



EUROPEAN COMMISSION
DIRECTORATE-GENERAL
REGIONAL POLICY

Guidance note on Article 55(6) of Regulation (EC) No 1083/2006

DISCLAIMER:

This is a Working Document prepared by the Commission services. On the basis of the applicable Union Law, it provides technical guidance to the attention of public authorities, practitioners, beneficiaries or potential beneficiaries, and other bodies involved in the monitoring, control or implementation of the Cohesion policy on how to interpret and apply the Union rules in this area. The aim of the working document is to provide Commission's services explanations and interpretations of the said rules in order to facilitate the implementation of operational programmes and to encourage good practice(s). However this guidance is without prejudice to the interpretation of the Court of Justice and the Court of First Instance or evolving Commission decision making practice, and cannot bind the Commission.

1. INTRODUCTION

- 1.1. Article 55 of Council Regulation (EC) No 1083/2006¹ (hereinafter ‘the General Regulation’) sets out how revenues from revenue-generating projects should be taken into account in calculating eligible expenditure, with a view to ensuring sound and efficient use of the EU budget and to avoiding financing more than is necessary in respect of such projects.
- 1.2. Article 55(6) excludes "*projects subject to the rules on State aid within the meaning of Article 87 of the Treaty*"² from the application of the rules set out within that article. The reason for this exclusion is that the rules on State aid for setting the public contribution to the financing of a project or a group of projects (aid amount) have a different and specific purpose from those set out in Article 55.
- 1.3. Where a revenue-generating project is subject to the rules on State aid, it is not subject to paragraphs 1 to 5 of Article 55. Where a revenue-generating project is not subject to State aid rules, it is subject to Article 55(1) to (5). This is not a matter of choice of the Member State and will have to be examined on a case-by-case basis, depending on the particularities of each project.

2. DETERMINATION OF THE PRESENCE OF STATE AID

- 2.1. The phrase "*projects subject to the rules on State aid within the meaning of Article 87 of the Treaty*" covers projects which involve State aid within the definition set out in Article 107(1) TFEU (formerly Article 87(1) of the Treaty).
- 2.2. According to the Treaty and consolidated case-law there is State aid within the meaning of Article 107(1) when: (a) there is an intervention by the State (or imputable to it) or through State resources; (b) the intervention confers an economic advantage on the recipient undertaking; (c) the intervention distorts or threatens to distort competition; and (d) the intervention is likely to affect trade between Member States.
- 2.3. State aid is an objective concept; therefore any public contribution including a contribution from the Structural Funds or the Cohesion Fund (hereafter "the Funds") which contributes to the financing of a (revenue-generating) project will be considered to constitute State aid if the conditions of Article 107(1) TFEU are met *ratione materiae*.
- 2.4. The simple fact that a project would *a priori* be eligible under a State aid scheme (e.g. it is located in an area generally covered by an aid scheme) is not sufficient for Article 55(6) to apply. The project should be specifically covered by a state aid measure³ and receive financial support under it.

¹ OJ L 210, 31.7.2006, p. 25.

² Now Article 107 TFEU.

³ The possible options are: (i) state aid measure authorised by a Commission decision; (ii) a measure exempted from the prior notification requirement in the meaning of Regulation 800/2008 of 6 August 2008 declaring certain categories of aid compatible with the common market in application of Article 87 and 88 of the Treaty (General block exemption Regulation) (iii) de minimis aid Commission Regulation (EC) No 1998/2006 of 15 December 2006 on the application of Articles 87 and 88 of the Treaty to de minimis aid (OJ L 379 of 28.12.2006) (iv) existing aid within the meaning of Article 1(b) of Regulation (EC) No 659/1999 including existing aid measures within the meaning of the Accession Treaties.

- 2.5. State aid issues only appear at the moment of granting public support co-financed by the Funds to one or a group of undertakings (i.e. private and public entities carrying out economic activities⁴) or for the production of certain goods or services. Thus, if the recipient of the funds is the Member State (at central, regional or local level), acting in its capacity as a public authority, and as such is not carrying out economic activities or if the co-financed operation does not involve the financing of infrastructure destined to be used in the performance of economic activities, it can be assumed that there is no State aid. Union funds used by a Member State to finance public works in the absence of a (public or private) beneficiary undertaking do not raise State aid issues⁵. However, if a Member State (at central, regional or local level) is active outside its public authority powers, the funds transferred to these State entities may qualify as State aid.
- 2.6. Where the public contribution to the financing of a project, including a contribution from the Funds, does not procure any economic advantage to an undertaking, the public contribution does not constitute State aid. This is the case, for instance, where the project is carried out by a public or private firm which is contracted under normal market conditions. A public tendering procedure to select the firm may help establishing that this is the case). Where the project is designed as a public-private partnership, guidance on the rules applicable for the selection of the private partners can be found in the Interpretative Communication on the application of Community law on public procurement and concessions to Institutionalised Public-Private Partnerships (IPPP)⁶.
- 2.7. For instance, in the case of services of general economic interest⁷, the Court of Justice in its *Altmark* judgment⁸ set criteria under which public financial support can be given to an undertaking providing a public service without it being considered a State aid within the meaning of Article 107(1) TFEU. The criteria are as follows: (i) the recipient is actually required to discharge public service obligations; (ii) the parameters on the basis of which the compensation is calculated have been established beforehand, objectively and transparently; (iii) payment does not exceed what is necessary to cover all or part of the costs incurred in discharging the public service obligations, including a reasonable profit; and (iv) when a public procurement procedure, which ensures that the service is provided at the lower cost for the community has not been used to select the service provider and the conditions for the delivery of the service, the level of payment has been determined on the basis of an analysis of the costs which a typical undertaking would have incurred in discharging those

⁴ Economic activity covers not only goods, but also services (see *Pavlov and Others v Stichting Pensioenfonds Medische Specialisten*, Joined cases C-180/98 to C-184/98, paragraph 75).

