



Moldova:

A Guide for the Design and Identification of  
State Aid Instruments  
to Minimize Competition Distortions

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## Preface

At the request of the Competition Council of Moldova (CCRM), World Bank Group's Investment Climate (IC) - Competition Policy Thematic Group (CPTG) supports the implementation of the state aid framework in the Republic of Moldova under the International Financial Corporation's Global Project on Competition Policy.

The Technical Assistance on Strengthening the State Aid Control Framework in Moldova (December 2013 – June 2015) aims at enhancing the implementation of the state aid control system in Moldova by (i) supporting the evaluation of state aids to ensure compatibility with a normal competitive environment, (ii) ensuring transparency of state aid and facilitate compliance with state aid regulations, and (iii) supporting implementation of state aid secondary legislation and alignment with the EU state aid rules. Secondary objectives of the Project include:

- Increasing awareness about the state aid control rules among the public administration bodies and the business community;
- Strengthening collaboration between CCRM and other public administration bodies that grant state aid; and
- Capacity building at CCRM and other public administration bodies that grant state aid.

A key part of this assignment is the drafting of a guide to help authorities to design state aid instruments to minimize the risk of distortions of competition conditions in the Moldovan markets and to identify whether they grant or receive State aid.

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## 1. Executive Summary

1. **The objective of this guide is to provide the Moldovan public authorities and undertakings with guidance** on how (i) to design state aid instruments to minimize the risk of distortions of competition conditions in the Moldovan markets and (ii) to identify whether they grant or receive State aid and the steps to follow in these cases.

2. **The guide aims at answering in an accessible manner and with examples a number of questions, as follows:**

- What is State aid?
- Which are the main rules on state aid and where can I find them?
- Am I granting State aid?
- Am I receiving State aid?
- What if I am granting/receiving State aid?
- Is State aid always illegal?
- Who has to notify and when?
- What if State aid is granted without notification?
- What are the consequences of granting illegal State aid?
- How can I avoid the violation of the State aid rules?

3. **Finally, the guide also discusses the possible State aid implications related to the provision of public services, and to the constitution and management of public private partnerships.**

## 2. Introduction

3. **Since August 16th 2013, the state aid legislation<sup>1</sup> in Moldova prohibits the granting of State aid to undertakings as it distorts competition and impairs the well functioning of the market.** The violation of this legislation brings about important consequences both for public authorities and for aid beneficiaries (the recipients of the aid). It is therefore important to understand what is State aid and what are the consequences of violating the State aid legislation. This brief guidance attempts to shed light on these issues and to help authorities and undertakings alike to identify State aid.

## 3. What is State Aid?

4. **State aid is, essentially, a financial transfer of public resources that favours an undertaking or a group of undertakings and distorts, or threatens to distort, competition.**

5. **Under Moldovan law, State aid is any support that meets the following conditions:** a) is awarded by the provider of state resources or resources administrative units in any form; b) confers an economic advantage which would not have been obtained under

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<sup>1</sup> Law No. 139 of 15 June 2012 on State Aid in the Republic of Moldova (the “State Aid Law”).

normal market conditions; c) is granted selectively; and d) distorts or threatens to distort competition.

6. **It is important to keep in mind that all four conditions have to be fulfilled. If one of them is not met, there is no State aid.** Let's see some examples of the different criteria (more examples of State aid can be found in Annex 1 to this document):

**a) State resources:** This criterion relates to public funding (grants) but also to any form of financial advantage (e.g. tax reliefs or guarantees) granted by a public administration (the State, region, municipality, province...) or even by a company in which the State -or any other administration- exercises a decisive influence because it is the majority shareholder (public companies) or because it has veto or other important powers of decision making. The State Aid Law gives some examples:

- subsidies
- cancellation or assumption of liabilities
- exemptions, reductions, postponement or rescheduling the payment of taxes
- granting of loans with preferential interest rates
- providing guarantees on preferential terms
- investment provider, the rate of return on such investments is lower than that normally expected by a prudent private investor
- discounts on goods and services provided, including the sale of movable and immovable property below market price.

**Example:** Assume that a public undertaking active in the gas sector adopts a very advantageous tariff for undertakings active in a given sector, for example, in the car industry sector. Could it be said in this case that the State is granting an aid to the car industry? In particular, are the resources of the public undertaking in this case to be considered State resources? The answer is that in order to consider the resources of the public undertaking as State resources, the decision of the public undertaking in this case must be imputable to the State. In other words, the resources of the undertaking can be State resources if it is proven that the undertaking has acted under the dominant influence of the State, as the State, in adopting this particular measure. A number of factors may indicate the dominant influence of the State over the public undertaking in a particular case, for instance, the integration of the undertaking within the administration of the State, the number of members appointed by the State in the managing board of the undertaking or whether the State must approve the tariffs of the undertaking before being put into effect.

**b) Economic advantage:** This criterion refers to any economic benefit which an undertaking would not have obtained under normal market conditions. The analysis of this criterion compares the financial situation of the undertaking allegedly receiving an aid before and after the public intervention under examination.

