vent de colère !* (C-262/12, paragraph 21) : « *Therefore, even if the sums corresponding to the measure in question are not permanently held by the Treasury, the fact that they* ***constantly*** *remain under public control, and therefore available to the competent national authorities, is sufficient for them to be categorised as State resources* ». This factor should be reintroduced in the Guidance paper of the Commission[24].

50. At paragraph 60, the Commission uses the terms "parafiscal charges". This concept should be defined or the Commission should at least provide its interpretation of this concept and its role in the qualification of State resources. For example, in the recent *Vent de colère !* case (C-262/12), it seems that the financing of the system through a "tax-like" or parafiscal mechanism played a role in the qualification of State resources, but this role was not explained by the Court. Guidance on this aspect would be welcome.

51. Still at paragraph 60, the Commission introduces a system of rule and exception by indicating that "*State resources can only be ruled out in very specific circumstances*". The Commission does not back this statement with any case law. This section of the Draft Notice is dedicated to the "*controlling influence over the resources*" and aims at explaining which cases imply a constant control over the resources (and thus State resources) and which do not. However, never in the case law is it said that existence of control is the rule and absence of control is an exception to the rule; in particular, the *Pearle* (C-345/02) and *Doux Elevage* (C-677/11) cases which the Commission quotes are just two examples of cases in which control was deemed not to exist, but which do not state that absence of control is exceptional or only exists in "*very specific circumstances*". This statement of the Commission essentially introduces a novel presumption mechanism the effect of which would be to shift the burden of proof from the Commission to the Member States. This statement should be deleted.

52. Also, the presentation of the *Pearle* and *Doux Elevage* judgments may be misleading. It is not so much the fact that "*resources are earmarked for a specific purpose in the interest of the members*" that is relevant; but rather that it is the private organisation or private beneficiaries that determine the said objective (and not the State). It would also be helpful if the Commission elaborated on the criteria developed in *Pearle* (paragraph 37) and *Doux Elevage* (paragraph 38) regarding the absence of controlling influence over the resources.

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[24] Note that paragraph 66 also states that "the sums in question remain under public control" and the word "constant" should be added.

53. At paragraph 61, the Commission states that "*A transfer of State resources is also present if the resources are at the joint disposal of several Member States who decide jointly on the use of those resources*". The *Dexia* case (Commission Decision 2010/606/EU) used in reference does not support this notion. In *Dexia*, various resources from various Member States may have been mobilised but the Commission did not consider the issue of joint control over similar resources.

3.2.3 *State involvement in redistribution between private entities*

54. At paragraph 65, the Commission states that "*State resources are present where the charges paid by private persons transit through a public or private entity designated to channel them to the beneficiaries*". This hypothesis refers back to the previous section dedicated to the transit of funds through intermediaries and the question of determining whether, despite not being held by the Treasury, they constantly remain under public control. What is more, according to the criteria developed by the Commission itself in section 3.2.2., this statement is incomplete: in order to conclude to the existence of State resources, constant public control must be shown. Indeed, according to this statement, the *Pearle* case should have concluded to the existence of State resources; but it didn't, and correctly so.

55. This confusion illustrates the problem with the dichotomy the Draft Notice tries to make between, on the one hand, measures transiting through intermediaries and, on the other hand, redistribution between private parties. Many measures, as well as ECJ cases, actually fall in both these categories. This is the case, for example, of the proceeds of a parafiscal charge that are levied on private entities, channelled through an intermediary (whether public or private) and granted to other private entities. Should the test be that of the existence of constant public control or that of redistribution between private entities? The case law is particularly unclear on this aspect and some guidance from the Commission on this issue would be welcome.

4 ADVANTAGE

56. The notion of advantage is crucially important to the notion of State aid. As Article 345 of the Treaty makes clear: "*[t]he Treaties shall in no way prejudice the rules in Member States governing the system of property ownership*". According to this principle, the public and private sectors are to be treated equally[25], a principle that holds true even where the undertaking recipient of the measure at stake is facing difficulties[26]. This means that the State and its various components remain free to intervene on the

[25] As the European Court have put it in many cases. See, for instance, ECJ, 8 May 2003, *Italian Republic and SIM 2 Multimedia SpA v. Commission*, joined cases C-328/99 and C-399/00, ECR II-4035, para 37.

[26] CFI, 6 March 2003, Westdeutsche Landesbank Girozentrale v. Commission, joined cases T-228/99 and T-233/99, para 208-2014.

market so long as they act as a private investor would. As the Commission rightly points out at paragraph 78 of the Draft Notice, in such a case, no advantage is conferred to the undertakings. It also means that the existence of aid cannot be presumed when a State intervenes, even by resorting to instruments of State power[27].

57. The comments below seek to ensure that the Draft Notice reflects these fundamental principles, and that the Draft Notice makes way for greater legal certainty.

4.1 The notion of advantage in general

⇨ *The Draft Notice does not adequately define the standard to determine whether a State intervention confers an advantage*

58. Assessing the existence of an advantage by resorting to a counterfactual test, such as described in paragraph 68 is a welcomed development. However, already at paragraphs 67 and 68, the Draft Notice fails to take the basic principles described above into account due to what appears to be mere drafting issues. It states "*An advantage [...] is any economic benefit which an undertaking would not have obtained under normal market conditions, i.e. in the absence of State intervention*". The Commission appears to consider that "*normal market conditions*" are not present when a State intervenes. A more accurate drafting would be "*An advantage [...] is any economic benefit which an undertaking would not have obtained in the absence of State intervention <u>at conditions differing from normal market conditions</u>*".

59. Similarly, the Commission affirmation that "*whenever the financial situation of an undertaking is improved as a result of State intervention, an advantage is present*" falls short of the principle of equal treatment. Obtaining a loan, a guarantee, a capital from an entirely private bank improves the financial situation of an undertaking. That is, clearly, also the case when the States or any other public entity intervenes at the same conditions as this entirely private bank. Thus, an advantage may only be present "*whenever the financial situation of an undertaking is improved as result of State intervention at conditions <u>differing from normal market conditions</u>*".