⁵ It should be noted however that State aid may be present if a public authority transfers the ownership, the usage or the economic exploitation of the co-financed assets or parts thereof to a particular undertaking or to a group of undertakings. For the purposes of Article 55 this may be irrelevant if such arrangements are performed outside of the scope of the co-financed operation.

⁶ Commission Interpretative Communication on the application of Community law on Public Procurement and Concessions to Institutionalised Public-Private Partnerships (IPPP), C(2007)6661, 5. 2. 2008. This document should be read in conjunction with the Proposal for a Directive of the European Parliament and of the Council on the Award of Concession Contracts COM(2011) 897 final

⁷ Communication from the Commission on the application of the European Union State aid rules to compensation granted for the provision of services of general economic interest, OJ C8, 11.1.2012, p. 4; Commission Decision of 20 December on the application of Article 106(2) of the Treaty on the Functioning of the European Union to State aid in the form of public service compensation granted to certain undertakings entrusted with the operation of services of general economic interest, OJ L 7, 11.1.2012, p. 3; Communication from the Commission, European Union framework for State aid in the form of public service compensation (2011), OJ C8, 11.1.2012, p. 15. Note the existence of specific SGEI *de minimis* Regulation (Commission Regulation(EU) No 360/2012 of 25.04.2012, OJ L 114, 26.04.2012, p.8)

⁸ Case C-280/00, 24.7.2003.

obligations. Where these four criteria are met, public service compensation does not constitute State aid, and consequently paragraphs 1 to 5 of Article 55 apply. If the Member States do not respect those criteria and if the general criteria for the applicability of Article 107(1) TFEU are met, public service compensation constitutes State aid. Consequently, in those cases, Article 55(6) applies⁹.

- 2.8. Operations in receipt of *de minimis* aid should be considered to be projects subject to the rules on State aid within the meaning of Article 107 TFEU, for the purposes of Article 55(6) of Regulation (EC) No 1083/2006. Firstly, specific rules exist in relation to *de minimis* aid; thus a literal interpretation of Article 55(6) would include such aid within its ambit, despite the fact that such aid is deemed not to be subject to Article 107 TFEU. Secondly, if *de minimis* aid is cumulated with State aid in respect of the same eligible costs, the entirety of the public aid would be considered as State aid, not merely the amounts above the threshold. Thirdly, applying paragraphs 1 to 5 of Article 55 to *de minimis* aid might undermine the possibility of such aid including a contribution from the Funds. This is because applying a funding gap calculation would often result in little or no aid being given in such cases, as the undertaking would normally only seek State aid where the proposed investment is potentially viable. Considering *de minimis* aid as falling outside the scope of Article 55(6) would also have the perverse effect of imposing requirements for the calculation of eligible expenditure and for monitoring on operations comprising *de minimis* aid whereas operation comprising State aid (aid in larger amounts) would not be subject to such requirements.
- 2.9. In accordance with Article 60(a) of the General Regulation, managing authorities are responsible for ensuring that operations comply with applicable Community rules and must therefore examine each project or group of projects to establish whether these could involve State aid within the meaning of Article 107 TFEU or whether paragraphs 1 to 5 of Article 55 of the General Regulation apply.

⁹ Communication from the Commission on the application of the European Union State aid rules to the compensation granted for the provision of services of general economic interest, OJ C8, 11.01.2012, p .4.

3. CONTRIBUTION FROM THE FUNDS TO PROJECTS SUBJECT TO STATE AID RULES

- 3.1. The maximum aid intensities allowable for State aid measures are determined by several regulations, communications, guidelines and individual decisions. DG Competition has issued a vade-mecum which gives an overview of the rules regarding State aid. See: http://ec.europa.eu/comm/competition/state_aid/legislation/legislation.html
- 3.2. The rates set out in the rules on State aid are generally expressed as maximum aid intensities (subject, where relevant, to bonuses or scaling-down mechanisms), except where otherwise provided for through the application of the balancing test (the measure is proportionate and on balance will produce significant positive effects and limited effects on trade and distortion competition). In line with the principle of sound financial management, however, Member States are recommended to apply a value-for-money assessment for determining the appropriate rate of financing, analysing the costs and benefits with the objective of limiting public financial support to that which is necessary for the project to be economically or financially viable. This analysis can take account of the administrative costs and legal requirements related to the choice to apply flat rules or specific rules for each single operation¹⁰.
- 3.3. In accordance with Article 41 of the General Regulation, all major projects, including those which involve State aid, have to be the subject of a Commission decision. Article 40 requires for all major projects the submission of a cost-benefit-analysis and a justification for the public contribution. The decision under Article 41 will then fix the amount to which the co-financing rate of the priority axis will apply (see information note to the COCOF on major projects in the programming period 2007-2013¹¹). It has to be noted that, projects that are covered by Article 55(6) may also require an additional Commission decision following a notification under Article 108(3) TFEU.
- 3.4. Where projects are related to the delivery of services of general economic interest, as defined by a Member State (unless the Altmark criteria are met), specific rules¹² apply which aim, among other, to define precise parameters for avoiding overcompensation. Other state aid compatibility rules may also be applicable according to the characteristics of the project (e.g. regional aid, environmental, aid, R&D&I aid, broadband projects, etc.).

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¹⁰ This recommendation does not create an additional legal obligation but incites public authorities to offer only the financial support that is necessary. The legal obligations under state aid rules must be respected to avoid questions of irregularity.

¹¹ COCOF 08/0006/02-EN.

¹² See above footnote 8.