In the case of a grant or a tax break to a given undertaking, this criterion is easy to identify as the market does not provide for them and the situation of the undertaking at stake is obviously better after receiving a grant or a tax break than before. In other cases it is necessary to analyse whether a transaction in which public authorities or companies under public influence are involved is market conforming or not. For instance, the purchase by an undertaking of a good or a service from a public administration or a provider of State resources (see above such as a public company...) below the market price means that the undertaking at stake is receiving an advantage. Similarly, an undertaking will be receiving

an advantage if it sells a good or service to a provider of State resources above the market price.

**Example:** Assume that a Moldovan public company buys a stake in the amount of 145 million lei in a undertaking domiciled in Chisinau that produces barrels storing wine. A competitor of this undertaking believes that the public investment is not truly an investment but rather a disguised state aid in the form of an investment. Is there State aid in this case? In order to determine whether there is State aid in this case, it is necessary to consider whether in similar circumstances a private investor of a size comparable to that of the Moldovan public company would have made this investment (based on the foreseeability of return, and leaving aside any consideration of social or regional or sectoral policy).

**c) Selectivity:** The advantage must be granted to certain undertakings or certain sectors. This criterion is usually met unless the economic advantage at stake (financed from State resources) is granted to all economic operators within Moldova.

In this regard, according to the State Aid Law, measures applicable to all sectors of national economy have to be considered as general (and therefore not selective measures). Similarly, the State aid law provides that there is no selective advantage in the case of funds released by the National Bank to a particular undertaking under some conditions specified in the State Aid law.

Special rules related to this criterion apply in the case of fiscal aid. In this case it will have to be identified whether the alleged advantage granted to an undertaking constitutes an exception to the generally applicable fiscal scheme or it simply derives from such application.

For example, a tax break from the generally applicable corporate income tax in Moldova to a single company, or to a group of companies operating in a given sector, will very likely be considered as a selective advantage whereas a low income tax rate (lower than that applicable in neighboring countries) applicable to all companies established in Moldova will be considered as a general (non-selective) measure.

Lastly, a *prima facie* fiscal selective advantage could still be considered as a general measure if it is justified by a general principle of the Moldovan fiscal system such as the progressive nature of income tax or profit tax scales (the fact that some companies will pay higher taxes than others because they make more profits is derived from the normal application of the Moldovan fiscal system: there more you earn, the more you pay).

**Example:** Assume that under Moldovan legislation, any undertaking investing more than 3,000 million lei in a new facility may receive a reduction in the corporate income tax. The measure does not distinguish between sectors, geographical location or type of undertaking, is this measure selective? The answer is yes because, although the measure does not explicitly select any particular group of undertakings, the investment that has to be made in order to benefit from the measure is so high that only large undertakings will *de facto*, benefit from this measure. The measure is therefore selective.

**d) distorts or threatens to distort competition:** This criterion is almost automatically met if the public support is given to an undertaking or group of undertakings in a sector that

is formally liberalized, even if there is at present a single operator in the sector. Indeed, according to Moldovan legislation, this criterion may be met if the public support affects:

- dynamic effects on long-term on stimulus to invest and compete;
- product market competition and challenge different reactions from competitors (reduced sales and investment plans, withdrawal from the market);
- competition in input markets and in particular in the place of investment.

**Example:** Assume that in a geographically remote region of Moldova, a small undertaking runs a municipal bus service with the financial support of the regional government. There are no competing undertakings in the region and no undertaking from outside the region has so far shown any interest in competing with the current provider of bus services. Is competition affected if the provider of bus services receives State aid from the regional government in this case? The answer is that if the market is formally liberalized and the financial support received by the undertaking from the regional government is higher than *de minimis* aid (2,000,000 lei in a period of three years), competition might be distorted as this requirement encompasses not only actual but also potential distortions of competition, which could also take place if the beneficiary undertaking decides to compete outside its region.

#### **4. Which Are the Main Rules on State Aid and Where Can I Find Them?**

7. **Law No. 139 of 15 June 2012 on State Aid in the Republic of Moldova (the “State Aid Law) is the most important piece of State aid legislation.** A number of regulations have been adopted to implement the State Aid Law. One of them, the Regulation on the notification form, examining procedure and decision making on state aid is particularly relevant as it explains when and how to notify State aid, and the manner in which State aid will be reviewed by the competent Moldovan body to monitor and authorize State aid, namely, the Moldovan Competition Council.

8. **Together with these two general documents, a number of more detailed implementing regulations have also been adopted.** These contain specific rules for sectors and types of enterprises. For example, rules on how much State aid can be granted in a given period for research and development to a company, or for training employees, or to attract investment in a particular region. These specific rules are contained in the following regulations:

- Regulation on state aid for research, development and innovation,
- Regulation on state aid register,
- Regulation on *de minimis* aid,
- Regulation on state aid for training employees and jobs creation,
- Regulation on the state aid granted for establishment of enterprises by female entrepreneurs, Regulation on state aid for regional development,
- Regulation on state rescue aid for beneficiaries in difficulty,
- Regulation on state aid granted for the beneficiaries which provide services of general economic interest,
- Regulation on state aid intended to remedy a serious disturbance in the economy,
- Regulation on state aid granted to small and medium sized enterprises,

- Regulation on state aid for environmental protection,
- Regulation on State Aid for Financing of Airports and Start-Up Aid to Airlines.