⇨ *The Draft Notice fails to determine an adequate test to assess whether a measure relieves an undertaking from a charge normally included in its budget*

60. At paragraph 69, the Commission considers that an advantage may be present when economic operators are relieved of the inherent costs of their economic activity "*even if there is no legal obligation to assume those costs*". This appears inconsistent with the case-law (except for a General Court judgment currently under appeal[28]), with the

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[27] ECJ, EDF, para 92.

[28] General Court, 11 September 2012, T-565/08, *Corsica Ferries*, not yet published.

Commission's own decisional practice[29] and with the notion that if there is no obligation to assume the relevant costs, the concerned undertaking could as well, in the counterfactual situation, not have had to assume such costs. No advantage would accordingly flow from the measure at stake. Having regard to the objectives that the Commission pursues with the Draft Notice ("*contributing to an easier, more transparent and more consistent application of [the notion of State aid] across Europe*"), using the legal obligations of an undertaking provides a clear and easy way to determine a benchmark. By contrast, determining the "*inherent costs of [an undertaking's] economic activity*" sets a benchmark that lacks transparency and foreseeability. It also does not cater for a consistent application of the notion of State aid but leaves a wide margin of discretion to the Commission.

61. Also, the Commission should at least maintain a coherent position between the general test seeking to identify whether there is an economic advantage and the computation of the liquidation costs of a public undertaking when the State seeks to privatise that undertaking. In the latter case, the Commission may, at times, have been tempted to conclude that a private investor, when facing the liquidation of a subsidiary, would only take into account the legal obligations falling upon it as shareholder. Applied in the context of the general test for the presence of an advantage, this means that a private investor would not normally consider costs going beyond its legal obligations. Therefore, any State intervention going beyond such legal obligations would not relieve the undertaking of the charges normally included in its budget. Conversely, should the Commission consider that "*alleviating*" charges of an undertaking may confer an advantage even if there is no obligation to assume such costs, it should then accept that private investors indeed incur costs going beyond their legal obligations, in particular when liquidating a subsidiary.

62. Finally, at paragraph 71, the Commission considers that "*the existence of an advantage is in principle not excluded by the fact that the benefit [of a measure] does not go beyond compensation of a cost stemming from the imposition of a regulatory obligation*". Existing case-law does not support this conclusion, since the CFI has already taken into account the existence of a "*structural disadvantage*" for a given undertaking to conclude that a measure did not constitute a State aid[30]. In any event, the relationship of such an assertion with the application of the Altmark case-law should be explained. In fact, the situation in Altmark concerned precisely the imposition of a "*regulatory obligation*" albeit of a specific nature. Accordingly:

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[29] Decision of 17 July 2002, N 797/2001 – Société française de production : the Commission considered that supplementary social measures assumed by a Member State in favour of employees that go beyond the legal obligations of the undertaking, without those measures relieving the employer from its usual responsibilities, falls within the scope of the social policy of the Member States and do not constitute State aid.

[30] CFI, 16 March 2004, *Danske Busvognmaend v Commission*, case T-157/01, ECR II-917, para 57.

- either the regulatory obligation mentioned at paragraph 71 of the Draft Notice has been imposed in the general economic interest and paragraph 71 appears superfluous ;
- or paragraph 71 does not concern regulatory obligation in the general economic interest (taking into account that Member States have a wide margin of discretion to determine their best general economic interest) and the Commission should make clear what type of situation paragraph 71 seeks to address. References to fact-based examples could be useful[31].

4.1.2. Indirect advantage

63. At this stage, the developments at paragraph 74 and 75 insufficiently define the notion of indirect advantage. Notably, the difference between an indirect advantage and mere secondary effects does not appear sufficiently precise.

64. As is apparent from recent case-law, the Commission should commit itself to state reasons more effectively in cases of indirect advantage in order not only to determine the existence of such an indirect advantage but also to quantify it the amount of aid that it entrails.

65. To support its explanations of the notion of indirect advantage, the Commission quotes the *Mediaset* case where it had concluded that subsidies for the purchase of digital TV decoders granted an indirect advantage to broadcasters. Litigation at national level regarding recovery of the State aid highlighted how difficult it is to accurately quantify the advantage received by the beneficiaries: studies showed an advantage that it was not established that broadcasters had effectively gained from the measure and in its judgment dated 13 February 2014, the Court held that the amount of State aid could not be excluded to be zero[32]. This judgement sends a signal to the Commission that it should quantify the advantage stemming from alleged State aids more precisely in its recovery orders, an idea that is fully transposable to decisions on the determination of the existence of State aids. For instance, in its decision adopted on 29 July 2013 concerning the restructuring aid to Group PSA and PSA Bank, the Commission precisely assessed the amount of indirect aid granted to Group PSA *via* a State

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[31] The precision, in footnote 106, that *"if a company receives a subsidy to carry out an investment in an assisted region, it cannot be argued that this does not mitigate costs normally included in the budget of the undertaking considering that, in the absence of the subsidy, the company would not have carried out the investment"* is in contradiction with point 68. This should be taken into account when conducting the counterfactual analysis, in particular when defining the amount of the advantage.

[32] CJEU, 13 February 2014, *Mediaset SpA v Ministero dello Sviluppo Economico*, C-69/13, not yet reported, para 37.

guarantee to PSA Bank[33]. The Commission should strive to apply such a standard in all cases.

4.2 The market economy operator (MEO) test

66. As mentioned above, the Draft Notice does not at present contain any rules regarding the burden of proof. Generally speaking, it falls upon the Commission to evidence that all criteria for the application of Article 107, paragraph 1 TFEU, are met[34]. However, concerning the applicability of the MEO test (*i.e.*, whether the State acted in its capacity as shareholder or as a public authority), the Court has detailed the respective role of the Member State concerned and of the Commission, for instance in the EDF case[35].

