

# EU State Aid Control

EU State Aid Control  
Law and Economics  
Second Edition

Edited by  
Philipp Werner  
Vincent Verouden

BOOK EXTRACT: CHAPTER 24  
State Aid and Privatisation  
Andreas von Bonin, Florian Reiter-Werzin &  
Sean Ennis

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## CHAPTER 24

# State Aid and Privatisation

*Andreas von Bonin, Florian Reiter-Werzin & Sean Ennis\**

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### 1 INTRODUCTION

The continued use of privatisations as a means of economic policy in the last two decades has presented new and challenging State aid questions. The global financial crisis and European sovereign debt crisis of 2008-2012 affected not only private but also State-owned enterprises. Political endeavours to reduce non-core State activities in combination with pressure on public finances have generated a pressure to privatise in a number of EU Member States. Even with the broad tendency towards privatisations, recent years have also witnessed an occasional reverse tendency toward re-nationalisation.<sup>1</sup>

For example, the so-called Programme Countries<sup>2</sup> were forced to implement strict privatisation programs in order to reduce their deficits through the proceeds of

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\* The views expressed in this chapter are those of the authors and do not necessarily represent the views of Freshfields or the University of East Anglia. The previous edition of this chapter has been co-authored by Andreas von Bonin and Elisabeth Häring.

1. The reverse trend can be observed, i.e., the (re-)nationalisation of companies and assets, for instance, in reaction to a perceived degradation in quality or financial position of the privatised service, such as the UK's private Railtrack being effectively re-nationalised as Network Rail, a company managed 'on a not-for-profit basis in the general and public interest' in 2002 (*see, e.g., Commission Decision SA.16301 of 17 July 2002 - Network Rail (OJ C 232, 28.9.2002. p. 2)*), Virgin Trains East Coast being taken over by LNER in 2018 or the UK's Northern rail franchise being taken over in January 2020. Re-nationalisations have also taken place for reasons of security of supply or perceived dependencies concerning essential infrastructure in the energy field, e.g., Commission Decision SA.52390 of 14 April 2019 - *Reacquisition of the Hamburg district heating network (OJ C 194, 7.6.2019, p. 5)* or, in the wake of the 2022 energy crisis, Commission Decisions SA.103791 and SA.105001 of 20 December 2022 in relation to the recapitalisations of Uniper and SEFE (former Gazprom Germania).
2. Since the global financial crisis and the European sovereign debt crisis (2008-2012), a number of Eurozone countries (Greece, Ireland, Portugal and Spain) have adopted austerity and reform programmes to reduce both their government deficits and their level of public debt in return for

privatisation. Furthermore, the European Commission's (the 'Commission') enforcement actions in relation to several State-owned banks have increased the number of privatisations, as the relevant banks had to divest substantial parts of their operations in order to satisfy the Commission's concerns. In some cases, commitments also related to the privatisation of the relevant banks.<sup>3</sup> Likewise, the Commission made its approval of COVID-related recapitalisations under the Temporary Framework and the recapitalisations in the context of Russia's war against Ukraine under the Temporary Crisis Framework conditional upon a subsequent (re-)privatisation of the recapitalised company by the State.<sup>4</sup>

Already in the 1990s, Europe experienced a series of privatisations. This was mainly due to the requirements set by the Commission for the opening and deregulation of sectors, such as telecommunications and transport. Above all, the disposal of government assets at the time served to replenish public budgets in countries with a large government debt and ease budget deficits. The same is true for modern-day privatisations (without public budgets being more balanced today).

This chapter considers the various State aid related questions that arise in the context of privatisations as well as the options available, primarily to buyers, to obtain maximum legal certainty. For this purpose, the specific requirements for privatisations to be deemed to be State aid compliant and selected issues that may arise in the application of State aid rules to privatisations are discussed.

## 2 THE ECONOMIC AND PUBLIC POLICY OF STATE AID IN PRIVATISATIONS

States have many reasons for privatisation that are policy-oriented in nature, while some can be more directly political.<sup>5</sup> Focusing on the policy and economic values of privatisation, reasons for privatisation include providing income to the state from the disposition of State-owned assets, avoiding ongoing loss-making activities, excluding the political mechanism from dealing with labour disputes (with a political mechanism having a tendency to result in higher labour and operational costs in the long run),

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the financial assistance offered by the International Monetary Fund as well as the European Commission (acting on behalf of the Eurozone countries) and the European Central Bank. These countries are referred to as 'Programme Countries' in this chapter.

3. See, for example, Commission Decision SA.47677 of 4 July 2017 – *New aid and amended restructuring plan of Banca Monte dei Paschi di Siena* (OJ C 40, 2.2.2018, p. 7). Some earlier examples of State aid cases regarding German banks are Commission Decision SA.28505 of 30 June 2009 – *Landesbank Baden-Württemberg* (OJ C 248, 16.10.2009, p. 7); Commission Decision SA.28505 of 22 February 2010 – *Landesbank Baden-Württemberg* (OJ L 188, 21.7.2010, p. 1); Commission Decision SA.28504 of 29 May 2009 – *HSH Nordbank* (OJ C 179, 1.8.2009, p. 1); and Commission Decision SA.28487 of 5 February 2013 – *Bayerische Landesbank* (OJ, L 109, 28.4.2015, p. 1).
4. See, for example, Commission Decision SA.57153 of 25 June 2020 – *Germany – COVID-19 – Aid to Lufthansa*, paras 248 et. seq.; Commission Decision SA.103791 of 20 December 2022 – *Germany – Recapitalisation of Uniper*, para. 190.
5. The 'State' includes national, regional, and local government as well as, potentially, state-controlled companies.

increasing efficiency of operation and avoiding the allocation of jobs by political process as opposed to merit.

## 2.1 Economic Rationale of Policy

### 2.1.1 Economic Value to State/EU of Privatisation

Privatisation is a natural part of changing governance mechanisms of enterprises and can be in the interests of the State for many reasons. These reasons include improving the State balance sheet and income statement going forwards, reducing or transferring investment risks, and seeking efficiency improvements with increased or complete private ownership.

The State balance sheet and income statements, while rarely referred to as such, are the State equivalents of a private company's balance sheet and income statement. In order to maintain State borrowing at low interest rates (and thus with the highest credit rating), States must limit their debts. Particularly for activities that require high capital investment in States that are close to the margin of a decline in ratings, States may tend to over-constrain borrowing and debt. In such cases, there are clear arguments for privatisation. Privatisation can further serve to transfer investment risks to private parties that may, in some instances, be better qualified to judge and hedge risks.

More generally, States may wish to lower their debt levels via asset sales that effectively result in lowering borrowing needs or paying off State debts. The necessity for maintaining debt at a maximum percentage of GDP is explicitly part of the Euro mechanism but is more generally necessary to maintain the ability to borrow at low interest rates, and thus applies in all States with substantial debt levels.

Efficiency gains can, at times, arise from private operations, particularly to the extent the State operation had low-powered incentives to control operational costs or high-powered political incentives to raise them or for positions to be allocated via a political process. Particularly when States have the capacity to finance company losses, such as when credit levels are well within accepted Euro mechanism limits or the credit rating of the national debt is relatively secure, incentives can be low-powered under State-ownership or control, notably due to the soft budget constraint that can apply while under state control, as argued by Kornai (1986).<sup>6</sup> The soft budget constraint that applies to certain State-owned companies can thus weaken incentives for a company to operate with maximum productive efficiency.

Efficiency enhancements are economically important due to their contribution towards improving productivity, and ultimately feeding into growth. Vickers and Yarrow (1991) emphasise that privatisation can apply to activities that are for potentially competitive sectors as well as to activities that are natural monopolies.<sup>7</sup> In

6. Kornai, J. 'The Soft Budget Constraint'. *Kyklos* (1986) 39: 3-30 <https://doi.org/10.1111/j.1467-6435.1986.tb01252.x>.

7. Vickers, John & George Yarrow (1991). 'Economic Perspectives on Privatization'. *Journal of Economic Perspectives*, 1991 5(2): 111-132 <https://doi.org/10.1257/jep.5.2.111>.

both of these cases, productive efficiency may benefit from the high-powered incentives of a private operation and from the takeover threat that can discipline management in private firms. They suggest that in some countries, such as France, privatisations of the 1980s were primarily of companies operating in competitive sectors, while in the UK a much greater focus was placed on moving natural monopolies into private hands, though with accompanying regulation. Particularly to the extent that privatisation can yield efficiency from hard budget constraints, and in order to prevent unequal conditions of competition, State aid disciplines play an important role in achieving efficiency in privatised activities.

For the two types of privatisations identified by Vickers and Yarrow (1991), international institutions such as the IMF, OECD and World Bank have regularly encouraged them: These encouragements would often be particularly strong for potentially competitive government activities, but could also arise for natural monopoly activities that can be adequately regulated. Broad economic rationales for privatisation can include the potential of such governance changes to contribute to growth via augmented productivity.<sup>8</sup> Additional rationales can also include reduction of State debt and increased revenue for the State from the proceeds of privatisation.

The potential efficiency benefits of privatisation depend very much on the agency problems that exist under State-ownership compared to those that would exist under private ownership. Laffont and Tirole (1991) emphasise this point by characterising the costs of the agency problem under State-ownership as 'a suboptimal investment by the firm's managers in those assets that can be redeployed to serve social goals pursued by the public.'<sup>9</sup> In contrast, the costs of transitioning to private ownership are characterised by them as arising from the need for a firm's managers to 'respond to two masters-the regulators and the shareholders'. They suggest that the outcomes of weighing these two factors against each other do not universally reach a conclusion in favour of one form of governance or the other.

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8. For useful overviews of the rationales for private operation versus public operation, a key lies in the incentive structures of entities under private and public operation and in non-contractable information differences between public and private operation as emphasised by Shapiro, Carl & Willig, Robert. *Economic Rationale for the Scope of Privatization*, in Sulieman, R. & Waterbury, J., *The Political Economy of Public Sector Reform and Privatization*, Routledge: New York (1991) and Willig, R. *Public Versus Regulated Private Enterprise*, Washington, D.C.: World Bank Group. (1994) 155-169. <http://documents.worldbank.org/curated/en/188931468739287745/Public-versus-regulated-private-enterprise>. The movement towards privatisation is attributed perceptions of 'waste, lethargy, inefficiency, and poor quality of output in the operations of state-run enterprises'. Lessons suggested by Willig on the ability of privatisation to meet its goals include that: (1) suitable institutions are in place; (2) a market-friendly environment is needed; (3) the microeconomic structure must be open to competition; (4) where the privatised enterprise provides natural monopoly services, an effective mechanism for reducing abuse of monopoly power is needed; (5) the government must confine its influence over the regulated firm, e.g., with a 'limited and predefined regulatory mechanism'. Willig emphasises the importance of government committing to an 'anonymous and arm's-length relationship'. One of the reasons for privatisation noted in a World Bank paper is 'the burden that loss-making SOEs place on hard-pressed public budgets'. (Kikeri, Sunita, John Nellis & Mary Shelley. 'Privatization: The Lessons of Experience', IBRD (1992)).

9. Laffont, Jean-Jacques, & Tirole, Jean. 'Privatization and Incentives'. *Journal of Law, Economics, & Organization*, (1991) 7: 84-105 <http://www.jstor.org/stable/764959>, [https://doi.org/10.1093/jleo/7.special\\_issue.84](https://doi.org/10.1093/jleo/7.special_issue.84).

Restructuring that recognises failing aspects of an enterprise may be easier and more effective or likely to occur when an enterprise is under private control than State control.