9. **The State aid Law and its implementing regulations can be found at the following Link in both English and Moldovan:** <http://competition.md/official-documents/state-aid/cadrul-legal/regulamente-si-instructii.html?cultureKey=en>.

## 5. When should State aid be granted?

10. **State aids usually have negative effects in the market by distorting the level playing field.** In addition, State aids often entail a significant waste of public resources when the incentives are ineffective. Indeed, although State aids might seem to have a positive impact in the economy *a priori* (e.g. in the development of markets, consumer's welfare, etc.); they might also be restricting competition and distorting the incentives of the different market players to invest and compete.

11. **At the same time, State aids might have positive effects if they are aimed at correcting a well-identified market failure** (efficiency considerations) or for equity reasons such as national cohesion in the case of regional aid or aid for disadvantage workers in order to help them access the labor market.

12. **Following this, it is important to consider that before making the decision of granting** incentives, it should be determined whether State aid is the most appropriate instrument, and then decide which one is the best way to design and implement the benefit in order to minimize potential negative effects. In other words, State aid should only be granted in order to address a market failure or for equity reasons and, and, in any event, only to the minimum extent necessary to achieve the purported goal.

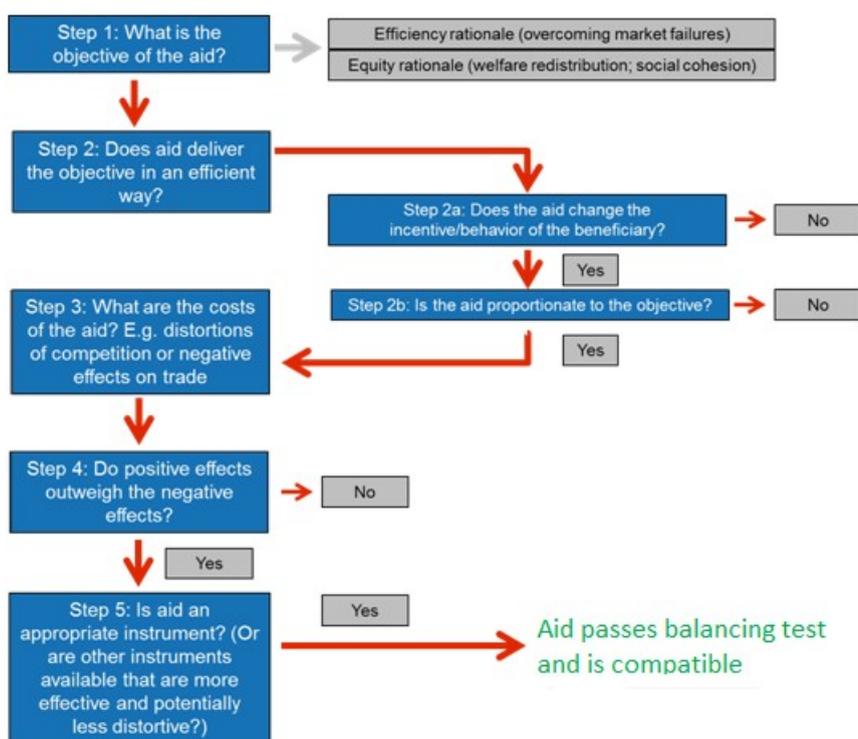
13. **To do so, we present four steps to think about when assessing the granting of State aid measures. In a nutshell, Moldovan granting authorities must demonstrate that:**

- State aid is necessary to achieve the objective of common interest which cannot be delivered by the market due to a market failure or that the aid is given for equity reasons (such as cohesion reasons in the case of regional aid);
- The amount of State aid is effective in achieving and proportionate to the stated objective;
- The unintended distortions of competition and trade are limited;
- The benefits of State aid outweigh its costs; and
- No alternative instrument is available that achieves the objective of common interest more efficiently than with the planned State aid.

14. **This type of analysis, an ex-ante analysis of State aid, encourages national authorities to identify the objectives of their aid measure as well as potential negative effects on competition or trade.** This analysis is also referred to as the “balancing test”, which seeks to weight the positive and negative effects of the aid.

**15. The test consists of the following questions:<sup>2</sup>**

- Is the State aid measure aimed at a well-defined objective of common interest (i.e. is there an efficiency and/or equity rationale for State aid)?
- Does the State aid deliver efficiently the objective of common interest?
- Does State aid restore efficiency or equity by changing the behavior of the aid recipient (incentive effect)?
- Is the State aid proportionate to the problem tackled, i.e. could the same change in behavior not be obtained with less aid?
- What are the negative effects of State aid, also in terms of distortions of competition and effect on trade?
- Do benefits outweigh costs?
- Do other, less distortive, instruments achieve the same results?