67. At paragraph 82, the Commission raises the issue but seems to suggest that the relevant developments of the EDF case relate to the question of whether the MEO test is satisfied and not merely of the applicability of that test. It also describes only the burden of proof falling upon the Member State are concerned (and not that falling upon the Commission, set out for instance at paragraph 86 of the Court's judgment). Accordingly, it would have been particularly useful for the Draft Notice to contain a precise set of rules on the respective roles and responsibilities of the Member States and of the Commission to apply the MEO principle. The Commission could also usefully underline in practice how it will assess the elements provided by the Member State, for instance, what types of documents will carry more evidentiary value.

4.2.1 General principles

⇨ *The globalised "MEO" test is a welcome development but should not be applied similarly to all situations*

68. The APDC welcomes the affirmation of point 78 that the market economy investor principle, the private creditor test or the private vendor test are variations of the same basic concept, defined in the Notice as the "*market economy operator*". In practice, the Commission should however take into account that these tests are sometimes different[36].

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[33] Decision of the Commission dated 29 July 2013 in case SA.35611.

[34] CJEU, 21 March 2013, *Commission v Buczek Automotive sp.,* C-405/11, *not yet reported*, para 22.

[35] CJEU, 5 June 2012, *Commission v EDF*, case C-124/10 P, *not yet reported*, para 82 and 86. The Court made clear that if a Member State relies on the MEO test during the administrative procedure, it must, where there is doubt, establish unequivocally and on the basis of objective and verifiable evidence that the measure implemented falls to be ascribed to the State acting as shareholder. On the other hand, it is for the Commission to carry out a global assessment, taking into account – in addition to the evidence provided by that Member State – all other relevant evidence enabling it to determine whether the Member State took the measure in question in its capacity as shareholder or as a public authority

[36] This also results from the Draft Notice itself as it contains a section specific to the application of the MEO to loans or guarantees.

For instance at point 82, the Commission requires that any evaluation of the rationality of the measure should be made before the transaction. The requirement of an *ex ante* business plan should only be applied to capital injections or new investments. In sale or purchase situations, the private operator will only make sure that a market price is paid.

⇨ *The Commission should make clear that MEOs take social considerations into account*

69. At paragraph 80, the Commission considers that "*the MEO test should be applied leaving aside all social, regional policy and sectoral considerations which relate to a Member State's role as a public authority*". The distinction between the role of the State as a shareholder and its situation as a public authority is indeed at the heart of the Court's case law. However, this should not be interpreted as excluding all social considerations from the application of the MEO principle. In many cases, entirely private undertakings will indeed consider the social impacts of their investments or other decisions such as closing a branch, liquidating a subsidiary etc. To put it as the General Court has: "*in a social market economy, a reasonable private investor would not disregard, first, its responsibility towards all the stakeholders in the company and, second, the development of the social, economic and environmental context in which it continues to develop. The challenges relating to social responsibility and the entrepreneurial context are, in actual fact, <u>capable of having a major impact on the specific decisions and strategic planning of a reasonable private investor</u>. The long-term economic rationale of a reasonable private entrepreneur's conduct cannot therefore be assessed without taking account of such concerns*"[37].

70. Accordingly, the Draft Notice should make it clear that, although the social considerations which relate to <u>the role of Member States as public authorities</u> can not be taken into consideration, the State may be acting as a shareholder, as any private investor would, taking into account both its responsibility towards all stakeholders in the company and the development of the social, economic and environmental context into which it develops. Any conclusion to the contrary would run against the principle of equal treatment.

⇨ *The description of the application of the BP Chemical case law grants the Commission too great a margin of discretion*

71. At paragraph 84, the Commission refers to the *BP Chemical* case-law to state that "*<u>In certain cases</u>, several consecutives measures of State intervention <u>must</u>, for the purposes of Article 107 TFEU, be regarded as a single measure. <u>That could be the case, in particular</u>, where several consecutive interventions are so closely linked to each*

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[37] General Court, 11 September 2012, *Corsica Ferries / Commission*, T-565/08, *not yet reported*, paragraph 82. This comment of the General Court concerned a situation of privatisation of an undertaking at a negative price, and therefore, the computation of the liquidation costs in the counterfactual situation. However, it is clear that this general comment is applicable to all areas of application of the MEO test.

other especially having regard to their chronology, their purpose and the circumstances of the undertaking at the time of those interventions, that they are inseparable from one another".

72. Arguably, these two sentences do not contribute to "*an easier, more transparent and more consistent*" application of the notion of State aid:

   ➢ By stating that "*in certain cases*" and "*that could be the case, in particular*", the Commission seems to broaden the scope of the *BP Chemical* case law. Whereas it is understandable that the Commission seeks to benefit from a certain degree of flexibility and could rely on a court judgment to support this statement[38], such a broad statement may make it difficult for undertakings or for the State to determine when a State aid may or may not exist. Characterising several State intervention as a single measure should be applied only when the criteria set out in the *BP Chemical* case law are present[39];

   ➢ In the specific circumstances of the *BP Chemical* case law, the Court did not consider that two State interventions "*must*" be regarded as inseparable. To the contrary, the Court expressly stated that "*the mere fact that a public undertaking has already made capital injections into a subsidiary which are classed as aid <u>does not automatically</u> mean that a further capital injection cannot be classed as an investment which satisfies the private market economy investor test*"[40]. It is clear that the Commission should replace "*must*" with "*may*";

73. The three criteria set out by the Commission in paragraph 84 of the Draft Notice to assess whether several State interventions may be regarded as a single measure do reflect accurately the *BP Chemical* case-law. However, the Commission then gives a list of practical examples that is so drafted: "*for instance, subsequent State interventions which take place in relation to the same undertaking in a relatively short period of time, are linked with each other, <u>or</u> were all planned or foreseeable at the time of the first intervention should <u>normally</u> be assessed together*" (emphasis added).