Reallocation of assets can be considered one form of restructuring. It may be more effective to reallocate assets (such as land) to their highest value when the assets are owned by a private operator.

Privatisation need not involve the sale of all State interests in a company. For example, States may sell only a minority of a company, or sell a majority part while maintaining a State interest. States may have already converted their interests into shares of a publicly listed company or may be selling interests in non-publicly listed enterprises. Perotti (1995) notes that the State may retain a stake in a company as a signalling mechanism to the private purchasers of the rest of the enterprise.<sup>10</sup> Such a stake can signal an absence of an intent to redistribute the outside investments. The risk of state intervention after privatisation can lead to a substantial discount on the price paid compared to the value. The State may then prefer not to retain any stake but instead to gain credibility over time by not taking advantage of buyers. Alternatives to privatisation that can achieve some of a state's objectives for efficiency can include outsourcing management contracts of an enterprise to a private company.

### ***2.1.2 Existence of State Aid or Necessary New State Aid***

The process of privatisation places a State enterprise more squarely in the domain of private operation and, in situations when the privatised activity can be competitive, private competition. If the State is politically seeking to ensure the new enterprise succeeds in the competitive marketplace, it may wish to provide, or buyers may seek to ensure, that the enterprise has a lower cost base than its actual or potential competitors. State support related to privatisation could take many forms. One more obvious form might be long-term loans to the company being sold that are at a below-market rate of interest, providing non-competitive and exclusive access to limited supply assets or replacing equipment before the end of life to ensure the sold company has new industrial equipment that is more efficient than that of competitors. More difficult-to-detect forms might include setting standards that limit competitors' success, setting bidder requirements in future tenders that advantage the privatised company, or entering into a long-term purchase contract above the level the State would otherwise purchase in either quantity, quality or price. Such State actions could constitute a hidden form of providing job guarantees or hidden industry champion support and constitute State aid that would have to be notified to the Commission. Safeguards are needed, in the process of privatisation, to ensure that the State does not provide over-generous support to a future privately-owned or managed company.

If the objective is to ensure a level playing field, though, States should be able to ensure the enterprise is not disadvantaged as a result of its State-ownership heritage.

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10. Perotti, Enrico C., 'Credible Privatization'. *The American Economic Review*, (1995) 85(4): 847-859.

This evidently comes into focus when considering pension obligations of State companies that may have been promised at levels that exceed those of the private sector. Moreover, salary and benefit structures may at times be higher in such enterprises than for comparable jobs in the private sector, and such structures are notoriously difficult to change to bring in line with private sector norms. While the Guidelines provide little recognition of such needs, there is an economic case to be made for taking such factors into account, for example, with the State absorbing the 'premium' pension costs above those of the private norm, if the ultimate goal is to ensure a vigorous competitive environment on as level a playing field as possible.

The Guidelines do not clearly recognise the additional interests of a State compared to a private investment manager. These could be illustrated through the calculation of balance sheet and income statements for governments (potentially combining national, regional and local considerations) that would explicitly take into account other factors. It is conceivable that, if an action of a State during privatisation is seeking to control balance sheet risk (e.g., to avoid costs of unemployment and retraining that ultimately raises the debt level of the State), a privately operated State would behave differently from a private investor.

### **2.1.3 Economic Basis for Controls of State Aid in Privatisation**

Economic analysis can both show ways in which current forms of operation and investment are inefficient and ways that future management may increase efficiency. This can provide an economic basis for controls of State aid in privatisation. Ensuring that privatised entities do not have an undue advantage due to their history of State-ownership is particularly important to the extent that State support can take many forms.

An economic approach to State aid in privatisation could consider the entire State interest as a whole, not exclusively as an investor in enterprise subject to privatisation. Such an approach could permit State aid that would increase the total returns to the State from privatisation, considering all assets and liabilities to the State. In particular, such an approach might consider factors beyond the narrow interest of a company investor. For example, a State may be able to reduce its pension obligations by transferring a company to the private sector. The State may also wish to provide modest support for employment in a privatised enterprise, to prevent a sudden increase in unemployment that, in some regions, might make loss of jobs difficult to reverse, though the pure private owners might make a simple private calculation to reduce employment in order to achieve rapid improvements in productive efficiency for a firm that was unproductive. In a similar manner, a private investor with a portfolio of investments would consider impacts on its entire portfolio from a change in one asset in the portfolio. The Commission may choose not to recognise such broader interests, due to their distance from the transaction in course and the difficulty of assessing them. More effort at finding means to assess such risks may be worthwhile both on the parts of States and the Commission, particularly to the extent that balance sheet risks have

taken on increased importance during successive financial and health crises, and the need for carbon adjustments.

## 2.2 *Ex Post* Review and the Effectiveness of State Aid Control of Privatisations

The process of *ex post* review of State aid control is intended to assess economic impacts and ensure the claims made at the time of granting of State Aid authorisation and determinations of compatibility are in line with actual needs. Such economic assessments are particularly difficult in the context of privatisation due to a number of factors that must be taken into account, such as changed business circumstances, changed operational objectives and measuring increased efficiency.

Vickers and Yarrow (1991) seek to provide an initial *ex post* assessment of privatisation in Chile, Poland and the UK. Their longest description is of developments in the UK, the (former) Member State that had perhaps the earliest and most rapidly encompassing form of privatisation. They suggest that overall, the benefits of privatisation depend very much on the extent of monitoring failure by the State under State-ownership, balanced against, especially in the case of privatised natural monopolies, the risks of market imperfections in the privatised enterprises. Ennis (2023) suggests the importance of proper characterisation of natural monopoly, particularly in the presence of inefficiency.<sup>11</sup> This point matters to the extent that inefficiency under State-ownership, due to agency problems, is often considered a precondition for achieving efficiency benefits from privatisation.

## 2.3 Transformative Projects and De-privatisation

The possible benefits of the State/EU from nationalisation may need to be balanced against some of the rationales for national ownership. In particular, national ownership may be financially beneficial to citizens for assets that have required an investment and when taking into account the lower interest rates paid by the State compared to corporate debt, and the potentially lower margins on operations for a State-owned enterprise. Such nationalisation may serve a cost-lowering and efficiency-enhancing purpose. Where management techniques for an activity are well established and compensation and conditions are at the same level as in a private enterprise, there may be benefits to citizens and taxpayers from State-ownership and operation compared to private ownership. One example in which the costs of national operation may be lower than for the private sector exists arguably in the context of the privatisation of motorway concessions. Such benefits to taxpayers from national ownership may need

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11. Ennis, Sean F. 'The Natural Monopoly Paradox: Incumbent Inefficiency and Entry' (20 February 2023) <https://doi.org/10.2139/ssrn.4364914>. Available at SSRN: <https://ssrn.com/abstract=4364914> or <http://dx.doi.org/10.2139/ssrn.4364914>.

to be balanced against the balance sheet impacts of maintaining State-ownership of such activities.<sup>12</sup>

National ownership may also be argued as necessary to ensure that transformative projects can be achieved. Examples include Germany's crisis-related acquisition of stakes in CureVac, Lufthansa and Uniper, or, prompted by a public referendum, the reacquisition of Hamburg's District Heating Network. More broadly, national ownership may be needed where the costs of motivating and organising private investors are very costly and complex compared to direct State investment to achieve a State objective.

From a State aid law point of view, renationalisation projects require the opposite perspective than privatisations – rather than the MEVP, the market economy investor principle ('MEIP') has to be applied. A renationalisation does not include a State aid element if the public body's investment would have been made in similar circumstances by a private investor of comparable size operating in normal conditions of a market economy.<sup>13</sup> For the purpose of carrying out the MEIP, *'only the benefits and obligations linked to the role of the State as an economic operator [...] are to be taken into account'*. In contrast, if a State intervention is driven by public policy reasons, *'the State's behaviour, while being rational from a public policy perspective, may at the same time include considerations which a market economy operator would normally not consider'*. This is an objective assessment which has to be carried out from an *ex ante* perspective.<sup>14</sup> However, the fact that public policy considerations may not be taken into account in the MEIP assessment, does not exclude that the MEIP may be fulfilled in a renationalisation project. In fact, the Notion of Aid Communication explicitly states that the MEIP *'should be applied leaving aside all considerations which exclusively relate to a Member State's role as a public authority'*.<sup>15</sup> Also in its decision practice, the Commission has acknowledged that a Member State may pursue public policy considerations and commercial objectives at the same time. For example, in the HDS case, the MEIP was applied to certain measures (i.e., assessing whether a prudent market economy investor would have granted comparable benefits to HDS, while Greece's public policy motives were not taken into account).<sup>16</sup>

Likewise, in the case of the reacquisition of the Hamburg district heating network, the citizens of Hamburg had voted in a referendum in favour of public ownership of the city's energy networks. When the city then negotiated the purchase of the district heating network, the Commission held that *'the Commission considers that the MEOP test is applicable in the present case. By acquiring full ownership via its subsidiary HGV, the city of Hamburg is acting not in its capacity as a public authority,*

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12. The balance sheet risks from ownership of activities that fully cover their costs may be mis-measured by ratings agencies, and more attention may be required on their part to ensure that cost-raising privatisations are not pursued for ratings reasons (as opposed to government determinations of a need to raise revenue).

13. Notion of Aid Communication, para. 74.

14. *Ibid.*, paras 76 et seq.

15. *Ibid.*, para. 77.

16. Commission Decision SA.34308 of 6 March 2013 – Greece, *Possible state aid to Hellenic Defence Systems HDS (EAS – Ellinika Amyntika Systemata)*, paras 35 et seq., 79 et seq., 107 et seq.

*but as an economic operator*'.<sup>17</sup> This case is a prime example that the presence of public policy considerations does not exclude the applicability of the MEIP.

As follows from the above, where the MEIP is passed on a commercial basis, the additional presence of public policy interests does not prevent the finding that the renationalisation is free of State aid.

### 3 CURRENT LEGAL FRAMEWORK: NOTION OF AID COMMUNICATION AND GUIDANCE PAPER ON PRIVATISATIONS

In an attempt to clarify the application of State aid principles to privatisations of State-owned enterprises, the Commission published, in 2012, a Guidance Paper on State aid-compliant financing, restructuring and privatisations of State-owned enterprises (the 'Guidance Paper').<sup>18</sup> According to the Commission, the purpose of the Guidance Paper is to '[...] *raise awareness in all Member States of EU State aid rules, which must be complied with when carrying out financing, restructuring and/or privatisations of [State-owned enterprises], and to provide clarifications on the way the Commission applies the main state aid principles*'.<sup>19</sup> Thus, the Guidance Paper is meant to assist Member States in designing and carrying out privatisations in a manner which is State aid compliant. In general, the Commission applies the State aid rules to all privatisations of State-owned enterprises strictly, regardless of the motivation behind the privatisation.<sup>20</sup> However, the Commission notes that the Guidance Paper is merely a '*staff working document for information purposes*' which does not represent its official or anticipated position.<sup>21</sup> The extent to which Member States can rely on the Guidance Paper is, therefore, severely restricted. It is thus prudent for market players and advisers to treat the Guidance Paper as a summary of the State aid principles applicable to privatisations according to the Commission, rather than as a statement of law.<sup>22</sup>

The Guidance Paper is wide in scope. It applies not only to totally or partially State-owned enterprises but more generally also to any stake or participation that a public authority may hold in a company, irrespective of whether or not the public

17. Commission Decision SA.52390 of 15 April 2019 – *Germany, Reacquisition of the Hamburg District Heating Network*, para. 21.