## 6. Am I Granting State Aid?

16. **Any Moldovan public authority dealing with public resources may be granting State aid.** This includes not only “State” authorities but also regional or municipal bodies and agencies dealing with State resources (public resources). In this regard, ministries, municipalities, and agencies are the main providers of State aid.

<sup>2</sup> The European Commission proposes a slightly different order of the questions within the balancing test. The order proposed is easier to follow, but note that the order is mostly irrelevant since following a different order does not affect the result of the balancing test.

17. **In addition, public bodies such as public undertakings or even private undertakings in which the State has a dominant influence can be considered as State aid grantors given that they manage State resources.** In this regard, public undertakings can be defined as any undertaking over which the public authorities may exercise directly or indirectly a dominant influence. Such influence can be presumed when the public authorities directly or indirectly hold the major part of the undertakings' subscribed capital, control the majority of the votes, or can appoint more than half of the members of its administrative, managerial or supervisory body.

18. **The above mentioned potential State aid providers/grantors should ask themselves the following questions in order to ascertain whether they are granting State aid:**

- Am I transferring State resources to one or several undertakings (public or private)? These transfers can be positive (a grant, a payment for a service above market price...) or negative (tax exemption, cancellation of a debt...)
- Does this transfer favour certain undertakings or the production of certain goods? In other words, is the transfer open to all undertakings resident in Moldova or just to some of them?
- Does the aid distort or threaten to distort competition? In other words, are the beneficiaries in competition with other undertakings in a liberalized market?

## **6. Am I Receiving State Aid?**

13. **Any natural or legal independent person, engaged in economic activity consisting in offering goods or services in a market, may be a beneficiary of State aid.** This therefore includes public and private undertakings in all societal forms (including cooperatives, trusts...) and public private partnerships (PPPs).

14. **The legal form of the beneficiary of State aid is not relevant, what is important is that it is engaged in an economic activity in a market that is open to competition.** In this regard, non-profit organizations or governmental bodies might be beneficiaries of State aid if they perform an economic activity.

15. **The above mentioned potential State aid beneficiaries should ask themselves the following questions in order to ascertain whether they might be receiving State aid:**

- Am I receiving State resources from public authorities or companies under State influence? Do I receive grants or subsidies or do I benefit from specific tax exemptions/reductions?
- Is the benefit that I am receiving open to all Moldovan undertakings or just to some (for example, undertakings adopting a particular societal form, or having a particular size, or belonging to a particular sector)?
- Am I operating in competition with other undertakings in a liberalized market?

## **7. What If I Am Granting/Receiving State Aid? Is State Aid Always Illegal?**

16. **State aid is not always illegal. State aid may be granted/received provided that it has been notified to the Moldovan Competition Council and authorized by the latter before being put into effect.**

17. **The Competition Council may formally approve State aids that meet the criteria and limits established in the State aid Law and its implementing regulations.** The Competition Council will take a decision not later than 45 working days from the date of receipt of a complete notification. If, within 45 working days of the notification, the Competition Council has not taken any decision, the notified aid will be considered approved.

18. **In addition, aid having an equivalent value below 2,000,000 lei per beneficiary within a maximum period of three years, regardless of its form and objective, is allowed, provided that it is not related to export activities.** In other words, this (so called de minimis) aid is tolerated and does not need to be notified to the Competition Council. However, as an exception to the general notification rule, it has to be interpreted strictly. The conditions for lawfully obtaining de minimis aid are detailed in the Regulation on de minimis aid.

19. **Similarly, there are two types of aid considered to be compatible with a normal competitive environment and exempted from the notification obligation to the Competition Council:** a) aid having a social character granted to individual consumers (for example aid to reduce the price of a bus or train ticket for pensioners or people with limited resources), provided that such aid is granted without discrimination related to the origin of goods or services; and b) aid to remedy damage caused by natural disasters or other emergencies.

## **8. Who Has To Notify and When?**

20. **Only State aid providers (grantors) can notify new aid plans under the State Aid Law. Potential recipients of aid (beneficiaries) are not allowed to formally notify to the Competition Council.** However, they can consult the Competition Council for advice on whether a particular scheme or transaction may involve State aid. They can also communicate to the Council possible cases of existing or illegal (non-notified) aid which they become aware of.

21. **The formal notification has to be made with sufficient time before the date aimed to be the date of aid grant in the legal document** (law, regulation, decision, transaction...) where the aid is established, taking into consideration the legal period during which the Competition Council is obliged to adopt a decision.

## 9. What If State Aid Is Granted Without Notification? What Are the Consequences of Granting Illegal State Aid?

22. **Moldovan State aid legislation attaches important consequences to the granting of State aid without the authorization of the Competition Council.** In this regard, the Competition Council may decide that:

- The legal document under which the unlawful aid was granted must be amended or repealed, and
- The aid should be recovered, with interest, from the beneficiary. State aid to be recovered under a recovery decision shall include interest calculated using the base rate (rounded up to next whole percentage), established by the National Bank in November of the previous year, applied to monetary policy in the short term, increased by 5 points. Interest is paid by the beneficiary of unlawful aid or misused aid and is calculated starting from the day on which the aid was made available to the beneficiary and until the day of its full recovery.