   ➢ The application of the *BP Chemical* case-law is precisely an area where the Draft Notice should provide more practical and factual guidance on how to apply those three factual criteria. The fact that the Commission gives examples is certainly

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38 CJEU, 19 March 2013, *Bouygues et Bouygues Télécom / Commission*, joined cases C-399/10 P and C-401/10 P, *not yet reported*, para 104, which is in itself subject to criticism, in particular since it relies on a previous case that did not concern State aid law but an issue relating to the common agricultural policy.

39 The question of whether several State intervention may be regarded as a single measure should be distinguished from the question of whether the various steps of a single overall and complex transaction (such as a contribution of assets followed by an increase in capital) could qualify as an asset deal or a share deal in cases relating to recovery of unlawful State aid.

40 BP Chemicals at para 170.

useful. It should however describe the examples more in details, explaining for instance, how it will assess the chronology of the measures, whether the fact that the various measures are of a similar nature (*e.g.* if all measures are capital increases as was the case in *BP Chemicals*) has consequences, what types of factual elements could show that the situation of an undertaking has changed etc.;

- More importantly, the three criteria laid down in *BP Chemicals* are cumulative. The use of "*or*" seems to indicate that in each of these situations, taken individually, several measures would "*normally*"[41] be considered as a single intervention. Such a wording seems grant the Commission considerably more flexibility than the case law does. In particular, the fact that the situation of the undertaking has changed between two measures could be a decisive element[42]. For instance, a measure, adopted at a time when an undertaking was facing difficulties, and a subsequent measure, adopted after a successful asset sale has consolidated its capital base beyond expectations, could be perfectly separable even if "*subsequent State interventions [...] take place in relation to the same undertaking in a relatively short period of time*".

- As regards the chronology of the measures, the relevant point of reference to be taken into consideration is not the moment when the measures were actually implemented, but rather the moment where the public authorities decided to have recourse to those measures[43]. This does not appear clearly from the wording of the Draft Notice.

⇨ *Circumstances where market conditions do not exclude the existence of an advantage should be truly exceptional*

74. At point 85, the Commission provides that *"there can be exceptional circumstances in which the purchase of goods or services by a public authority, even if carried out at market prices, may not be considered in line with market conditions."* This affirmation is too general and does not provide legal certainty. These "*exceptional circumstances*" should truly remain exceptional and the Commission should already define them in the Notice, and provide an exhaustive list of these circumstances: *e.g.* when (*i*) no other authority entered in the same kind of transactions and (*ii*) there is a manifest

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[41] As explained *supra*, the CFI made clear in the *BP Chemical* case law that subsequent State interventions would not automatically be regarded as a single measure, which seems difficult to reconcile with the Commission's position that it would "*normally*" be the case.

[42] Decision of 12 June 2012, *Osuuskunta Karjaportti*, OJ L 12, 16.01.2013, p. 1.

[43] Decision of 13 July 2009 on the restructuring aid for Combus A/S, OJ L 345 of 23 December 2009, p 28. In this case, the Commission even considered that for *BP Chemicals* to be applicable, the second measure must have already been adopted at the time the decision concerning the first measure was made. In the *BP Chemicals* case, two decisions were adopted simultaneously, during one and the same board of directors of the undertaking.

contradiction in the arguments put forward to justify that there was a need for the transaction. Finally, even if the existence of an advantage can be proven, the amount of the advantage should only be defined by using a counterfactual analysis.

4.2.2 Application of the MEO test

75. For this section, the Commission distinguishes situations where it is empirically possible to establish compliance with market conditions by relying on market specific-data from other situations. Situations where market-specific data exists is when the transaction is carried out *pari passu* with a private investor or when a tender procedure is carried out. In the absence of such elements, the Commission accepts to resort to benchmarking or to other methods to establish the existence of market conditions. This distinction appears well-founded: if there are market specific elements showing that a transaction was conducted at market conditions, such elements should be sufficient to be relied upon.

76. This however should not lead the Commission to consider that one set of elements prevails over another. At paragraph 87, the Commission considers that where an investment is carried out with another investor but does not meet the *pari passu* test, or a sale is made following a bid under conditions that do not establish a market price "*it would not normally be appropriate to use other assessment methodologies to reach a different conclusion*". However, different terms and conditions between public and private parties may simply reflect different level of risks and rewards. For instance, when the private investor is an industrial undertaking, a State may well intervene by taking part in a capital increase at the same time as a private investor but with a different rationale or under different conditions. Should the State nevertheless establish that its investment is profitable on the long-term[44], there is no reason to consider that the MEO test is not met. Accordingly, the Commission could usefully clarify that the existence of market-specific data does not rule out relying on other methods.

[44] In the absence of strictly comparable and concurrent public and private investments, a public investment does not constitute State aid provided that it is economically rational, *i.e.* that the investment will provide return which would be acceptable for a market economy operator. General Court, 6 March 2003, *Westdeutsche Landesbank Girozentrale and Land Nordrhein-Westfalen v Commission*, T-228/99 and T-233/99, ECR II-00435, paragraph 255: "*The conduct of a private investor in a market economy is guided by prospects of profitability (Case T-296/97 Alitalia v Commission [2000] ECR II-3871, paragraph 84). Thus, the use of an average return must be consistent with the notion that an informed private investor, that is, an investor who wishes to maximise his profits but without running excessive risks in comparison with other participants in the market, would, when calculating the appropriate return to be expected for his investment, in principle require a minimum return equivalent to the average return for the sector concerned*".

4.2.2.1 Cases where compliance with market conditions can be empirically established

⇨ *The conditions to recognise that two transactions are* pari passu *appear more stringent than those set by the Court*

77. First and foremost, the applicable case-law lays down two criteria to determine whether the MEO test is satisfied: (*i*) the investment of the public and private investors must be concomitant, *i.e.* carried out at the same time; and (*ii*) it must have been made in comparable circumstances[45]. The General Court has recently again applied this case law, by holding that the MEO will be respected when "*inter alia, [a public] contribution was made at the same time as a significant capital contribution on the part of a private investor effected in comparable circumstances*"[46]. Accordingly, when the Commission states at paragraph 88 that two transactions are *pari passu* when "*carried out under the same terms and conditions (and therefore with the same level of risk and rewards*", it imposes a criteria that goes beyond the current wording of the case law. Whereas it is certain that the transactions are *pari passu* if public and private investors have precisely the same level of risk and rewards, the existence of some differences may nevertheless prove economically insignificant and accordingly still satisfy the "*comparable circumstances*" criteria.