18. Commission Staff Working Document, Guidance Paper on state aid-compliant financing, restructuring and privatisation of State-owned enterprises, 10 February 2012, SWD (2012) 14 final.

19. Guidance Paper, p. 3.

20. See in particular Commission Decision SA.20727 of 30 April 2008 – *Bank Burgenland*, paras 116 et seq. (OJ L 239, 6.9.2008, p. 32), and Commission Decision SA.24127 of 27 February 2008 – *Automobile Craiova*, paras 55 et seq. (OJ L 239, 6.9.2008, p. 12); regarding the general requirements of State aid conforming privatisation see Commission Decision SA.9296 of 8 September 1999 – *Stardust Marine*, paras 66 et seq. (OJ L 206, 15.8.2000, p. 6) and Commission Decision SA.9545 of 11 April 2000 – *Centrale del Latte di Roma*, paras 82 et seq. (OJ L 265, 19.10.2000, p. 15).

21. Guidance Paper, p. 3.

22. See also von Bonin, Andreas, Aktuelle Fragen des Beihilferechts bei Privatisierungen', *Europäische Zeitschrift für Wirtschaftsrecht*, 2013, 247-252; and Nicolaidis, P., How EU State Aid Rules Apply to Privatisation of Public Enterprises, *Concurrences*, Legal Practices, No. 1, 2015.

authority effectively exercises control over it.<sup>23</sup> Thus, the same State aid requirements will apply to the sale of a majority or minority shareholding owned by a State.

The Guidance Paper covers three main questions that are relevant for privatisation from a State aid perspective:

- (1) the general principles regarding the Market Economy Vendor Principle;
- (2) specific questions with regard to the application of the Market Economy Vendor Principle and the suitability of preparatory measures to facilitate the subsequent privatisation of State-owned enterprises; and
- (3) the procedural requirements for a State aid-compliant sales process.

### 3.1 Market Economy Vendor Principle

The Guidance Paper contains insights into how the Market Economy Operator Principle ('MEOP')<sup>24</sup> applies to privatisations. In the context of privatisations, the State's actions are examined and compared to those of a private market seller to determine whether the sale was conducted on market terms. In this situation, the general MEOP therefore translates into the so-called Market Economy Vendor Principle ('MEVP'). The same principle is also covered by the Commission Notice on the notion of State aid pursuant to Article 107(1) TFEU ('Notion of Aid Communication').<sup>25</sup> According to the Notion of Aid Communication, the MEVP is used to assess whether a private vendor, under normal market conditions, could have obtained the same or a better price.<sup>26</sup>

#### 3.1.1 General Principles of the MEVP

When examining the MEVP, the Commission assumes that a private vendor would always sell its company at the highest possible price, without imposing any conditions that could negatively impact the purchase price.<sup>27</sup> This approach is supported by case law. For instance, in the *WestLB* case, where the General Court pointed out that '*normally a private investor is not content merely with the fact that an investment does not cause him a loss or that it produces only limited profits. He will seek to achieve the maximum reasonable return on his investment [...]*'.<sup>28</sup>

A sale by a Member State may therefore involve State aid if the State behaves in a manner different to that of a private vendor, e.g., by not seeking the maximum possible proceeds or by failing to minimise the losses of the sale, thus foregoing State income in favour of the buyer or the company to be privatised. If there are any

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23. Guidance Paper, p. 3.

24. See Conte, G. & M. Khalil (2024), *Advantage*, in Chapter 2 of this book.

25. Commission Notice on the notion of State aid as referred to in Art. 107(1) of the TFEU (2016/C 262/01), (OJ C 262, 19.7.2016, p. 1).

26. Notion of Aid Communication, para. 74.

27. See, e.g., Commission Decision SA.9545 of 11 April 2000 – *Centrale del Latte di Roma*, para. 36 (OJ L 265, 19.10. 2000, p. 15).

28. Judgment of the General Court in Joined Cases T-228/99 and T-233/99 of 6 March 2003 – *WestLB v. Land Nordrhein-Westfalen* [2003] ECR II-0435; ECLI:EU:T:2003:57, paras 314 et seq.

indications that the Member State behaves differently from a private vendor, a notification to the Commission and an assessment of the compatibility of the privatisation with State aid rules is required.

Whether a dysfunctional market or market failure exists (e.g., temporarily depressed prices due to market turbulence or excessive risk aversion on the part of investors) is irrelevant to the presence of aid and can only be considered during the later compatibility assessment.<sup>29</sup> Positive external effects which can be achieved through the sale are equally irrelevant for the assessment of whether the privatisation involves the granting of aid but may become relevant when considering whether the aid is compatible with the common market.

The Commission's practice to date indicates that the behaviour of the Member State is no longer judged only by reference to the behaviour of an investor pursuing a global or sectoral policy, guided by long-term profitability considerations.<sup>30</sup> It is now further expected that the State behaves like a prudent investor who seeks to limit, on a case-by-case basis, the investment risk as much as possible.<sup>31</sup>

Long-term and strategic considerations are to some extent recognised by the Commission, but such considerations have to be set out in detail by the Member State.<sup>32</sup> This has been confirmed by the European Court of Justice ('the Court'),<sup>33</sup> which takes the position that, when applying the MEVP, only the benefits to and obligations of the State in its role as the shareholder may be taken into account and compared to the behaviour of an investor seeking to make a profit. In general, if the State pursues objectives other than that of profit making (considering the degree of risk), it does not behave like a private operator but exercises its prerogatives as a public authority that grants State aid.<sup>34</sup>

29. 'Note that the presence or absence of a dysfunctional market or market failure (e.g. temporarily depressed prices due to negative externalities and excessive risk aversion) is irrelevant for determining the presence or absence of aid. However, market failures or other potential aid justifications can be taken into account when deciding on the compatibility of the aid': see Guidance Paper, p. 9.

30. This was still the case in Judgment of the European Court of Justice C-305/89 of 21 March 1991 – *Italy v. Commission (Alfa Romeo)*, [1991] ECR I-1603; ECLI:EU:C:1991:142, para. 20.

31. Commission Decision SA.28507 of 20 April 2011 – *Treves*, paras 71 et seq. (OJ L 274, 19.10.2011, p. 1). See also Judgment of the General Court in Joined Cases T-228/99 and T-233/99 of 6 March 2003 – *Westdeutsche Landesbank Girozentrale v. Commission* [2003] ECR II 0435; ECLI:EU:T:2003:57, paras 314 et seq.

32. Judgment of the General Court in Joined Cases T-228/99 and T-233/99 of 6 March 2003 – *Westdeutsche Landesbank Girozentrale v. Commission* [2003] ECR II-435; ECLI:EU:T:2003:57, para. 270. See also Friederiszick, H.W. & Troege, M. (2006), Applying the Market Economy Investor Principle to State Owned Companies: Lessons Learned from the German Landesbanken Cases, *Competition Policy Newsletter*, 2006, 1, 105-110.

33. Judgment of the European Court of Justice in Joined Cases C-214/12 P, C-215/12 P and C-223/12 P of 24 October 2013 – *Bank Burgenland v. Commission* [2013] ECR I-0000; ECLI:EU:C:2013:682, which refers to the judgment of the Court of Justice C-124/10 P of 5 June 2012 *Commission v. EDF* [2012] ECR I-0000; ECLI:EU:C:2012:318.

34. Joined Cases C-214/12 P, C-215/12 P and C-223/12 P of 24 October 2013 – *Bank Burgenland v. Commission* [2013] ECR I-0000; ECLI:EU:C:2013:682, para. 56.

### **3.1.2 Considering Previous Investments by the Member State**

In particular, in the context of preparatory measures to privatisations (e.g., a further capital increase before the sale of the company), the question may arise whether previous investments by the Member State in the company may be considered in a MEOP assessment. Even after the *WestLB* decision, it was not entirely clear to what extent shareholder effects could play a role, but in the Notion of Aid Communication it has been clarified that prior economic exposure to a company, in particular through a position as an equity holder or prior loans or guarantees, should be taken into account when assessing the MEVP.<sup>35</sup> If the Member State owns shares in a company, it will have an increased interest in making further investments to maintain the company as a going concern, as it will otherwise not only lose the return on any additional investment but also any earlier investments.

### **3.1.3 Considering Previous Investments by the Member State That Included State Aid?**

Considering previous investments in a subsequent MEVP assessment relating to a new measure has been limited in some decisions to constellations where the previous investment did not include any State aid. Such a scenario may also arise in the context of privatisations where the Member State has previously granted State aid to the company that shall be privatised. The Court has held that when analysing the inherent economic rationale of a measure in order to determine whether a private investor would have behaved in the same way as the State, risks arising for that Member State from the previous grant of State aid cannot be taken into account. This became apparent in the *Commission/FIH* case, where the Court analysed, in essence, whether the sale of a ‘bad bank’ (i.e., an entity to which the most problematic mortgage loans and derivatives with a nominal value of EUR 2.3 billion) for EUR 268 million by FIH, a Danish bank that was in financial difficulties, to a financial stability company, a public body set up by Danish authorities in the context of the global financial crisis, constituted State aid in 2013. Already previously, in 2009, the Danish State had granted FIH a EUR 255 million capital injection and a EUR 6.71 billion State guarantee, which were notified to and approved by the Commission as State aid. On the assessment of the sale of the ‘bad bank’, the Court supported the Commission’s conclusion that this sale constituted State aid because a private investor wouldn’t have taken part in this operation, due to the insufficient level of remuneration. In this assessment, the Court didn’t take into account the possible cost that the Danish State would have had to bear in the absence of the transfer of the ‘bad bank’ to the Danish State and a potential default of FIH. The Court therefore concluded that in the MEOP assessment on the sale of the ‘bad bank’, the financial stability body (i.e., the Danish State) cannot take into account the risks for the Danish State resulting from a potential default of FIH, the seller of the ‘bad bank’, in a ‘counterfactual scenario’, i.e., if the ‘bad bank’ wasn’t sold and

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35. Notion of Aid Communication, para. 106.

FIH would default, thereby leading to an effective call on the guarantee by the other creditors.<sup>36</sup>

However, the Court has also held that any shareholder may wish to renegotiate the conditions of their redemption and that the State's behaviour in such a scenario has to be compared with that of a hypothetical private investor. The amendment to the repayment terms of a capital injection must satisfy an economic rationality test. A private investor would also accept an amendment to the repayment terms if this increases the prospects of obtaining repayment. In the *Commission/Netherlands*<sup>37</sup> case, the Netherlands had injected in an 'initial measure' in 2008 EUR 10 billion in capital to ING by subscribing 1 billion shares without voting rights or dividend entitlement at an issue price of EUR 10. It had been agreed that ING could either repurchase the shares at EUR 15, or the shares would be converted into ordinary shares after three years, in which case the Netherlands could in turn require ING to redeem the shares at EUR 10 per share plus accrued interests. The Commission considered the initial measure to include State aid, but to be compatible with the internal market. In a 'second measure' in 2009 that mainly involved an impaired asset transaction, the Netherlands also agreed with ING on an amendment of the repayment terms of the shares, pursuant to which ING could repay 50% of the shares at an issue price of EUR 10 plus interest plus an early repayment penalty if the share price trades above EUR 10. The Commission considered the amendment to the repayment terms to constitute State aid, with the exact aid amount depending on the share price and without analysing whether a private investor may have agreed to the amendment. However, the General Court and the Court held that the Commission must analyse whether '*the amendment to the repayment terms of the capital injection has satisfied an economic rationality test whether a private investor might also be in a position to accept such an amendment, in particular by increasing the prospects of obtaining the repayment of that injection*'. on substance, the Court thereby argued that even though a previous investment constituted State aid (the initial capital injection), a subsequent State measure (the renegotiation of the repayment terms) can be assessed on the basis of the MEOP, thereby implicitly taking the previous State aid measure into account.