23. **In addition, the aid can be suspended during the investigation. Beneficiaries of unlawful aid will have to repay the public authorities the entire aid plus interest,** and this even if neither the public authority nor the beneficiary undertaking knew about the State aid legislation or the State aid character of the measure at stake at the time when the aid was granted. The same will apply if the undertaking believes, erroneously, that the aid was lawful because it was notified and authorized by the Competition Council. Furthermore, the consequences for the legislation/policy affected are also very severe as this legislation/policy will be amended or repealed.

24. **It is therefore in the best interest of public authorities and undertakings alike to respect the State aid rules and, in particular, to notify any aid plan to the Moldovan Competition Council before implementation** as failure to notify will encompass severe consequences.

## 10. How Can I Avoid The Violation of the State aid Rules?

25. **The best way to avoid the violation of the State aid rules is to notify any aid plan before its implementation to the Competition Council.**

26. **In addition, State aid rules are clear and foreseeable. The criteria and limits for the granting of State aid are detailed in the regulations implementing the State aid law.** Any aid or aid scheme plan should be adapted to the conditions established in those regulations in terms of maximum aid levels, eligible costs that can be compensated with aid etc., and then notify the plan to the Competition Council before putting it into effect.

27. **Framing aids and aid schemes in accordance with the limits set by the State Aid Law implementing regulations will also speed the procedure before the Competition Council,** as this body will be able to verify more easily that the aid at stake is compatible with the State aid rules.

## 11. Public Services and State aid

28. **Providers of services traditionally considered as public services, such as a hospital or a local bus or tram company, will be considered as undertakings for the purposes of the application of the State aid rules if they perform an economic activity,** that is, if they offer goods or services in a market. The exercise of public authority duties such as national security or law enforcement is not considered as an economic activity. Similarly, the running of the social security system based on the principle of solidarity (mandatory membership, State control, services independent of the amount of individual contribution...) is not considered as an economic activity either.

29. **However, in most cases, these types of services (e.g. for the provision of a local bus or tram service) that Moldovan legislation refers to as *services of general economic interest* (“SGEI”) will be considered as economic activities** and therefore any financial compensation granted for their provision may amount to State aid, which should be notified for approval to the Moldovan Competition Council as any other aid.

30. **Nevertheless, given the particular nature of these services, there will not be State aid, and therefore, there will not be need to make a notification to the Competition Council if four cumulative conditions are fulfilled:**

I. The recipient undertaking must actually have SGEI obligations to discharge, and such obligations must be clearly defined;

II. The parameters on the basis of which the compensation is calculated must be established in advance in an objective and transparent manner, in order to avoid providing anyone with economic advantage that may favor the recipient undertaking over other competing undertakings. A payment of compensation by the State for any damage inflicted on an undertaking, while having not established the parameters of such compensation in advance and having subsequently ascertained that the discharge of that service was not economically sustainable, is considered State aid;

III. The compensation cannot exceed what is necessary to cover all or part of the costs incurred in the discharge of SGEI obligations, taking into account the relevant receipts and a reasonable profit;

IV. Where the undertaking which is to discharge SGEI obligations, in a specific case, is not chosen pursuant to a public procurement procedure which would allow for the selection of the tenderer capable of providing those services at the least cost to the community, the level of compensation needed must be determined on the basis of an analysis of the costs which a typical undertaking, well run and adequately provided with the relevant means, would have incurred for discharging SGEI obligations, taking into account the relevant receipts resulting from it and a reasonable profit. (Regulation on the State aid granted to recipients providing services of general economic interest).

31. **If any of these conditions is not met, then the compensation for the provision of this type of services (traditionally known as public services) will be State aid,** which will have to be notified to the Competition Council. The analysis that the Competition Council will make in order to authorize aid for this type of services is explained in the Regulation on the State aid granted to recipients providing services of general economic interest.

## 12. Public Private Partnerships and State Aid

32. **State aid can be present in a Public Private Partnership (PPP) if the public authority that takes part in the PPP is disadvantaged** when compared to the private operator (for example assuming more risk or receiving less profits). By contrast, if the private partner has been chosen as a result of an open tender procedure and the risks and benefits of the project are shared equally by all the investors involved, there will probably be no State aid involved. In this regard, in order to evaluate whether a financial advantage has been granted to the private partner of the transaction, and to quantify such advantage, it is crucial that the tender procedure be open (and not closed or restricted) as this will allow investors to make offers reflecting the market price of the transaction.

33. **Finally, according to Moldovan Law “Financial support provided through public-private partnership, constitutes state aid covered by Law No. 139 of 15 June 2012 on state aid if any the following conditions is met :**

- a) the public authority has not chosen the private partner as a result of a competition, made through a rigorous advertising so as to be made aware of potential investors the main criteria that must be met.
- b) private and public contributions are not proportionate with the profit ( income ) obtained by the parties, and project risks are not distributed in proportion to their respective share of public- private parties.
- c) public resources are allocated before the private ones.
- d) encouraging the private partner during subsequent selection by modifying clauses of public-private partnership, including extension of the period of time etc.” (Section 49 of the Moldovan Regulation on the notification form, examining procedure and decision making on state aid).