78. Further, the Commission seems to consider that "*the starting position of the public entities and the private operators [should be] comparable*". This condition seems particularly stringent as the Commission would take into account "*any other circumstance specific to the private or to the public operator which could distort the comparison*" (emphasis added). The issue relating to the existence of a previous exposure on the recipient of the measure will be assessed *infra*. However, it seems that beyond that specific case, such a broad statement would be unwarranted and in practice very difficult to assess. Firstly, the Commission does not refer to any case-law in that regard. Secondly, there may be a wide variety of factors of differentiation between public and private investors that would economically have little, if any, impact on the economic rationale of the State's investment. For instance, in the EDF case, the Court held that the fact that the State used fiscal resources (which are, by definition, not available to a market operator) did not preclude the application of the MEO test. Finally, this condition does create more certainty or transparency for the application of the notion of State aid. To the contrary, it grants a very wide discretion to the Commission to determine whether "*any other circumstances could distort the comparison*". In any

[45] General Court, 12 December 2000, *Alitalia*, T-296/97, ECR II-03871, paragraph 81: "*A capital contribution from public funds must therefore be regarded as satisfying the private investor test and not constituting State aid if, inter alia, it was made at the same time as a significant capital contribution on the part of a private investor made in comparable circumstances*".

[46] General Court, 11 September 2012, *Corsica Ferries / Commsision*, T-565/08, *not yet reported*, paragraph 115.

event, it should be particularly clear that the situation of the public and private investors should be comparable and not identical.

79. At footnote 138, the Commission states that the terms and conditions of a public and of a private intervention occur on the same terms but at different moments, "*following a change in the economic situation*". It should firstly be clear that the Commission refers to a change in the economic "*of the relevant undertaking*". Also, such a change should only be relevant when material to the application of the MEO test: not all changes should be used to disqualify the *pari passu* analysis but only significant changes that impact criteria relevant to the MEO test. In the same line, footnote 140 seems excessively restrictive when stating that "*if the transactions are different and are not carried out at the same time, the mere fact that the terms and conditions are different do not provide any decisive indication (positive or negative) as to whether the transactions carried out by the public body is in line with market conditions*". It should however be clear that when it is possible to show that the difference in terms and conditions reflects precisely a materially relevant change in the economic situation of the undertaking, the *pari passu* test could be satisfied, or, in the alternative and at the very least, the private intervention should be considered a sufficiently close benchmark to fulfil the MEO test[47].

80. Also, the Commission considers that "*Naturally, the decision taken by the private investor should not have been influenced by public authorities*" (emphasis added). The Commission thus presumes that in such cases, the private investor would not have made an investment in the absence of the State intervention. Such a statement is very wide (mere influence could be demonstrated in virtually every case). Again, this confers too great a margin of discretion to the Commission, in particular since there are no indications of how, in practice, the Commission will assess this condition. Accordingly, the Commission should consider removing that condition since, in any event, its objective seems fulfilled by paragraph 90 of the Draft Notice.

81. At paragraph 90, the Commission indeed states that "*the* 'pari passu' *condition may not be applicable where public involvement is a strict requirement for the participation of the private operators to participate in the transaction*". Such a statement may be justified in some cases (where the State intervenes precisely to make it possible for MEOs to take part in a transaction) but not in other cases (for instance, where the State is the majority shareholder of the concerned undertaking). Accordingly, paragraph 90 should only apply after a case by case analysis. The Commission should in any event emphasize that, in the opposite scenario, the commitment by a public investor to make

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[47] See our comment, *supra* at point 76 of the present reply.

its contribution to the transaction conditional upon the commitment of private investors is a strong evidence that the *pari passu* condition is satisfied[48].

⇨ *The sale or purchase of assets, goods or services through open, transparent, non-discriminatory and unconditional tenders*

82. Firstly, the Commission intends, *via* the Notice, to repeal the existing notice on the sales of lands and buildings, but some of the provisions of the previous notice's provisions are not taken over, which may be problematic.

83. At paragraph 91, the Commission considers that, to be able to presume that sale or purchase of assets, goods or services are in line with market conditions, public authorities must set up a tender procedure compliant with the principles laid down in the Public procurement Directives "*even in cases where those Public procurement Directives are not as such applicable*". The Commission makes clear that the Directives' principles are not merely those of an open, transparent and non-discrimination tender since it refers more specifically to the types of procedures laid out in those Directives (open or restricted tenders).

84. Apart from the fact that the Commission seeks, *via* a mere Notice, to extend the scope of legislative acts (Directives), referring to the Public procurement Directives in the context of the notion of State aid seems questionable. The benchmark that should apply to a State intervention is whether it acts as a private investor, not whether it acts as a public person by complying with Directives that are only applicable to public persons. Also, the Public procurement Directives do not pursue the same objectives as the law of State aid and it accordingly seems particularly unwarranted to refer to the former in the context of the latter. Finally, in every day economic activities, private undertakings carry out a vast number of calls for tenders that do no respect the criteria of the Public procurement Directives. All such means that are normally used by MEOs should be available for a State intervention and any solution to the contrary would breach the principle of equal treatment.

85. Referring to such directives is also unwarranted since until now, in order to conclude that a privatisation process involved no State aid to the purchaser, the Commission has consistently relied on the guiding principles set out at paragraphs 402 *et seq*. of the XXIIIrd Report on Competition Policy of 1993[49]. These principles are sufficiently precise to ascertain that transactions are made on market terms, in particular insofar as they impose that the sale process be non-discriminatory, open and transparent. The application of the Public procurement Directives and the recourse to an open procedure

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48 Commission Decision of 7 June 2005 in case C2/2005 – Alitalia, OJ L 69, 8.3.2006, p. 1, recital 199.