The Court's (subsequent) judgment in the *Commission/FIH* case appears to contradict the conclusions of the *Commission/Netherlands* case. In *Commission/FIH*, the Court has held that previous State aid must not be taken into account in a subsequent MEOP assessment. In both decisions, the first measure involved State aid, and in the *Commission/FIH* decision the Court even pointed out that the State had not pursued, even in part, a profit objective in the first measure (a State guarantee).<sup>38</sup> A profit objective was not discussed for the first measure (a capital increase) of the *Commission/Netherlands* case either, though. Both decisions argue that an MEOP assessment has to be made to assess a subsequent (second) measure, which was made

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36. Judgment of the European Court of Justice C-579/16 P of 6 March 2018 – *Commission/FIH and others*, paras 2 et seq., 63 et seq.

37. Judgment of the European Court of Justice C-224/12 P of 3 April 2014 – *Commission/Netherlands and others*, paras 4-19, 35 et seq.

38. Judgment of the European Court of Justice C-579/16 P of 6 March 2018 – *Commission/FIH and others*, para. 61.

in different contexts in the two decisions: In the *Commission/FIH* case, the Court points out that ‘*in the case giving rise to the judgment of 3 April 2014, Commission v. Netherlands and ING Groep in contrast to the present case [Commission/FIH], the beneficiary of the previous aid was not, at the time when those amendments were contemplated, in financial difficulties affecting the continuous functioning of their operations and that those amendments did not involve a bail out by means of significant public investment*’.<sup>39</sup> In this regard, the Court argued that in the *Commission/Netherlands* case, the ‘*amendments were intended, in particular, to encourage the undertaking receiving the aid to make early repayment of the capital injected and to increase the chances for the Dutch State to be satisfactorily remunerated, which the initial conditions did not in any event guarantee*’.<sup>40</sup> The Court ultimately differentiated in the *Commission/FIH* judgment between the State acting as a public authority and investor, and argued that these two spheres should be kept separate in an MEOP assessment: ‘*It follows that the risks to which the State is exposed and which are the result of State aid that it has previously granted are linked to its actions as a public authority and are not among the factors that a private operator would, in normal market conditions, have taken into account in its economic calculations.*’<sup>41</sup>

It can be argued that there are factual differences between the facts in the *Commission/FIH* and *Commission/Netherlands* judgments. First, the beneficiary’s financial position at the time when the second measure was taken was close to default in the *Commission/FIH* case, whereas this wasn’t the case in the *Commission/Netherlands* judgment. Second, the second measure involved an amendment to the first measure (amendment of the repayment terms) in the *Commission/Netherlands* case, while the second measure consisted of a completely new measure (sale of the ‘bad bank’, which is unrelated to the initial guarantee) in the *Commission/FIH* judgment. However, the factual differences don’t warrant a fundamentally different treatment, neither from a legal nor an economic perspective. There remains a contradiction in the legal test applied by the Court in the two judgments, namely that in one case a previous State aid measure was considered in an MEOP test (*Commission/Netherlands*), and in the other case not (*Commission/FIH*).

However, in most cases where State aid has been granted to a beneficiary (in particular in the context of restructuring aid) the Member State and the beneficiary have to accept certain commitments (in particular relating to the principles of ‘burden sharing’ and ‘restoring long-term viability’). From an economic point of view, these commitments are designed and have the effect of a compensation which the beneficiary of the aid ‘pays’ in return for receiving State aid. For example, the burden-sharing rules require the beneficiary to pay ‘an adequate remuneration for State interventions’, and the rules on long-term viability are designed to enable the beneficiary to ‘cover all its costs including depreciation and financial charges and provide an appropriate return

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39. *Ibid.*, para. 69.

40. *Ibid.*, para. 70.

41. *Ibid.*, para. 58.

on equity taking into account the risk profile of the bank'.<sup>42</sup> These are measures which a private investor that grants a capital increase would equally require or impose on the company. Restructuring State aid therefore evidently comes with a *quid pro quo*. The general statement that previous State aid cannot be taken into account in a subsequent MEOP assessment appears questionable against this background, as the previous State aid was also compensated by the beneficiary who accepted certain conditions that have the effect of an economic reward for the State as an investor.

### 3.1.4 *Considering Broader Policy Concerns in the MEVP*

A State acting as a private operator may reasonably be acting with respect to broader concerns. For example, while positive employment effects have not been accepted as a rationale for accepting a lower price in a privatisation, one may argue that a State, acting like a private operator with respect to its *entire* income and balance sheet, in reality, has a broader exposure to risks than a private shareholder, namely through the potential costs of paying for unemployment support to dismissed employees or through impacts on tax revenues from different plans of some acquirers compared to others. The foreseeable costs of unemployment from one acquirer compared to another would seem to be a part of the legitimate calculus of a State qua private operator, given that private investors would consider their entire income and balance sheet effects; such a possibility has not been included in the narrowly stated MEVP.<sup>43</sup>

However, such a broader understanding of the MEOP has been previously rejected by the Court, which explicitly held that 'a distinction must be drawn between the obligations which the State must assume as owner of the share capital of a company and its obligations as a public authority. Since the three companies in question were constituted as limited companies, the [...] owner of the share capital, would only have been liable for their debts up to the liquidation value of their assets. That means in the present case that the obligations arising from the cost of redundancies, payment of unemployment benefits and aid for the restructuring of the industrial infrastructure must not be taken into consideration for the purpose of applying the private investor test'.<sup>44</sup>

As follows from the Commission's decision practice, the fact Member States also pursue public policy objectives while carrying out transactions under market terms

42. See, *inter alia*, Communication from the Commission on the application, from 1 August 2013, of State aid rules to support measures in favour of banks in the context of the financial crisis (2013/C 216/01) ('Banking Communication'), paras 15 et seq., and Commission communication on the return to viability and the assessment of restructuring measures in the financial sector in the current crisis under the State aid rules (2009/C 195/04) ('Banking Restructuring Communication'), paras 9 et seq. See Mavroghenis, S., A. Kontosakou & D. Magos (2024), *Aid in the Banking Sector*, in Chapter 23 of this book.

43. In this respect, it is interesting to note that in approving buyers in the context of bankruptcies, the relevant commerce judges can and do, at times, consider employment effects, as these are both a legitimate state public interest and state financial interest. The rationale is unclear for excluding such a consideration for privatisations.

44. Judgment of the European Court of Justice in Joined Cases C-278/92, C-279/92, C-280/92 of 14 September 1994 – *Spain/Commission*, para. 22.

does not exclude the applicability of the MEOP (please see below section 6.3 for more detail).

### **3.1.5 Burden of Proof in the MEVP**

In relation to the burden of proof, whether the conditions of the MEOP, including the MEVP, are met, the Court recently ruled that the Commission has to carry out an overall assessment, taking into account ‘*all relevant evidence in the case enabling it to determine whether the recipient company would manifestly not have obtained comparable facilities from such a private operator*’.<sup>45</sup> For this reason, the Commission has to gather the relevant evidence and also consider the developments which were foreseeable at the time when the decision to implement the measure at issue was taken. The Commission must ask the Member State to provide it with all the relevant information enabling it to determine whether the conditions of the MEOP are met. Even if a Member State does not cooperate and does not provide the information requested, the Commission must base its decisions on reliable and coherent evidence which provides a sufficient basis for concluding that an undertaking has benefited from an advantage.<sup>46</sup>

## **3.2 Possible Preparatory Measures in Advance of Privatisation**

### **3.2.1 General Principles Regarding Preparatory Measures**

Preparatory measures may be important in advance of a privatisation; in particular if the State decides to restructure the State-owned enterprises to be privatised to increase investor interest. Such preparatory restructuring measures (e.g., write-off of State debt, debt-to-equity or asset conversions and capital increases) can comprise State aid elements. If so, the rules on rescue and restructuring aid schemes (in particular the Guidelines on State aid for rescuing and restructuring non-financial undertakings in difficulty<sup>47</sup> and the rules specific to the rescue and restructuring of banks)<sup>48</sup> must be applied.

In the context of preparatory restructuring measures,<sup>49</sup> the MEOP usually applies in form of the ‘Market Economy Creditor Principle’ (‘MECP’), since the Member State is often in the position of a creditor.<sup>50</sup> Preparatory restructuring measures that are in line with MECP do not involve State aid, with the general principles of the MECP being established decision practice by the Court and the Commission.

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45. Judgment of the European Court of Justice C-244/18 P of 26 March 2020 – *Larko/Commission*, paras 65 et seq.

46. *Ibid.*, paras 65 et seq.

47. R&R Guidelines.

48. Banking Communication.

49. See also Soltész, U. & F. Maier-Rigaud (2024), Rescue and Restructuring Aid, in Chapter 13 of this book.

50. This principle was recognised in Judgment of the European Court of Justice C-342/96 of 29 April 1999 – *Spain v. Commission* [1999] ECR I-2459; ECLI:EU:C:1999:210, para. 46.

Preparatory restructuring measures are in line with MECP if the creditor (State) is better off with the restructuring measure than it would be without it.<sup>51</sup> For example, a settlement of old public debt of the company to be privatised satisfies the MECP if this is a pre-requisite to sell the company and the only viable alternative would be to liquidate the company, and the liquidation proceeds (accruing to the State as a creditor) would be lower than the privatisation proceeds (accruing to the State as a shareholder and the holder of any remaining debt).<sup>52</sup> In that situation, the Member State is better off by selling, and waiving some of the outstanding liabilities, rather than by liquidating the company. The same applies to a debt-to-equity swap, which is market conform if the creditor could not reasonably expect to recover a higher amount under bankruptcy proceedings.<sup>53</sup> Moreover, a capital increase may be compliant with State aid principles if the additional costs are covered by the additional proceeds, e.g., by means of a subsequent initial public offering ('IPO').<sup>54</sup>

In any event, it is appropriate – and recommended in the Guidance Paper – to discuss potential State aid issues with the Commission up-front during the preparatory phase of the privatisation. Past experience has shown that close coordination with the Commission is important in order to avoid delays in the implementation of the entire privatisation programme.<sup>55</sup> Moreover, as will be set out in section 5 below, clarity on State aid issues increases legal certainty, which is important for investor interest and therefore a key element to successful privatisation. It is in fact crucial for the seller's credibility, and the overall success of the transaction, that State aid issues do not arise during the privatisation process. By clearing all issues upfront with the Commission, the likelihood of complaints or recovery demands is reduced and the State ultimately ensures that the sale is successful and the privatisation proceeds are maximised.

### 3.2.2 *Special Cases of Preparatory Measures*

#### 3.2.2.1 *Extension of Exclusive Rights*

In some cases, the potential extension of exclusive rights prior to a privatisation may be relevant. In its decision regarding the *Greek gambling monopoly*<sup>56</sup> which concerned the prolongation of the exclusive gambling rights of OPAP (the monopoly holder) in return for a payment to the State of a consideration prior to its privatisation, the Commission held that the extension of exclusive rights must be remunerated at market price, even if the added value would likely be covered (i.e., returned to the state) by the expected higher sales proceeds in the subsequent privatisation. In fact, the Commission analysed separately whether the notified arrangements for the extension of OPAP's exclusive rights conferred an economic advantage to OPAP within the meaning of Article 107(1)

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51. This is in line with the position taken in the Notion of Aid Communication, section 4.2.3.