**Example:** A public authority wants to create a PPP that will cover the design, the construction, the financing and the operation of a new road infrastructure, which is are to be carried out by a private investor. In other words, the PPP is a combination of a public works contract for the construction of the road and of a concession for operating the road once it is finished. The public authority decides to call for tender in order to make sure that the private operator is compensated at market terms, in other words, to exclude the presence of an advantage to the private partner. The public authority decides to opt for a negotiated procedure. Is there State aid in this case?

The answer is that the construction and operation of road infrastructure can be considered as economic activities, therefore, there will be State aid if the private investor in this case (an undertaking) receives an advantage from State resources that distorts or threaten to distort competition. An open, transparent and non-discriminatory tender procedure tends to minimize potential advantages to the service providers and thus possible elements of state aid. However, an element of state aid may remain in this case as the public authority has not opted for a fully open tender procedure, which provides a good estimate of the market price, but for a negotiated one which is more complex and therefore less certain about the market price of the services at stake. Consequently, the measure should be notified to the competition council for analysis under the State aid rules as it might not be excluded whether, despite the tender, there remains any element of State aid.

34. **Is there any way, apart from a fully open tender, to ensure that a PPP does not include State aid for the private partner?** Yes, the public authorities may show that the

valuation of the service provided by the private partner of the PPP has been conducted by leading independent consultancy firms and/or international banks. However, in this case, all the information related to the creation and operation of the PPP will have to be notified to the Competition Council for assessment under the State aid rules.

## Bibliography

Bacon, K, *European Community Law of State Aid* (Oxford: Oxford University Press, 2009).

Biondi, A, 'The rationale of State aid control: a return to orthodoxy' (2010) *Cambridge Yearbook of EU Law* 35.

Buendia Sierra, JL, 'Finding the Right Balance: State Aid and Services of General Economic Interest', in *EC State aid law-Le Droit des Aides d'Etat dans la CE, Liber Amicorum Francisco Santaolalla Gadea* (The Hague, Kluwer Law International, 2008) 191.

De Cecco, F., *State Aid and the European Economic Constitution* (Oxford : Hart, 2013).

Hancher,L, Ottervanger,T, and Slot, PJ, *EU state aids* (4th ed. London : Sweet & Maxwell / Thomson Reuters, 2012).

Nicolaides, P, 'State Aid, Advantage and Competitive Selection: What Is a Normal Market Transaction?' (2010) *European State Aid Law Quarterly* 65.

Quigley,C, *European state aid law and policy* (2nd ed,Oxford ; Portland, Or.: Hart Pub., 2009).

Szysczak, E, (ed), *Research Handbook on State Aid* (Cheltenham, Edward Elgar, 2011).

Van de Castele, K, and Hocine,M, ' 'Favouring certain undertakings or the production of certain goods':Selectivity' in Mederer, W, Pesaresi, N, and Van Hoof (eds.), *EU Competition Law, Volume IV, State aid, Book One* (Leuven: Claeys & Casteels, 2008) 247.

## Annex 1: Examples of State Aid Analysis

### **Example 1: May an investment by a public authority, or by a public enterprise, in a given undertaking be considered State aid? If so, how to calculate it?**

Economic transactions carried out by a public body or a public undertaking may confer an advantage on its counterpart and therefore constitute aid, if they are not carried out in line with normal market conditions. To determine whether a public body's investment constitutes State aid, it is necessary to assess whether, in similar circumstances, a private investor of a comparable size operating in normal conditions of a market economy could have been prompted to make the investment in question. Therefore, investments, particularly capital injections by public bodies or authorities may amount to be considered as State aid if they do not follow a market logic. For instance, a public capital injection into an undertaking that has been making losses for years would in principle seem as a rather unlike investment for a rational market operator due to its low expected return.

In this regard, for example, in 1979 the Belgian authorities decided to make a capital injection in a company that encountered significant economic difficulties during the 1970s. The Belgian State replaced with this investment a number of private shareholders of the company at stake, taking 72% of the capital. Despite the investments made by the public authorities in the company as the new shareholders the economic situation of the company deteriorated further during the next decade, and the State finally decided to acquire the remaining participations of the private shareholders of the company. In such a precarious situation, the European Commission concluded that no private undertaking would have made capital injections into the company, even more so in this case as there was structural overcapacity in the market and declining demand. The Belgian authorities however argued that they were just acting as any shareholder would act in order to protect their investments. The Court of Justice found in favour of the European Commission noting first that excessively high production costs, continual operating losses, poor liquidity and heavy indebtedness led to the withdrawal of almost all the private shareholders from the undertaking. The Court added that under those circumstances, the company's prospects of profitability were not such as to induce private investors operating under normal market economy conditions to enter into the financial transactions in question, that it was unlikely that the company at stake could have obtained the amounts essential for its survival on the capital markets and that, for that reason, the Belgian Government's support constituted State aid.