49 General Court, *Land Burgenland and Republic of Austria v Commission* (the "***Bank Burgenland judgment***"), T-268/08 and T-281/08, paragraphs 19 *et seq*.

or to a restricted procedure compliant with those Directives would impose a considerable and unnecessary burden on public authorities.

86. At paragraph 97, the Commission explains that for the purposes of applying the private vendor test, "*the only relevant criterion for selecting the buyer should be the highest price, also taking into account the requested contractual arrangements (e.g. the vendor's sales guarantee or other post sale commitments)*". This affirmation seems firstly to contain a contradiction between the "*only relevant criterion*" and the requirement to "*also [take] into account*" other considerations. Secondly, it reflects neither the state of the case law nor the practice of private operators.

87. The Commission cites the *Bank Burgenland* judgment to support its affirmation. The General Court confirmed the Commission decision and ruled that the market price was the only criterion to take into account in the very specific facts of that case, so that the Land Burgenland should, in that case, have sold Bank Burgenland to the highest bidder. The Commission omits to specify that in *Bank Burgenland*, it itself contemplated that a market economy operator may accept a lower bid in two situations:

- "*where it is obvious that the sale to the highest bidder is not realisable*"[50], which covers, for instance, situations where the undertaking submitting the highest bid is not economically sound or where it is proved that regulatory authorities would prohibit the sale to the highest bidder.

- "*Where the taking into account of factors other than the price is justified, subject to the proviso that only those factors can be considered which would have been taken into consideration by a market economy investor*"[51].

88. Precisely, it is more often than not the case that market operators take into account other factors. Market operators do indeed consider a variety of other factors, such as the solvability or general financial soundness of their counterpart, its identity, delays for the payment etc. Accordingly, paragraph 97 of the Draft Notice should, in our opinion, be entirely redrafted.

89. At paragraph 99, the Commission first considers that a tender must give rise to a sufficient level of competition to establish a market price. This is perfectly understandable. However, the Commission also states that "*where it is apparent that only one operator is realistically able to submit a credible bid, the tender cannot be deemed competitive and thus cannot be considered to adequately establish the market price for the transaction*". This affirmation should, from our perspective, be redrafted to provide more flexibility:

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[50] *Bank Burgenland* judgment, paragraph 22.

[51] *Bank Burgenland* judgment, paragraph 23.

- Firstly, the Commission should make it clear that the fact that a particular tender gave rise to only one firm offer does not in itself mean the tender was not competitive. A particular tender may have given rise to only one bid without having only one company realistically able to bid (other companies may have decided not to bid for reasons of their own).

- Secondly, a market price may, in some circumstances, exist when only one company was realistically able to bid, for instance, where demand for the assets or goods concerned is very limited. In such an illiquid market, prices may be quite low and this would merely reflect a market reality. Market operators may in such conditions nevertheless proceed with a tender and try to obtain the best price possible. Accordingly, paragraph 99 should at the very least be redrafted to ensure it makes room for exceptions.

- Thirdly, and in any event, it should be clear that the Commission should bear the burden of proving that only one company was realistically able to bid.

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

90. As a general comment, the Draft Notice should contain specific rules applying to sales or purchases by the State, which would provide that the production of a fairness opinion should suffice to demonstrate that the price is a market price, provided that it falls within the range defined by the fairness opinion[52].

91. As far as benchmarking goes, the Commission lists, at paragraph 102 of the Draft Notice, various factors that it would take into account. It indeed seems very useful that the Commission lists such factors. Clarity could be reinforced if the Commission explained which factors would have pre-eminence. Also, it could be explained that, based on these factors, a benchmark that is very close to the situation examined would be more convincing than a less comparable benchmark but that the Commission will in practice assess every case on its own merits, paying attention to all elements of facts. This is particularly important since, in practice, in many cases, there might not be a sufficiently close benchmark or a number of factual elements may be unknown about a given benchmark.

92. At paragraph 103, the Commission points out that benchmarking does not give a precise reference value but a set of reference, or a range of values. However, it also considers that it is normally appropriate to take into consideration the central tendency such as the average of the median value. No case law supports this notion. Such a

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[52] The section on benchmarking mainly relates on investments, but may not be applicable to sales and purchase.

requirement is not in line with the conduct of market operators[53] and may introduce considerable uncertainty on the existence of State aid in a number of transactions. It should at the very least be explained that a transaction carried out at the average or median value, as determined by the benchmarking exercise, could carry additional evidentiary value but that any value within the range of values could prove the existence of a market price. Any other solutions would not allow the Commission to adapt its position to the great variety of transactions that it assesses. Such a conclusion is also applicable to paragraph 107, relating to the benchmarking of the net present value ("**NPV**") or of the internal rate of return ("**IRR**").

93. As far as the "*other assessment methods*" section is concerned, the Commission states at paragraph 104 that such other assessment methods should apply "*if none of the above assessment criteria apply*". However, it should be clear that the use of indicators such as the NPV or IRR could usefully be referred to within the context of for instance, the benchmarking methodology: a similar IRR to a private and a public investment should indeed qualify the private investment as a relevant benchmark to satisfy the MEO test.

94. Also, the Commission's developments on the use of financial indicators such as the IRR or the NPV seems to lack practical indications on the implementation of such a methodology. In particular, the Commission should set out in more details the methodology that it will follow to determine whether the financial indicators provided by a Member State are reliable, and what type of evidence will carry greater evidentiary value.

4.2.2.2 Counterfactual analysis in the case of prior exposure to the undertaking concerned

95. Generally speaking, refusing to take into account prior exposure to the undertaking concerned when such prior exposure derives from previous measures involving State aid does not seem justified. As any market operator does indeed take into account his own prior exposure into account, the principle of equal treatment would require that a State may also consider the consequences of its prior exposure in an undertaking. Whereas it can be understood that previous State aid should not be used to allow further State intervention to avoid being characterised as State aid, such a concern is fully addressed by the application of the *BP Chemical* case law cited *supra*: if the State intervenes again to protect an initial investment, that second intervention may be characterised as State aid (provided naturally that that case law's conditions are met). Such a solution should also prevail in the situation where the Commission has ordered the recovery of previous State aid, as the Commission made clear in some decisions[54].