52. Commission Decision SA.25459 of 4 August 2010 – *PZZ Hydral*, paras 201 et seq. (OJ L 298, 16.11.2010, p. 51).

53. *Ibid*, para. 248.

54. *Ibid*, paras 231 et seq.

55. See, e.g., the privatisation programs for Greece and Portugal.

56. Commission Decision SA.33988 of 3 October 2012 – *OPAP* (OJ C 1, 4.1. 2013, p. 8).

TFEU, without taking into account the possibly higher sales price due to the extension of the rights. The Commission required that the remuneration for the exclusive right consists of its total value, minus a 'reasonable profit'.<sup>57</sup> In conclusion, the Commission analysed whether each transaction separately was market conform.

### 3.2.2.2 *Capital Increases for Subsidiaries*

In relation to the implementation of restructuring measures in the banking sector, the Commission has recognised that a capital increase by a public banking group in one of its subsidiaries does not include State aid if this is a necessary preparatory measure in advance of the sale of the subsidiary and if such a sale would otherwise not be possible.<sup>58</sup> This approach is in line with the general principle that the investment overall makes sense from a business logic (MEVP).

### 3.2.2.3 *Compensation for 'Legacy Costs'*

A considerable proportion of privatisations has occurred in economic sectors that have been subject to a process of liberalisation, such as the postal sector, the energy sector (notably electricity generation), and the air transport sector. Often these liberalisation processes were driven by policy initiatives at the EU level. A question frequently asked in relation to the privatisation of State-owned enterprises in this context (but also in relation to firms that stay in public ownership) is whether the State may compensate for so-called legacy costs. An important example of legacy costs relates to pension liabilities.<sup>59</sup> This concerns the comparatively high (and increasing) pension costs borne by certain (formerly) State-owned companies linked to the status or high number of (former) employees as public officials. As a result of these rather 'abnormal' costs (not faced by private companies), the companies in question would not be able to compete in a liberalised market context. One common form of compensation for legacy costs is the transfer of pension liabilities to the State.<sup>60</sup>

Whether an economic advantage is granted by the State by taking over liability for these pension charges depends on the question of whether the State acts like a market economy operator, i.e., whether the MEOP is satisfied. The key question is

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57. *Ibid.*, paras 28 et seq. (OJ C 1, 4.1. 2013, p. 8).

58. For example, the preparation of sale of MKB by BayernLB, Commission Decision SA. 28487 of 5 February 2013 – *BayernLB* (OJ L 109, 28.4.2015, p. 1).

59. Another important example of 'legacy costs' are the 'stranded costs' which can occur in liberalisation cases in the energy sector due to existing investments in infrastructure for the incumbent utility that may become redundant in a competitive environment. This chapter focuses, however, on the pension cost example.

60. See, e.g., decisions relating to the post sector: in particular Commission Decision SA.21240 of 10 October 2007 – *La Poste* (OJ L 63, 7.3.2008, p. 16); Commission Decision SA.14588 of 25 January 2012 *De Post-La Poste (now bpost)* (OJ L 170, 29.6.2012, p. 1); Commission Decision SA.17653 of 25 January 2012 – *Deutsche Post* (OJ L 289, 19.10.2012, p. 1); Commission Decision SA.31479 of 21 March 2012 – *Royal Mail* (OJ L 279, 12.10.2012, p. 40); for a comprehensive overview on the this, see also Conte, G. & M. Khalil (2024), Advantage, in Chapter 2 of this book.

whether a private operator would have accepted the conditions under which the State took over the pension costs.<sup>61</sup>

In case the measure is not in line with MEOP, it may still be argued that, by taking over liability for these pension costs, the State is covering a disadvantage which is unique to that company (because of the historical context) and which a private company would not face in the first place. It could be argued that offsetting this disadvantage would not amount to an economic advantage, and therefore not constitute State aid, within the meaning of EU State aid rules. The General Court has in fact accepted this reasoning in the past (in its *Combus* judgment of 2004) and has agreed that the State may cover pension costs if this is necessary to alleviate the company from ‘structural disadvantages’ (linked to a context of a previously non-liberalised sector) which it has compared to its private competitors.<sup>62</sup>

This reasoning has not been confirmed by the Court. The Commission has mostly tended to conclude that the transfer of pension costs leads to an economic advantage, as it relieves the company of pension costs the company normally has to bear itself, and therefore constitutes State aid.<sup>63</sup> In other words, instead of assessing whether the measure gives an advantage with respect to its competitors, the Commission applies a ‘before-after’ comparison, to see whether the company is better off with the measure than without.<sup>64</sup> Under this approach, which has been applied in the *Belgacom* case (albeit without any privatisation context), offsetting legacy pension liabilities without State aid requires that the transfer of pension liabilities (from Belgacom to the State pension scheme) is financially neutral, which was ensured by Belgacom paying a compensation in the amount of the net present value of the transferred liabilities to the State pension scheme.<sup>65</sup> While the Commission appeared to have considered the

61. The Commission has accepted this in its Decision SA.16878 of 21 January 2004 – *Belgacom*, paras 21 et seq. The Commission decided that the transfer of pension obligations for Belgacom’s statutory employees to the Belgian State did not involve State aid. The transfer was financially neutral, as Belgacom paid the Belgian State an amount corresponding to the net present value of the obligations taken over by the Belgian State, in exchange for the transfer of its pension obligations to the Belgian State.

62. Judgment of the General Court T-157/01 of 16 March 2004 – *Danske Busvognmoend v. Commission* (‘*Combus*’) [2004] ECR II-917; ECLI:EU:T:2004:76, para. 57.

63. See, e.g., Commission Decision SA.19790 of 10 May 2007 – *OTE*, para. 100 (OJ L 243, 11.9.2008, p. 7); Commission Decision SA.14588 of 25 January 2012 *De Post-La Poste (now bpost)* (OJ L 170, 29.6.2012, p. 1). Commission Decision SA.17653 of 25 January 2012 – *Deutsche Post*, para. 263 (OJ L 289, 19.10.2012, p. 1); Commission Decision SA.31479 of 21 March 2012 – *Royal Mail*, para. 144 (OJ L 279, 12.10.2012, p. 40); Commission Decision 2009/703/EC of 11 February 2009 – *United Kingdom of Great Britain and Northern Ireland – Crown guarantee to British Telecommunications* (OJ 2009 L 242, p. 21); Commission Decision 2012/540/EU of 20 December 2011 – Reform of the arrangements for financing the retirement pensions of civil servants working for France Télécom implemented by the French Republic in favour of France Télécom; Commission Decision SA.17653 of 7 February 2020 – *Germany’s measure in favour of Deutsche Post AG*.

64. Commission Decision SA.19790 of 10 May 2007 – *OTE*, paras 96 et seq. (OJ L 243, 11.9.2008, p. 7) and Commission Decision SA.21240 of 10 October 2007 – *La Poste (France)*, paras 146 et seq. (OJ L 63, 7.3.2008, p. 16). In the *OTE* case, the Commission however left open the question whether the measure constituted aid, given that the measure would be compatible in any event.

65. Commission Decision SA.16878 of 21 January 2004 – *Belgacom*, paras 23 et seq.

*Combus* judgment not to be of major relevance in some cases,<sup>66</sup> the Commission has applied the *Combus* reasoning in the recent *Deutsche Post* decision,<sup>67</sup> as requested by the General Court in its judgment in the same matter.<sup>68</sup> The Notion of Aid Notice appears to dismiss the relevance of the *Combus* judgment (cf. footnote 113).

The *Combus* approach is not without complications. It requires a comparison with a private company in order to be aid free. This may be quite difficult in former monopoly areas, such as the postal sector, where there are no private companies in a comparable legal and factual situation to the company to be privatised.<sup>69</sup> The Commission therefore may have shied away from applying such a comparison in the past,<sup>70</sup> thus finding an advantage as soon as the company is exempted from costs which it normally, in the existing legal context, would have had to bear. However, in the recent *Deutsche Post* decision in which the Commission applied the *Combus* reasoning, the Commission analysed in a first step the level of wage-based social security contributions of other undertakings in the mail/parcel sector, then, in a second step, it established the level of wage-based social security contributions which *Deutsche Post* bears for its civil servants, and then, as a third step, compared the two levels. When doing this assessment, the Commission ultimately concluded that no advantage for *Deutsche Post* could be found.<sup>71</sup>

While recognising the difficulties involved in finding comparable private operators, economic arguments could suggest no harm in principle from a State covering pension obligations down to the level of pensions that would be covered by a private operator. However, compensating the company for comparatively high pension costs is only one side of the coin and may still leave the company with an advantage. More generous overall compensation packages may lead to less staff turnover, for instance.

As indicated, the *Combus* judgment was never confirmed by the Court. Generally, it has to be noted however that there are diverging decisions by the European Courts in relation to considering legacy costs. The Court appears to have confirmed the Commission's more cautious approach in the *British Telecommunications* case, where it noted that the exemption from the obligation to pay a contribution to a pension protection fund qualified as State aid within the meaning of Article 107(1) TFEU, irrespective of the question whether private companies face lower pension charges or

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66. See, e.g., Commission Decision SA.19959 of 11 December 2007 – *Tieliikelaitos/Destia*, para. 247 (OJ L 270, 10.10.2008, p. 1); Commission Decision SA.17653 of 25 January 2012 – *Deutsche Post*, para. 262 (OJ L 289, 19.10.2012, p. 1).

67. Commission Decision SA.17653 of 7 February 2020 – *Germany's measure in favour of Deutsche Post AG*.

68. Judgment of the General Court T-143/12 of 14 July 2016 – *Germany/Commission*.

69. Commission Decision SA.21240 of 10 October 2007 – *La Poste*, paras 119 et seq. (OJ L 63, 7.3.2008, p. 16).

70. See, e.g., Commission Decision SA.17653 of 25 January 2012 – *Deutsche Post*, para. 263 (OJ L 289, 19.10.2012, p. 1): In this decision the Commission once more takes the view that liabilities a company bears under employment legislation or collective agreements with trade unions, such as pension costs, are part of the normal costs of a business which a firm has to meet from its own resources. Those costs, even if they stem from arrangements decided upon in a previous and different context, are to be considered inherent to the economic activity of the company.

71. Commission Decision SA.17653 of 7 February 2020 – *Germany's measure in favour of Deutsche Post AG*, paras 90, 112.

not. In this case, also the General Court had previously concluded that the measure constituted State aid, apparently deviating from its argumentation in the *Combus* case.<sup>72</sup> Similarly, in the *Orange* case, the General Court and the Court held that the effects of a measure, but not their aims are relevant to assess whether the transfer of liabilities to a State pension scheme amounts to State aid, and that the measure at hand does not fulfil the criteria of a service of general economic interest.<sup>73</sup>

However, the General Court subsequently followed the same approach as in its *Combus* judgment in the *Deutsche Post* case. It held that in order to argue that the transfer of pension costs to the State constitutes State aid ‘*the mere assertion that the pension costs are part of the costs which are normally included in the budget of an undertaking was not sufficient to establish the existence of a real economic advantage in favour of Deutsche Post*’. To establish whether there is an advantage, a comparison with the burdens which an undertaking must ‘normally’ pay with regard to private employees should have been made.<sup>74</sup> The Commission subsequently did not appeal the General Court’s decision, and applied the *Combus* reasoning in its subsequent decision, as laid out above.

