



# Momentum

EU and Competition

August 10, 2016

## EU STATE AID RULES CLARIFIED TO ENHANCE PUBLIC INVESTMENT

On May 19, 2016, the European Commission published a new guidance on EU State aid rules in its *Notice on the notion of State aid as referred to in Article 107(1) TFEU* ("**Notice**"). This is a "must read" for public authorities and companies receiving or granting public funds. It clarifies those cases in which public support measures can be granted without needing approval under EU State aid rules and explains the notion of State aid based on updated decisional/judicial practice.

### What is State Aid?

In accordance with the TFEU, State aid is prohibited unless there is a formal authorisation either by EU legislation or by the European Commission itself on grounds of meeting the EU general interest aims, such as protecting the environment or benefiting regional development, or correcting market failures such as the access of SMEs to financing.

Public intervention may be qualified as State aid when it meets all of the following four conditions, which are clarified in the Notice:



- the intervention entails an economic advantage in favour of a company exercising an economic activity;
- it has been decided by a public entity and is funded by public resources;
- it favours certain companies or activities to the detriment of others; and
- it distorts or threatens to distort competition and affects trade between Member States.

### **What are the Notice's key clarifications?**

Firstly, the Notice assists Member States and companies to recognise public investments that fall under the criteria of State aid by elucidating on the different requirements of the notion of State aid referred above. Additionally, the Notice provides a thorough guidance on the following topics:

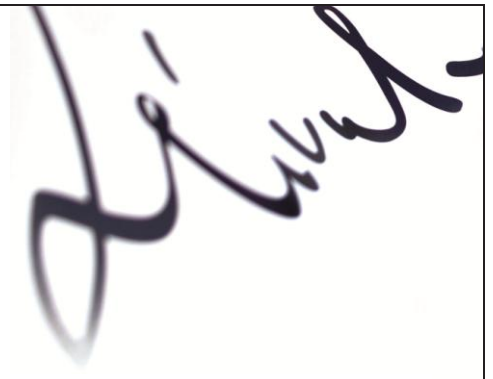
- Public investment for the building or improvement of infrastructure;
- State investment in the construction of infrastructure does not qualify as State aid and hence no scrutiny from the European Commission is needed, if it does not directly compete with other infrastructure of the same kind (for example, railway infrastructure, roads, inland waterways and water supply and wastewater networks). In contrast, infrastructure in areas such as energy, broadband, airports or ports is frequently in competition with analogous infrastructure and such financing may be subject to the European Commission's authorisation if it fulfils the State aid concept.



- The construction of infrastructure involving State funding may not amount to “State aid” if the operators and clients pay a market price, for instance as a result of a competitive, transparent, non-discriminatory and unconditional tender.
- The European Commission’s control is critical in cases where EU State aid has cross-border effects, but it is less intense in relation to public investment in local infrastructure or services.
- In principle, there is no State aid if the public entities sell or purchase assets, goods or services in the context of tenders which are in line with the rules of the EU on public procurement.
- Certain cultural activities that are not commercial (e.g. free or against payment of a minimal fee) do not fall under State aid rules.

### **Why it matters?**

The Notice is not binding but is of high relevance for both public entities (e.g. Government, municipalities, direct and indirect administration) and companies (public and private) that are recipients of State aid. It is important to ascertain whether public investments (i) do not involve State aid, or (ii) require prior authorisation from the European Commission or (iii) need to be revised in order to avoid distortions of the level playing field in the single market.



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The notice is a practical instrument to ensure the proper application of the rules. However, due to the innumerable forms of State aid which are constantly subject to change, the qualification as State aid is not always clear-cut and a thorough examination of the specific circumstances of the case is needed.

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