As to the calculation of the aid amount, in the case of a capital investment such as this, if no part of the investment can be considered compatible aid under any of the implementing regulations of the Moldovan State Aid Law, the aid amount will be the total amount of aid being invested in a company in circumstances under which a market economy investor would not have done it.

### **Example 2: May a credit granted by a public body or a public authority to a given undertaking be considered State aid? If so, how to calculate it?**

As mentioned before, economic transactions carried out by a public body or a public undertaking may confer an advantage on its counterpart and therefore constitute aid, if they are not carried out in line with normal market conditions. To determine whether a public body's credit constitutes State aid, it is necessary to assess whether, in similar circumstances, a private creditor of a comparable size operating in normal conditions of a market economy could have been prompted to grant the credit in question. In other words, we must compare the behaviour of a public creditor to that of hypothetical private creditors that find themselves in a similar situation.

In 1993, a Belgian regional government granted an interest-free loan of 20 million Belgian Francs (BFR) to a private airline, repayable in annual instalments of BFR 4 million from the second year. In exchange, the beneficiary undertook to continue to develop and operate a number of European air routes from a Belgian airport. The European Commission considered that no private investor would have granted a loan without interest under normal market conditions. The European Commission further considered that the amount of State aid in this case was that corresponding to the interest which the private airline would have paid under normal market conditions. By contrast, a competitor of the private airline argued that the aid amount should have been considered as the sum lent (and not only the unpaid interest) and challenged the Commission Decision before the European Courts. The latter found for the Commission concluding that the relevant question was whether a private investor would have entered into the transaction in question on the same terms and, if not, on which conditions he could have entered into the transaction. In other words, the EU Courts agreed with the Commission in that only the difference between the interest which would have been paid if a market rate had been applied and the interest which was actually paid was to be treated as aid. To consider the sum lent as aid, the Court concluded, would not have been conformant to the principle of proportionality.

Therefore, there will be State aid in the case of a credit granted by public institutions under preferential conditions (e.g. preferential floating interest rate), and the aid amount will be the difference between the interest that a private creditor would have required for the loan at stake and that required by the public body or authority.

**Example 3: Is the granting of land and/or buildings free of charge State aid? And, if so, how to calculate it?**

According to settled case law, the sale by public authorities of land or buildings to an undertaking or to an individual involved in an economic activity, may constitute State aid, in particular where it is not made at market value, that is to say, where it is not sold at the price which a private investor, operating in normal competitive conditions, would be likely to have fixed.

Two methods are usually followed to exclude the presence of State aid from this type of transaction: first, a sale of land and buildings following a sufficiently well publicised, open and unconditional bidding procedure, comparable to an auction, accepting the best or only bid and, second, an ex – ante valuation report prepared by an independent expert. These methods seeks to ensure that the price at which land is sold by public authorities reflect, as far as possible, the market value of that land, so as to rule out that the sale confers an advantage on the purchaser of the land.

For example, in 1999 a company purchased a plot of land of 50000 m<sup>2</sup> from a Finnish Municipality. The selling price was not determined on the basis of an unconditional bidding procedure or an independent valuation carried out prior to the negotiations on the sale. Therefore, when the European Commission knew about this transaction, it raised doubts as to the possible existence of State aid. The Finnish authorities submitted two recent land purchases at a price comparable to that included in the transaction under review. The Commission however considered that insufficient to exclude the presence of aid, particularly in the absence of an unconditional bidding procedure or an independent valuation. In addition the Commission noted that the transactions put forward by Finland involved public authorities and therefore were not fully similar to the one under review. In this context, the advantage granted to the company is the difference between the market price, or the price that a private investor would have paid for the land at stake, and the price actually paid by the company. The Commission found that the value of a plot of forestland in Finland depends mainly on the value of the trees growing in the area in question. On that basis, it calculated the actual advantage granted to the company, namely, the difference between the price of the land based on the number of trees therein and the price actually paid to the company.<sup>3</sup>

In light of the foregoing, the granting of land and/or buildings to undertakings free of charge is very likely to constitute State aid. The amount of aid being granted will be determined by the value of the land and/or buildings at stake which should be calculated either by an open public tender or through independent valuation reports.

**Example 4: Is the issuance of a guarantee to obtain a loan State aid? If so, how to calculate it?**

Any public guarantee involves a loss of resources by the State, if the market price is not paid for the guarantee and therefore can be State aid. The borrower of a loan usually receives it in exchange of a certain premium. There might be an advantage (and State aid) if the borrower does not need to pay the premium, or pays a low premium thanks to the State guarantee. A State guarantee might enable the borrower to obtain better financial terms for a loan than those normally available on the financial markets (lower rates or less security). Sometimes, the State guarantee is necessary for the borrower as, without it, it would not find a financial institution ready to lend on any terms.

In order to know whether a certain State guarantee is State aid it has to be assessed whether, under similar circumstances, a market operator would have issued the guarantee. In other words, the market economy operator test applies. In this regard, State aid will not be involved where the beneficiary undertaking could obtain equivalent financial resources in the capital or financial market.