In light of these diverging decisions by the European Courts – which were, of course, based on very different sets of facts in the various cases – there remains some uncertainty about whether transferring legacy costs amounts to State aid. In summary, there are two judgments by the Court that support the Commission’s approach (*British Telecommunications* and *Orange*), in both decisions the General Court previously also concluded there was State aid. However, there are also two judgments by the General Court which state that compensating for legacy costs does not amount to an advantage (*Combus* and *Deutsche Post*), which were not appealed by the Commission. The Commission itself has mostly applied a strict economic analysis of the transferring measure in a ‘before-after’ analysis without taking into account the costs that a private company in the same or a comparable sector usually has to bear. Under this approach, a State aid free way to compensate for legacy costs is illustrated in the *Belgacom* case mentioned above. However, in its most recent decision in *Deutsche Post*, it followed the General Court and applied the *Combus* reasoning.

Irrespective of the above, it is important to note that the question of whether legacy costs constitute a ‘special charge’ can play a role in the compatibility assessment under Article 107(3)(c) TFEU. If a measure which allegedly constitutes State aid is compatible with the common market, it is irrelevant whether the measure in fact constitutes State aid or not,<sup>75</sup> albeit the Commission must not leave open, under recent

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72. Judgment of the European Court of Justice C-620/13 P of 22 October 2014 – *British Telecommunications* ECLI:EU:C:2014:2309; See also Judgment of the General Court in Joint Cases T-226/09 and T-230/09 of 16 September 2013 – *British Telecommunications plc and others v. Commission* [2003] ECR I-000; ECLI:EU:T:2013:466; with annotation from A. von Bonin & A. Rodenhäuser in *EStAL*, Issue 3/2014, pp. 598-605.

73. Judgment of the European Court of Justice C-211/15 P of 26 October 2016 – *Orange/Commission*, paras 42 et seq.

74. Judgment of the General Court T-143/12 of 14 July 2016 – *Germany/Commission*, paras 151 et seq.

75. See Commission Decision SA.19790 of 10 May 2007 – *OTE*, para. 102 (OJ L 243, 11.9.2008, p. 7).

case law of the General Court, whether a measure constitutes State aid or not.<sup>76</sup> Of course, this presupposes that the rules on compatibility are not overly strenuous from the point of view of the Member State so that compliance with these rules does not cause any real burden for the Member State. Otherwise, the aid vs. no aid question is relevant as the Member State might prefer pursuing a ‘no-aid status’ to a compatibility decision.

In a restructuring situation, the compensation of pension charges can be compatible with the common market based on Article 107(3)(c) TFEU in connection with the Rescue and Restructuring Guidelines.<sup>77</sup> Where compensation of pension charges takes place in any other context, Article 107(3)(c) TFEU can be directly applicable.<sup>78</sup>

A transfer of pension costs can only be compatible with the common market if the measure is not contrary to the common interest within the meaning of Article 107(3)(c) TFEU.<sup>79</sup> In addition, the measure must be necessary for the privatisation of the State-owned enterprise and compensate for the competitive disadvantages of the State-owned enterprise compared to its private competitors. Only measures that are necessary for the company to compete with its competitors are permissible. The compensation must not exceed the required amount to counterbalance the additional costs when comparing the company to be privatised to its competitors. In this regard, the proportionality assessment follows three steps:<sup>80</sup>

- (1) the level of pension charges (e.g., as a % of the wage cost) must be determined which other comparable companies in the same industry would need to cover;
- (2) the higher pension level must be determined which the beneficiary company needs to pay for its officials (e.g., as a % of the wage cost); and
- (3) both levels must be compared to each other to determine the amount that goes beyond the ‘normal’ costs, thereby representing the maximum reimbursable amount.

In summary, measures undertaken with respect to legacy costs will mostly constitute State aid according to the Commission’s decision practice. Some of these measures are held to be compatible with the common market, while others are not. A

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76. Judgment of the General Court T-469/20 of 16 November 2022 – *Netherlands/Commission*, para. 71.

77. Commission Decision SA.31479 of 21 March 2012 – *Royal Mail*, paras 203 et seq. (OJ L 279, 12.10.2012, p. 40).

78. For example, Commission Decision SA.17653 of 25 January 2012 – *Deutsche Post*, paras 288 et seq. (OJ L 289, 19.10.2012, p. 1).

79. For example, the Commission has several times taken the position that the liberalisation of the postal services contributes to the attainment of an objective of common interest (e.g., in the *Deutsche Post* decision). See Commission Decision SA.17653 of 25 January 2012 – *Deutsche Post*, paras 293 et seq. (OJ L 289, 19.10.2012, p. 1).

80. Commission Decision SA.17653 of 25 January 2012 – *Deutsche Post*, para. 299 (OJ L 289, 19.10.2012, p. 1); Judgments of the General Court T-135/12 of 26 February 2015 – *France v. Commission* [2015] ECLI:EU:T:2015:116 and T-385/12 of 26 February 2015 – *Orange v. Commission* [2015] ECLI:EU:T:2015:117.

higher level of caution is therefore advisable when adopting measures which mitigate the charges that companies would ordinarily have to bear.

### 3.3 State Aid Requirements with Regard to the Privatisation Process

In its Guidance Paper, the Commission refers to the principles in the XXIII Report on Competition Policy of 1993, which set out how the Commission applies State aid rules to the sale of State participations.<sup>81</sup> The principles, which are also retained in the Notion of Aid Communication,<sup>82</sup> specify three circumstances in which a privatisation process is presumed to be State aid compliant, and where a notification to the Commission is not required. These three scenarios are where the privatisation is made through a sale: (i) in the form of an IPO; (ii) of shares on the stock exchange; or (iii) through an open, transparent, unconditional and non-discriminatory bidding process. Besides, it has been acknowledged in the Commission's and the Court's case practice that the market conform purchase price can also be determined on the basis of an independent expert opinion.<sup>83</sup> The Court has also held that '*while it is clear that the best bid or an expert report are likely to provide prices corresponding to actual market values, it cannot be ruled out that other methods may also achieve the same result*'.<sup>84</sup> However, if a tender procedure has been carried out and offers have been submitted, the market price cannot be determined on the basis of an independent expert opinion (that considered a lower price) anymore.<sup>85</sup>

A sale on the stock exchange will often be inappropriate and may not always lead to the most desirable outcome for the sellers. For example, an IPO may be too costly an option given the (limited) size of the company in question. Also, potential acquirers may not be interested in acquiring shares in a publicly listed company – an IPO therefore may also reduce the interest in the company. Alternatively, the value of the company to be privatised may end up being too low, especially where it can be expected that private investors are willing to pay a premium for obtaining control over the company<sup>86</sup> or where the privatisation is taking place in adverse market conditions, such as during a financial crisis.

Therefore, a bidding process is often the more appropriate approach. A privatisation in the form of a bidding process does not involve State aid, provided that the tender is: (1) open;<sup>87</sup> (2) transparent<sup>88</sup> and non-discriminatory,<sup>89</sup> and (3) that it is not

81. Paragraphs 402 et seq. of the XXIII Report on Competition Policy 1993.

82. Notion of Aid Communication, section 4.2.

83. Commission Decision SA.9545 of 11 April 2000 – *Centrale del Latte di Roma*, para. 88 (OJ L 265, 19.10.2000, p. 15).

84. Judgment of the European Court of Justice C-239/09 of 16 December 2010 – *Seydaland/BVVG*, para. 39.

85. Judgment of the European Court of Justice in Joined Cases C-214/12 P and C-215/12 P of 24 October 2013 – *Land Burgenland/Commission*, para. 94.

86. This is the so-called control premium. See also Commission Decision SA.24127 of 27 February 2008 – *Automobile Craiova*, para. 52 (OJ L 239, 6.9.2008, p. 12).

87. This follows from the Commission's case practice: Commission Decision SA.9296 of 8 September 1999 – *Stardust Marine*, paras 66 et seq. (OJ L 206, 15.8.2000, p. 6); the tender must be sufficiently well publicised, see, e.g., Commission Decision SA.9545 of 11 April 2000 – *Centrale*

subject to any conditions that could negatively affect the purchase price. There should be sufficient time for the bidder to evaluate the offer (4) and the sale should be to the highest bidder (5).

### 3.3.1 Openness

The tender must be well publicised. It should be advertised over a reasonably long period in the national press, estate gazettes and/or other appropriate publications. Where European or international investors might also be interested in participating in the bidding process, the tender should be published in publications with regular international circulation. The tender should also be announced through agents addressing European and international clients.<sup>90</sup>

Where it is obvious that only a small group of bidders will be interested in the privatisation (and therefore wider publication would be pointless), it is sufficient to inform only this group of bidders, e.g., by way of a teaser.<sup>91</sup> However, the openness requirement is applied strictly; the Commission will treat it as unsatisfied even where all but one potential bidder were informed of the privatisation.<sup>92</sup>

There may also be constellations where due to the particularity of an asset or regulatory requirements, the interest in acquiring an asset by investors is limited to a single buyer (e.g., a buyer who already rents the asset or operates the business). In order to prevent the asset simply being sold to this buyer without going through a market check of the purchase price, it may be considered to organise a tender on the buyer's refinancing terms of the asset. Such a tender on the refinancing terms of the buyer's purchase of an asset can serve as a proof that the privatisation of the asset does not involve State aid if the purchase price for the asset is determined by the refinancing terms which result from an open, transparent and competitive tender process. In such a case, interest in the refinancing is a signal that there is a viable business, while there is no interest in the asset itself due to the particularity of the asset or regulatory requirements. The tendering can ensure that the terms of the sale are at market level.

From a business point of view, the question remains open of whether private sellers may prefer local purchasers at times. If so, a State might argue it is not opening up the sale to international buyers for similar reasons as private sellers. Private sellers

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*del Latte di Roma*, para. 82 (OJ L 265, 19.10.2000, p. 15), where publication in only two national newspapers was not considered to be sufficient; Commission Decision SA.11984 of 20 December 2001 – *Gröditzter Stahlwerke*, paras 15 and 42 (OJ L 105, 20.4.2002, p. 33).

88. Information must not selectively be made available to individual bidders, *see, e.g.*, Commission Decision C 2406/98 of 22 July 1998 – *Société de Banque Occidentale*, paras 25 et seq. (OJ L 103, 20.4.1999, p. 19).

89. Changes to contractual terms in the context of individual negotiations are, however, permitted provided that they comply with common business practice, *see* Commission Decision SA.24127 of 27 February 2008 – *Automobile Craiova*, para. 77 (OJ L 239, 6.9.2008, p. 12).

90. Guidance Paper, pp. 11 et seq.

91. This approach can be chosen if, due to the particularity of the asset, regulatory requirements or other case specific features, only a few potential purchasers exist.

92. *See* Commission Decision SA.9296 of 8 September 1999 – *Stardust Marine*, paras 66 et seq. (OJ L 206, 15.8.2000, p. 6).

could potentially prefer local buyers for a number of reasons. These could include: (i) local buyers may have lower transport costs or assets that allow them to predictably serve as the most profitable owners of the purchased company and its assets; (ii) a large category of bidders may not make sense in some transactions as the process would become too complicated, e.g., because it is clear from the beginning that local (or administrative/legal) knowledge is required; (iii) it is clear from the beginning that only certain bidders (with a specific business model or certain complementary capabilities) will be interested; and (iv) sales to a foreign buyer will create union problems for remaining activities of the seller or environmental considerations are more likely to be taken into account by a local buyer. These factors have not yet been recognised in the Commission's decision practice, however. Against the background that the main purpose of the MEVP is to induce the State to sell at the terms and conditions a private vendor would do as well, these considerations should be taken into account by the Commission.

