



EUROPEAN COMMISSION  
DIRECTORATE-GENERAL  
REGIONAL POLICY

## **Information 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 Community 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 Community 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.*

## 1. INTRODUCTION

- 1.1. Article 55 of Council Regulation (EC) No 1083/2006<sup>1</sup> (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*" 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 87(1) of the Treaty.
- 2.2. According to the EC Treaty and consolidated case-law there is State aid within the meaning of Article 87(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 87(1) 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 that scheme and receive financial support under it.
- 2.5. State aid issues only appear at the moment of attribution of public financing to one or a group of undertakings. Where there is no transfer of State resources to an undertaking, there is no State aid. Thus, if the State (at central, regional or local level) is the beneficiary of the contribution from the Funds, there is no State aid as there is no transfer of resources away from the State. Therefore, Community funds used by a Member State to finance public works in the absence of a beneficiary undertaking do not raise State aid issues. These issues may arise at a later stage if the Member State decides to attribute 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, but this may be irrelevant for the purposes of Article 55, to the extent that such arrangements are performed outside of the scope of the co-financed operation.

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<sup>1</sup> OJ L 210, 31.7.2006, p. 25.

- 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 (including, if applicable, where the firm is selected as a result of a public tendering procedure). 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)<sup>2</sup>.
- 2.7. In the case of services of general economic interest<sup>3</sup>, the Court of Justice in its Altmark judgment<sup>4</sup> 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 87(1). 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) if a public procurement procedure is not 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 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 does not respect those criteria and if the general criteria for the applicability of Article 87(1) of the Treaty are met, public service compensation constitutes State aid that is subject to Articles 73, 86, 87 and 88 of the Treaty. Consequently, in those cases, Article 55(6) applies.
- 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 87 of the Treaty", for the purposes of Article 55(6) of Regulation (EC) No 1083/2006. Firstly, specific rules exist in relation to Article 87 of the Treaty which concern *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 not subject to Article 87. 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 87(1) of the Treaty or whether paragraphs 1 to 5 of Article 55 of the General Regulation apply.

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<sup>2</sup> C(2007)6661, 5. 2. 2008

<sup>3</sup> Commission decision 2005/842/EC on the application of Article 86(2) of the EC Treaty to State aid in the form of public service compensation granted to certain undertakings entrusted with the operation of services of general economic interest, OJ L 312, 29.11.2005, p. 67-73.

<sup>4</sup> Case C-280/00, 24.7.2003.

- 2.10. Where doubts exist as to whether State aid could be present in respect of any given project, managing authorities should, as a first step, seek advice from qualified practitioners and/or consult their relevant national authorities. As a second step, Member States may also consult the Commission services (DGs Competition, Transport, Maritime Affairs and Fisheries or Agriculture) including, in a limited number of cases where strong doubts remain, in view of notifying the measure for legal certainty.

Sections 1 and 2 contain the interpretation of legal provisions by the services of the Commission. Section 3 constitutes a policy recommendation of the services of the Commission.

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

The maximum aid intensities allowable for State aid measures are determined by several regulations, communications, guidelines and individual decisions which cannot be exhaustively listed here. 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](http://ec.europa.eu/comm/competition/state_aid/legislation/legislation.html)

- 3.1. 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 principle of proportionality. In line with the principle of sound financial management, however, where assistance from the Funds is granted under state aid rules to project, Member States are recommended to apply a value-for-money assessment for the determining 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 operation<sup>5</sup>.
- 3.2. 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 2007-2013<sup>6</sup>).
- 3.3. 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), the Commission Decision on public service compensations for services of general economic interest<sup>7</sup> or the Community framework for State aid in the form of public service compensation<sup>8</sup> are relevant<sup>9</sup>. These documents aim, among other, to define precise parameters for avoiding overcompensation.

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<sup>5</sup> 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.

<sup>6</sup> COCOF 08/0006/02-EN.

<sup>7</sup> Commission decision on the application of Article 86(2) of the EC Treaty to State aid in the form of public service compensation granted to certain undertakings entrusted with the operation of services of general economic interest (C(2005 2673), OJ L 312, 29.11.2005, p. 67.

<sup>8</sup> OJ C 297, 29.11.2005, p.4.

<sup>9</sup> Regulations 1191/69, 1107/70 and 1370/07 are relevant as regards land transport.