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[53] It may therefore breach the principle of equal treatment.

[54] See for instance, Commission decision of 8 July 1999, Gröditzer Stahlwerke GmbH and its subsidiary Walzwerk Burg GmbH.

In any event, the drafting of paragraph 109 is at present much too broad. If the State took a stake in the capital of an undertaking say 10 years ago, that previous exposure should be taken into account regardless of whether such investment did at the time constitute State aid. At the very least, a case by case assessment should be carried out.

96. Also, the counterfactual analysis in the case of prior exposure to the undertaking should not be so restrictive as to take into account only the costs incurred by the State. It should also take into account the risks to which the State is exposed as any other market economy operator. For instance, all investors are liable to incur liabilities as director in an "*action en comblement de passif*", regardless of their being public or private investors. Such a legal action is therefore not a responsibility specific to the public authorities and should accordingly be taken into consideration in the market economy investor test. This is precisely an area of the Draft Notice where the Commission should provide more practical guidance (in particular, give examples) on how to compute the counterfactual liquidation costs as the current case-law and decisional practice are particularly complex and contain contradictory statements.

97. In footnote 166 of the Draft Notice, the Commission refers to the case T-565/08 *Corsica Ferries France v. Commission.* However, it does not seem to exactly reflect the reasoning of the General Court. In particular, it appears that the necessity of paying complementary indemnities can be demonstrated by showing either that such payments are an established practice amongst private companies in similar circumstances or that the State's conduct was motivated "*by reasonable probability of obtaining an indirect material profit, even in the long term*"[55]. The Commission should make clear that this is an alternative, not cumulative, test.

4.2.2.3 Specific considerations to establish whether loans or guarantees are in line with market prices

98. According to the Commission, in the absence of sufficient information to establish a debt transaction's compliance with market conditions, benchmarking may be used to assess the conditions of the transaction. However, credit default swaps (CDS) spreads on a given company may not be a reliable information that reflects its financial soundness.

99. CDS are financial derivatives of a speculative nature. Holding and trading CDS on a company is not conditional upon actually holding a loan instrument of that company (*i.e.* being a creditor of that company). Thus, CDS are not necessarily used to protect the creditor against a credit default of the company, but rather to generate short-term profits. Furthermore, if proceedings opened by the Commission against nine banks and a clearing house for CDS leads to an infringement decision, the Commission itself will

[55] General Court, 11 September 2012, *Corsica Ferries / Commsision*, T-565/08, *not yet reported*, paragraph 101.

further demonstrate that CDS are not reliable financial instruments[56]. Therefore, CDS may not serve as a benchmark to establish a transaction's compliance with market conditions in all cases and their use as a benchmark should be cautious.

5 SELECTIVITY

100. When referring to the advantage a measure can give to certain undertakings or the production of certain goods, the Commission aims in fact at assessing under the selectivity criterion whether a distortion of competition resulting in a public measure increases the economic power of its beneficiary in comparison with other competitors which are therefore put in disadvantage.

5.1 General principles

101. In order to assess the selectivity criterion, Section 5 provides with a methodology for Member States or parties concerned which is rather detailed compared to other sections which are less complete – in particular the State resources section. The APDC calls therefore for a harmonization of the level of detail of each section in the Notice.

102. The APDC commends the efforts of the Commission to lay down a comprehensive three-step analysis. However, as for other sections, it would be useful to include more case law to illustrate the principles exposed.

103. For example, Section 5.2 is almost entirely illustrated with the *Gibraltar* case. As a result, it seems almost exclusively tax-focused whereas the case law encompasses other situations and the issue of selectivity may rise outside the tax field (i.e. export aid schemes, infrastructure financing, etc.). In addition, Section 5.2.3 focuses on mitigating measures; however, selectivity issues may also arise regarding other non-mitigating measures. Therefore, further examples on the general principles and material selectivity applied beyond the tax measures should be provided for a more practical understanding of the section.

5.2 Material selectivity

5.2.2 Selectivity stemming from discretionary administrative practices

104. Concerning Section 5.2.2, the Commission seems to assume that selectivity necessarily arise where authorities have discretionary power in applying a given measure. In certain cases however, it may be difficult to define criteria in full detail, and a certain degree of discretion may be necessary – this does not necessarily imply selectivity. This appears to lower the standard of evidence which the Commission needs to meet.

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[56] IP/11/509, 29 April 2011.

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

105. On Section 5.2.3, regarding the identification of the system of reference and the derogation, the current Draft Notice does not provide with sufficient practical guidelines in order to determine whether the derogatory measure results from the nature and the economy of the tax scheme or it is a genuine derogation. Since the logic of a tax system is a highly controversial area and the distinction between "general" and "selective" tax measures is not clear, it would be helpful that the Commission provides practical examples for each step of the analysis to be conducted.

106. Moreover, the exception presented in paragraph 129 may be a source of legal uncertainty. In this paragraph, the guidelines indicate that the three-step analysis presented in the previous paragraphs may not be applied in certain particular cases; however, little detail is provided as to the cases referred to, and to the conditions under which the three-step test will not be applied. This may also result in a reversal of the burden of proof: indeed, in this case, the Commission may just present the measure which it deems as being selective, without ensuring the three-step test is fulfilled. It is then up to the Member State to demonstrate that the measure is not selective.

107. In this regard, there might be a contradiction between the Commission's statement requiring that the three-step analysis should be made "*in light of the objectives intrinsic to the system*" according to the *NOx* judgment[57] and the fact that Article 107 TFEU "*does not distinguish between measures of State intervention in terms of theirs causes or aims*" (paragraph 129). It is therefore unclear whether the aims of the State measure, which reflect the nature and the general scheme of the system, are taken into account by the Commission when assessing selectivity. Such contradiction leads to legal uncertainty for Member States and parties concerned.