### 3.3.2 *Transparency and Non-discrimination*

The requirements of transparency and non-discrimination are closely linked to each other. They both require that all bidders are equally notified of information which is relevant to the sales process, such as information on the evaluation of the target. If such information is provided selectively to certain bidders, the process runs a serious risk of being regarded as non-transparent or as discriminatory.<sup>93</sup>

It is therefore important that all necessary documentation and information is provided to all bidders so that they are in a position to evaluate the target company in an appropriate way. This is usually done by providing the bidders with an information memorandum and granting them access to an (electronic) data room, which contains detailed information on the target company and the transaction, such as the draft purchase agreement.

It is not clear whether the information memorandum and the information in the data room must be provided in English, in situations where international bidders participate in the bidding process. The Commission has thus far not provided any guidance in this regard. However, to comply with the transparency and non-discrimination requirements, it should be sufficient to provide the relevant information in its original language. Indeed, it may even be that the additional provision of an English translation could be regarded as positive discrimination in favour of English-speaking bidders as compared to other bidders, who may need to translate the information into their native language.

The principles of transparency and non-discrimination also require the Member State to adhere to the conditions set in the bidding process. In the *Nürburgring* case, one of the conditions of the bidding process was that the bidders must prove evidence that they secured financing of their offer. The successful bidder proved its financing by

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93. See Commission Decision C 2406/98 of 22 July 1998 – *Société de Banque Occidentale*, paras 25 et seq. (OJ L 103, 20.4.1999, p. 19).

providing a letter from Deutsche Bank that stated that ‘*Deutsche Bank is willing to underwrite a loan of 45 million EUR.*’ However, the letter contained an ‘*important notice*’ that stated that ‘*this term sheet is for discussion purposes only as it is not intended to create any legally binding obligations*’. The Court held that ‘*it is clear from that information that the letter from Deutsche Bank [...] did not impose any binding financing commitment*’. By giving the award to the successful bidder, instead of excluding it for failing to prove evidence on a secured financing, the Member State infringed the principles of transparency and non-discrimination.<sup>94</sup>

### 3.3.3 *Absence of Undue Conditions*

Conditions attached to the sale are generally viewed by the Commissions as problematic in a privatisation scenario. By imposing certain conditions that a market operator would not have imposed, in particular, conditions that limit the entrepreneurial freedom of the acquirer (e.g., the requirement to reach certain production levels in the future or to continue employing the entire workforce), the State potentially lowers the proceeds and foregoes additional revenue thereby bringing the sale within the scope of Article 107(1) TFEU.<sup>95</sup>

First, the Commission will view employment guarantees as forming a binding constraint on the buyer, as it requires the latter to run the acquired business in a different manner than it would have done in the absence of the condition.<sup>96</sup> Given that the potential buyer is unable to run the business as it sees fit, this likely reduces the sales price that may be obtained for the business and hence, entails a loss of resources for the State. Whether this entails an actual net loss of resources to the State is not certain, however, as one can think of the State as having a balance sheet and income statement that includes much more than the company being privatised, and the State may be obliged to provide unemployment support in case of redundancies, which counts as a cost to the State. As laid out in section 3.1.4 above, such wider considerations have not been recognised by the Court’s decision practice as regards the notion of aid under Article 107(1) TFEU, which is not to say they cannot be considered under the compatibility assessment under Article 107(3) TFEU.

Second, by imposing conditions potential investors may be deterred from submitting a bid in the first place, thereby arguably interfering with the competitive environment which may result in a situation where the highest bid does not necessarily represent the actual market value.

Third, undue conditions may lead to an advantage in favour of the privatised company (or the ‘economic activity’, in the Commission’s parlance) if they require that

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94. Judgment of the European Court of Justice C-647/19 P of 2 September 2021 – *Ja zum Nürburgring eV/Commission*, paras 82 et seq.

95. Commission Decision SA.24127 of 27 February 2008 – *Automobile Craiova*, para. 50 (OJ L 239, 6.9.2008, p. 12).

96. See Commission Decision SA.24127 of 27 February 2008 – *Automobile Craiova*, para. 52 (OJ L 239, 6.9.2008, p. 12). See also Commission Decision of 30 July 1996 – *Head Tyrolia Mares* (OJ L 25, 28.1.1997, p. 26) and Commission Decision SA.9545 of 11 April 2000 – *Centrale del Latte di Roma* (OJ L 265, 19.10.2000, p. 15) on the aid granted by Italy to Centrale del Latte di Roma.

the company will continue or expand its activities and it would not have had this possibility under normal market conditions. In its decision on the privatisation of Automobile Craiova in 2007, a Romanian car plant, the Commission took the position that the sales conditions which were imposed by the Romanian government directly benefitted the privatised company, given that the conditions attached to the sale would have led to certain production, investment and/or employment levels being maintained or even increased which would not have been achieved in the absence of the conditions.<sup>97</sup> While one may debate whether the company's viability is necessarily helped by the conditions imposed on it, one can indeed argue that they lead to 'favouring the production of certain goods' (cf. Article 107(1) TFEU), i.e., the economic activity pursued by the company. In addition, such conditions may benefit the various suppliers of the company in question, which see the demand for their products increase because of the conditions.

If conditions that lower the sales price do not specifically benefit the company to be privatised or its suppliers, but possibly the buyer who may benefit from reduced bidding competition, they do not lead to an economic advantage in favour of the company but rather the buyer who may end up paying a lower purchase price.

For the above reasons, conditions relating to the achievement of specified production levels are inadmissible, either because they lead to an advantage in favour of the company (i.e., its activities) or in favour of the buyer by adversely affecting the purchase price and deterring potential bidders from participating in the bidding process.<sup>98</sup> Moreover, conditions which limit the buyer's entrepreneurial freedom in an inappropriate way are generally inadmissible. This includes, *inter alia*, conditions which force the buyer to maintain or create jobs, commit to future investments and/or financing, source a certain percentage of raw materials from local producers, or maintain a local production location with the intention to protect the local market.<sup>99</sup> Such conditions are further inadmissible due to their discriminatory effect, as they may have the effect of reducing the number of potential bidders from the outset, benefitting individual bidders with a particular business model, or specifically excluding the participation of other potential bidders.<sup>100</sup>

In terms of recovery, if undue conditions are attached to the tender process, the Commission takes the view that the State foregoes revenues amounting to the difference between the market value of the company (i.e., the price that would have

97. Commission Decision SA.24127 of 27 February 2008 – *Automobile Craiova*, paras 45, 52, 66 and 80 (OJ L 239, 6.9.2008, p. 12). The Romanian authorities had attached specific conditions to the privatisation, in particular the achievement of a minimum production level of 200,000 cars in the fourth year after the privatisation, a minimum level of investments and the maintenance of all of the 3,900 employees. Ford Motor Company eventually bought the company for a price of EUR 57 million, while the Commission came to the conclusion that the market value of Craiova Automobile (absent conditions) was closer to EUR 84 million.

98. Commission Decision SA.24127 of 27 February 2008 – *Automobile Craiova*, paras 55 et seq. (OJ L 239, 06.09.2008, p. 12).

99. See Commission Decision SA.5706 of 8 July 1999 – *Gröditzter Stahlwerke*, para. 87 (OJ L 292, 13.11.1999, p. 27); Commission Decision SA.9545 of 11 April 2000 – *Centrale del Latte di Roma*, para. 91 (OJ L 265, 19.10.2000, p. 15).

100. See Commission Decision SA.9545 of 11 April 2000 – *Centrale del Latte di Roma*, para. 91 (OJ L 265, 19.10.2000, p. 15).

been obtained in the absence of the conditions) and the lower sales price actually received.<sup>101</sup> This amount has to be recovered from the company if the conditions benefit the company (which is typically the case in the context of conditions regarding production, employment or investment levels) or the buyer (insofar as the conditions have led to a ‘softer’ bidding competition). Either way, the buyer ends up paying the price of the cost of the conditions, directly or indirectly (as the equity value of the privatised company it has just bought will drop due to recovery).<sup>102</sup> The rationale of the Commission’s approach in this context is probably one of ‘deterrence’: by the prospect of recovery, it seeks to ensure that no State-owned company is sold for a price any lower than the intrinsic value of the company (without conditions). In this way, it tries to avoid that conditions are imposed in the first place. But, as we discuss in section 5 below, this approach has some drawbacks too, as it creates a degree of uncertainty for the buyer.

The Commission will not only assess the conditions expressly referred to in the offer but also look at de facto conditions which result, for example, from the design of the sales process in a way that excludes bidders by way of a certain sales strategy.<sup>103</sup> This increases the number of substantial issues related to imposing conditions on sales in the privatisation context.

Nevertheless, some limited conditions which correspond to usual market practice, such as to avoid purely speculative offers or to ensure the timely and secure payment of the purchase price, are acceptable. A condition is ultimately permissible if a private investor would also have reasonably imposed it. The Commission evaluates the impact of the conditions and whether they reduced the level of bids or whether the amount of the bid was pushed lower.<sup>104</sup> *E contrario*, this means that if a condition would be capable of pushing the purchase price up, it would be permissible under the private vendor test concept. Any conditions on potential bidders that are not customary in comparable transactions between private parties and capable of potentially reducing the sales price can amount to State aid. In this regard, the Commission has held in the *Kommunalkredit* case that also a private vendor would have excluded conditional price offers, as the disregard of conditional price offers avoids the seller’s future exposure to such risks.<sup>105</sup> Very often, private sellers also set certain conditions in sales processes such as continuing to grant access to IP or maintaining a supply relationship. The conditionality requirement was also considered satisfied by the Commission in the case of the imposition of protection clauses for tenants and employees of a to-be privatised

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101. Commission Decision SA.24127 of 27 February 2008 – *Automobile Craiova*, paras 81 et seq. (OJ L 239, 6.9.2008, p. 12).

102. Moreover, it makes little sense for the buyer to reduce its bid, as a ‘protective’ step: under the Commission’s approach, the recovery amount is a direct function of the level of the winning bid itself: the lower the price of the winning bid, the greater – by the very way it is calculated – the State aid element in the tender, and hence the potential recovery amount.

103. Guidance Paper, p. 12.

104. Judgment of the European Court of Justice in Joined Cases C-214/12 P, C-215/12 P and C-223/12 P of 24 October 2013 – *Land Burgenland v. Commission* [2013] ECR I-0000; ECLI:EU:C:2013:682, para. 143.

105. Commission Decision SA.32745 of 17 March 2017 – *Sale of parts of Kommunalkredit Austria AG*, paras 59, 63.

State-owned housing company, as long as the standard of protection is comparable with other transactions and can therefore be regarded as normal market practice.<sup>106</sup> Similarly, the Commission also accepted that a transaction was made conditional on the respect of the rental privileges to existing berth holders in the privatisation of a marina because the Commission considered it necessary to make concessions to the berth holders, with which the seller had engaged in rental agreements for 30 years and which were making concrete legal threats that in the eyes of the seller risked undermining the privatisation itself.<sup>107</sup> Also, standard requirements such as the bidder's disposal over sufficient financial and operational resources to proceed with the transaction and the non-existence of *a priori* hindrances for regulatory approvals (e.g., an assessment of whether the acquirer would obtain within a reasonable timeframe any required regulatory approvals, such as merger control, foreign direct investment or sector-specific approvals) do not qualify as undue conditions.<sup>108</sup> In fact, imposing provisions of public law explicitly as conditions in the bidding process (e.g., respecting environmental regulations) does not constitute undue conditions either, because the bidder would have to adhere to these provisions of public law anyway (irrespective of whether they are imposed as conditions in the tender process or not).<sup>109</sup>

The general design of the tender process should correspond to an auction process which would have been reasonably imposed by a private vendor as well. In most private auctions, this would start with an announcement of the sale upon which interested parties can declare their interest, and after which speculative bidders, or interest parties that are merely on an 'information fishing expedition', but that are not credible bidders can be excluded. This initial phase would be followed by a phase 1, where typically an information memorandum is shared with the bidders, accompanied by access to a data room, often including financial, commercial, operational and legal information. After this phase 1, bidders would have to submit nonbinding offers and evidence that they satisfy certain eligibility criteria relating to their financial and operational capabilities to pursue the transaction within a reasonable timeframe. Such a phase 1 can be followed by a phase 2 with a handful of remaining bidders that receive more granular information on the privatised asset (such as customer contracts, etc.), after which the bidders submit binding offers (potentially together with 'hard' evidence on their financial capability to pursue the transaction). It could also be possible to directly enter exclusive negotiations with a single bidder after such a phase 1, though.