Where a State guarantee does not comply with the market economy operator principle, it is deemed to entail State aid. As the European Commission has summarized: “the State aid element will be deemed to be the difference between the appropriate market price of the guarantee and the actual price paid for that measure. Where the market does not provide

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<sup>3</sup> Commission Decision of 21 December 2000 on State aid granted by Finland to Ojala-Yhtymä Oy, OJ L 105, 20.4.2002, p. 19–25. See also, for a different method of valuation concerning agricultural and forestry land Commission Decision on State aid SA.33167 Proposed alternative method to evaluate agriculture and forestry land in Germany when sold by public authorities, OJ C 43, 15.2.2013, p. 7.

guarantees for the type of transaction concerned, no market price for the guarantee is available. In that case, the aid element should be calculated in the same way as the grant equivalent of a soft loan, namely as the difference between the specific market interest rate this company would have borne without the guarantee and the interest rate obtained by means of the State guarantee after any premiums paid have been taken into account.”<sup>4</sup>

In other words, the issuance of a guarantee to obtain a loan may be State aid if the premium paid for the guarantee is not market conformant. In the absence of a market for guarantees, the analysis will have to be based on the difference between the specific market interest rate the alleged beneficiary would have paid without the guarantee and the interest rate obtained by means of the State guarantee. Finally, in exceptional circumstances, the aid element of a guarantee may turn out to be as high as the amount effectively covered by that guarantee.<sup>5</sup>

For example, in 2009, a Spanish Region agreed to grant to the winner of a tender to build and operate an airport a guarantee covering 100 % of a bank loan of up to EUR 200 million that the company had asked in order to build the airport. The European Commission considered very unlikely that a private operator would have undertaken such transaction. Indeed, the Commission considered that such an operation rather seemed to reflect typical public behaviour of providing finance where the market did not in order to attain public interest objectives (e.g. construction of infrastructure). In this case, since the Commission did not find a readily available market price for a similar guarantee in the financial markets, , the aid element if any contained in the guarantee had to be calculated as the difference between the specific market interest rate the bid winner would have borne without the guarantee and the interest rate obtained by means of the State guarantee after the premium paid for the guarantee has been taken into account. By carrying out this analysis the Commission found that there was an advantage and that net present value of the aid element of the guarantee on the loans (i. e. gross grant equivalent) amounted to EUR 26.46 million.

### **Example 5: Is the transfer free of charge of assets belonging to municipalities, such as sewerage and water supply networks, State aid?**

As mentioned in **Example 3**, when public authorities sell or transfer public property (be it land, buildings or other) it must be established whether the public authority behaved like any seller operating in a market economy (private vendor test). If public authorities do not behave as rational economic operators, the beneficiary undertaking (in this case the company that buys or receives the property) will receive an economic advantage which it would not have obtained under normal market conditions, placing it in a more favourable

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<sup>4</sup> Commission Notice on the application of Articles 87 and 88 of the EC Treaty to State aid in the form of guarantees, OJ C 155, 20.6.2008, p. 10–22.

<sup>5</sup> However, if the borrower is a company in difficulty, a market guarantor, if any, would probably, at the time the guarantee is granted charge a high premium given the expected rate of default. If the likelihood that the borrower will not be able to repay the loan becomes particularly high, this market rate may not exist and in exceptional circumstances the aid element of the guarantee may turn out to be as high as the amount effectively covered by that guarantee. That is, if the State provides a guarantee to a company that very likely will not be able to repay, the amount of aid could be, in exceptional circumstances, the amount effectively covered by that guarantee (the entire loan).

position to that of its competitors. To transfer public assets having an economic value free of charge to economic operators might therefore appear at odds with the conduct that a private vendor would have adopted. Nevertheless, the particular circumstances of the case must be analyzed before reaching a definitive conclusion.

In addition, the notion of State aid requires that all its constitutive elements described in section 3 above be met. In this regard, the public measure under examination must be liable to distort or threaten to distort competition and this criterion is usually not met if the public support is given to an undertaking or group of undertakings in a sector that is not formally liberalized. Therefore, it will have to be assessed whether the sector in which the reviewed transaction is taking place is formally liberalized. Similarly, there can be no distortion of competition if a given service is subject to a legal monopoly, that is, if the service is reserved by law or regulatory measures to an exclusive provider, with a clear prohibition for any other operator to provide such service.<sup>6</sup>

Finally, in the case of infrastructure related to sewerage and water supply network, it should be taken into account that both services could be considered as Services of General Economic Interest (SGEI) and, therefore, even if the measure under review could be considered as State aid, it should be analyzed whether the aid could be justified as a legal compensation for the provision of SGEIs under section 4 of the Moldovan Regulation on the State aid granted to recipients providing services of general economic interest. In any event, if the transfer of the infrastructure under review is considered State aid it will have to be notified to the Moldovan Competition Council and only this latter body will be competent to eventually declare it compatible as compensation for the provision of an SGEI.

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<sup>6</sup> See in this regard Commission Decision of 7 July 2002 on State aid No N 356/2002 - United Kingdom - Network Rail, OJ C C 232, 28.9.2002, p. 2, recitals 75-77.