108. On another subject, the three-step analysis set by the Commission is based on a discrimination analysis insofar as it aims at assessing whether an undertaking enjoy more favorable treatment. However, recent case law seems to sustain a market analysis test to determine the *prima facie* selectivity nature of a measure since the effect of such measure which constitutes an competitive advantage for the beneficiaries is scrutinized[58]. This approach would be more respectful of the methodology based on the effects of the measure.

109. In this context, it would be useful that the Commission presents its position regarding the appropriateness of a market analysis test at the third step of the three-step analysis.

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57 ECJ, 8 September 2011, *Commission v Netherlands*, case C-279/08, paragraph 128.

58 *Ibidem*.

110. Concerning the administrative tax rulings, the APDC welcomes such codification. Although the guidance provided by the Commission contributes to the predictability on the application of tax rules for undertakings, the criteria set for qualifying selectivity are insufficiently precise to allow legal certainty. Indeed, the application of a measure leading to a "*more favourable tax treatment compared with other taxpayers in a similar factual and legal situation*" is too vague and requires criteria to be construed (paragraph 177). In this regard, point 173 provides useful guidance as to when a transaction between the tax administration and a taxpayer may entail a selective advantage. Some of the terms used are however still too vague to ensure an appropriate level of legal certainty. In particular, the Commission should define criteria to identify when "*a more 'favourable' discretionary tax treatment*" has been applied or when "*the amount of tax has been unlawfully reduced*".

6 EFFECT ON TRADE AND COMPETITION

6.1 General principles

111. The Draft Notice recalls that pursuant to Article 107(1) TFEU, public support is prohibited only if it distorts or threatens to distort competition, and insofar as it affects trade between Member States.

112. As introductory comments, the APDC wishes to stress that:

- Although it is correct that, under applicable case law, these two criteria are often treated jointly[59], the assessment of the effect on trade and that of the distortion of competition require different tests (the existence, or likelihood, of competition; the existence, or likelihood, of trade between Member States) which should lead the Commission to determining whether or not, on certain occasions, such reviews should be carried on separately. This view is supported by the mere fact that the Draft Notice addresses each criterion in turn;

- Even where, under particular circumstances, an aid might be assumed to distort (or threaten to distort) competition and/or affect trade between Member States, it should be reminded that the Commission must state the reasons for its decision and specify the facts that led to such assumption (see C-156/98, *Federal Republic of Germany*, paragraph 98).

[59] It should be highlighted that paragraph 81 of joined cases T-298/07 and others *Alzetta* precisely mentions that these criteria are, "*as a general rule*" (emphasis added), considered inextricably linked. The Draft Notice could be amended to reflect such precise wording accordingly.

6.2 Distortion of competition

113. The Draft Notice recalls that, under applicable case law, a financial advantage granted to an undertaking active in a market not closed to competition should be assumed to distort competition (see e.g. T-298/07 and others, *Alzetta*).

114. Accordingly, in all cases where such presumption is not applicable, the Commission should also carry out a real assessment of the effect of the aid on competition, which should resemble the assessment that it carries out under Articles 101 and 102 TFEU to assess the existence of a restriction of competition. This could in particular help the Commission truly focus on more important cases and to allocate its resources in a more efficient fashion.

115. In order to be able to assess concretely the existence of an effect on competition and trade, the Commission should systematically define the relevant market which is affected by the aid. In that respect, we note that the Commission does not mention cases where the Court recognized this requirement (e.g.: 296/82, paragraph 24 ; T-34/02, paragraph 123 ; T-304/04, paragraph 64).

116. In addition, the Draft Notice states in substance at paragraph 190 that the existence of an effect on competition is presumed if an advantage exists. In our view this conclusion cannot be drawn from the letter of Article 107 TFEU. On the contrary, Article 107 clearly states that the advantage and the effect on competition are two distinct criteria, which must therefore be addressed separately. It should at least be required that the selectivity test is satisfied as well, before any presumption can take place.

117. Furthermore, the Draft Notice states that the definition of State aid does not require that the distortion of competition or effect on trade is significant or material (paragraph 190). However, even though it is not *stricto sensu* a matter of definition, in our view the Draft Notice could usefully mention the existence of Commission Regulation No 1407/2013 of 18 December 2013 on *de minimis* aid, which is deemed not to distort competition and/or affect trade between Member States.

6.3 Effect on trade

118. According to the Draft Notice (paragraph 191), "*an advantage granted to an undertaking operating in a market which is open to competition will normally be assumed to distort competition and also be liable to affect trade between Member States*" (emphasis added).

119. We refer to our comments above regarding the link between the two conditions set forth at Article 107(1) TFEU. Such comments seem all the more accurate, given that in several cases, the Commission considered that the activities at stake had a purely local impact and consequently did not affect trade between Member States (paragraph 196), whereas the measures granted could, at least theoretically, distort or threaten to distort

competition[60]. One cannot therefore automatically infer that a measure that can be assumed to distort or threaten to distort competition should also be assumed to affect trade between Member States.

120. In addition, we are of the opinion that the Draft Notice cannot "*assume*" (paragraph 191) that a measure has an effect on trade on the sole basis that such measure takes place in a market that is "*open to competition*". Indeed, according to its very quote of case T-288/07, the beneficiary must be "*competing in intra-Community trade*", which is an additional requirement that the Commission must show is satisfied. This implies evidencing, in the first place, that trade between Member States exists, or at least that is not "*merely hypothetical*" (paragraph 193).

121. Lastly, as about the condition pertaining to the distortion of competition, it must be emphasized that the Commission is liable to state the reasons why it believes that this condition is met.

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60 For an older case, see *Zone franche Corse et Pacte de relance pour la ville*, XXVIth Annual Report on Competition Policy, Section State aid, paragraph 16, p. 8.