### 3.3.4 *Sufficient Time and Information for a Proper Evaluation*

In light of the transparency and non-discrimination requirements, the bidder must be given the opportunity to properly assess and evaluate the target company. In *Olympic*

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106. See Commission Decision SA.28487 of 5 February 2013 – *Bayern LB*, Annex I, footnote 11 (OJ L 109, 28.4.2015, p. 1).

107. Commission Decision SA.34815 of 4 May 2018 – *Dutch marina 'Jachthaven Scharendijke'*, para. 73.

108. Commission Decision SA.32745 of 17 March 2017 – *Sale of parts of Kommunalkredit Austria AG*, para. 59.

109. Notion of Aid Communication, para. 94.

*Airlines/Olympic Airways Services* and *Kommunalkredit*, the Commission emphasised the importance of providing adequate information about the target company or transaction and required that the bidders were given equal access to the data room.<sup>110</sup>

In addition, bidders must be given a reasonable time to prepare their offer and, in particular, their valuation of the target company. There are no specific rules on how much time has to be granted under State aid rules; this depends on the specific facts and circumstances of each individual case. Generally, a period of approximately one month following the publication of the privatisation in the international press is considered to be a reasonable time for a potential bidder to express an interest.<sup>111</sup> If bidders are given a further one to two months for the due diligence and preparation of binding offers, this should also be deemed sufficient. In the *Kommunalkredit* case, three weeks to analyse the information contained in the first process letter to submit an indicative offer, and subsequently almost six weeks to submit a binding offer were considered sufficient.<sup>112</sup>

### 3.3.5 Sale to the Highest Bidder

The business or assets must be sold to the highest bidder. Normally, it can be presumed that the highest purchase price offered corresponds to the market value, even if the seller believes otherwise.<sup>113</sup>

In this regard, the Court confirmed a judgment by the General Court<sup>114</sup> and the underlying Commission decision<sup>115</sup> regarding aid granted by Austria in connection

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110. Commission Decision SA.27765 of 10 March 2009 – *Olympic Airlines/Olympic Airways Services*, para. 19; Commission Decision SA.32745 of 17 March 2017 – *Sale of parts of Kommunalkredit Austria AG*, para. 51.

111. Commission Decision C 2406/98 of 22 July 1998 – *Société de Banque Occidentale*, p. 25 (OJ L 103, 20.4.1999, p. 19) where the Commission took the position that 8-11 days was not a sufficient time period for the submission of the expressions of interest; Commission Decision SA.27765 of 10 March 2009 – *Olympic Airlines/Olympic Airways Services*, para. 19 where the Commission considered a period of one month for the expression of interest to be sufficient.

112. Commission Decision SA.27765 of 10 March 2009 – *Olympic Airlines/Olympic Airways Services*, para. 19 where the Commission considered a period of five weeks for the submission of non-binding and binding offers to be sufficient and Commission Decision SA.20727 of 30 April 2008 – *Bank Burgenland*, paras 30 et seq. (OJ L 239, 6.9.2008, p. 32) where two months were regarded to be sufficient; Commission Decision SA.32745 of 17 March 2017 – *Sale of parts of Kommunalkredit Austria AG*, para. 52.

113. This is settled case law, e.g., Judgments of the European Court of Justice C-390/98 of 20 September 2001 – *H.J. Banks & Co. Ltd v. The Coal Authority and Secretary of State for Trade and Industry* [2001] ECR I-6117; ECLI:EU:C:2001:456, para. 77 and Case C-277/00 of 29 April 2004 – *Germany v. Commission* [2004] ECR I-3925; ECLI:EU:C:2004:238, para. 80; see also Judgment of the General Court T-268/08 of 12 February 2012 – *Land Burgenland v. Commission* [2012] ECLI:EU:T:2012:90 and Judgment of the European Court of Justice in Joined Cases C-214/12 P, C-215/12 P and C-223/12 P of 24 October 2013 – *Land Burgenland v. Commission* [2013] ECR I-0000; ECLI:EU:C:2013:682, where the Commission dismissed the argument that the highest bid was too high; see annotation on the judgment of the Court of Justice from Barbist Johannes & Pinggera Markus (2014). 'State Aid Law and Privatisations: The Bank Burgenland Case before the Court of Justice', *EStAL* (2014) 2: 351 et seq.

114. See Judgment of the General Court in Joined Cases T-268/08 and T-281/08 of 28 February 2012 – *Land Burgenland v. Commission* [2012] ECR II-0000; ECLI:EU:T:2012:90.

115. Commission Decision SA.20727 of 30 April 2008 – *Bank Burgenland* (OJ L 239, 6.9.2008, p. 32).

with the privatisation of Bank Burgenland, in particular the assessment of the MEVP. The facts of the case concerned the sale of Bank Burgenland for which not the highest bid (by a foreign investor), but the second highest bid (by a domestic investor) was accepted; the difference between the two bids amounted to approximately EUR 50 million.

The Commission held that by accepting the lower bid, Austria granted illegal aid in the amount of the difference between the two bids. Austria argued that only in case the bank is sold to the second highest bidder (the domestic bidder) a statutory liability of the State (the ‘Ausfallhaftung’, under which the State would act as ultimate guarantor, in the event the bank would run into financial difficulty) could be avoided. According to Austria, reasons other than the highest price, for example, the security of payment, the survival of the bank, the avoidance of State liability as well as transaction security in general could play a role when deciding on the best offer because a private seller would also include those elements in the evaluation of the bids.<sup>116</sup>

However, the General Court confirmed the Commission’s argumentation according to which it can be presumed that the market price corresponds to the highest offer.<sup>117</sup> In addition, the General Court held that the sale to the highest bidder was neither impractical nor were there special reasons that could have justified the sale to another bidder than the highest bidder.<sup>118</sup> As a result, the General Court found the second highest bidder was granted State aid in the amount of the difference between the lower price actually paid and the highest bid, i.e., the market price.

The Court upheld the judgment of the General Court with regard to the presumption that a private seller would have chosen the highest bid (corresponding to the market price) regardless of the reasons behind the highest offer.<sup>119</sup> In addition, the Court ruled that the potential State liability had to be disregarded as a prudent private investor would not have accepted the liability in the first place and would therefore not be exposed to any related claims after the privatisation.<sup>120</sup>

This was the first time that the Court confirmed the recovery of State aid granted to the second highest bidder in the course of a bidding process after the privatisation had already been completed.

The sale to a bidder that has not offered the highest price is only possible in exceptional cases.<sup>121</sup> For example, a market operator might exceptionally opt for a

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116. Judgment of the General Court in Joined Cases T-268/08 and T-281/08 of 28 February 2012 – *Land Burgenland v. Commission* [2012] ECR II-0000; ECLI:EU:T:2012:90, in particular paras 12 and 95.

117. *Ibid.*, paras 87 et seq.

118. *Ibid.*, paras 107, 133 et seq.

119. Judgment of the European Court of Justice in Joined Cases C-214/12 P, C-215/12 P and C-223/12 P of 24 October 2013 – *Land Burgenland v. Commission* [2013] ECR I-0000; ECLI:EU:C:2013:682, para. 99; Differently, Soltész U. & Melcher P. (2014), ‘Privatisierungen werden schwieriger: Anmerkungen zum Urteil Bank Burgenland’, *BRZ*, (2014) 1: 16 et seq.

120. Judgment of the European Court of Justice in Joined Cases C-214/12 P, C-215/12 P and C-223/12 P of 24 October 2013 – *Land Burgenland v. Commission* [2013] ECR I-0000; ECLI:EU:C:2013:682, paras 54 and 60 et seq.

121. See Commission Decision SA.20727 of 30 April 2008 – *Bank Burgenland*, para. 112 (OJ L 239, 6.9.2008, p. 32); confirmed by Judgment of the General Court in Joined Cases T-268/08 and T-281/08 of 28 February 2012 – *Land Burgenland v. Commission* [2012] ECR II-0000;

lower offer if it is obvious that a sale to the highest bidder is not feasible (e.g., either because the bidder will not be able to pay the full consideration or the necessary approvals for the sale to this bidder cannot be obtained), and it is justified to take into account factors other than the price.<sup>122</sup> The fact that the contract is not awarded to the bidder offering the highest price is thus not irrefutable evidence of State aid, and the concept of the ‘highest bidder’ needs to be widely interpreted in order to take into account the economic risks associated with a bid. It is decisive that the seller selects the most economically advantageous bid. According to the Notion of Aid Communication, the only criterion for selecting the buyer should be the highest price, but other contractual arrangements (e.g., the vendor’s sales guarantee or other post-sale commitments) can indeed be taken into account.<sup>123</sup> This can be interpreted to mean that the seller can consider other aspects which are economically relevant and influence the overall value of the offer. In practice, sellers will often use a point system to compare the economic values of bids. The price should always be the most important criterion in this point system but does not necessarily need to be the only one. There are circumstances where a seller may accept an offer of a slightly lower price if other aspects of the offer are economically more attractive.<sup>124</sup> In the *Kommunalkredit* case, the Commission supported Austria’s view that it was legitimate to exclude conditional price offers. A bidder had submitted a bid that included both an unconditional and a conditional element and argued that when adding the unconditional part as well as the conditional part of the bid in a likely future scenario, its bid was higher than the bid that was selected by Austria as ‘highest bid’ which only included an unconditional offer. Austria rejected this view, as it did not only consider the offer to work on unrealistic assumptions but, more importantly, also excluded conditional price elements in order to avoid lengthy discussions on the likelihood of future events and reduce incalculable risks. The Commission agreed that this was an economically rational and prudent approach that would also have been acceptable to a private seller.<sup>125</sup>

## **4 PROCEDURAL CONSEQUENCES ANCILLARY TO THE GUIDANCE PAPER**

### **4.1 State Aid-Compliant Bidding Processes**

Where the Commission’s bidding process requirements are met, the State-owned enterprise or State participation is sold at market conditions (in particular, at market price), and therefore does not involve State aid. A prior notification of the sales process

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ECLI:EU:T:2012:90 and Judgment of the European Court of Justice in Joined Cases C-214/12 P, C-215/12 P and C-223/12 P of 24 October 2013 – *Land Burgenland v. Commission* [2013] ECR I-0000; ECLI:EU:C:2013.

122. See Commission Decision SA.20727 of 30 April 2008 – *Bank Burgenland*, paras 120 et seq. (OJ L 239, 6.9.2008, p. 32).

123. Notion of Aid Communication, para. 95 with reference to the *Bank Burgenland* judgment.

124. This is made apparent in the Notion of Aid Communication, para. 95, in particular footnote 149.

125. Commission Decision SA.32745 of 17 March 2017 – *Sale of parts of Kommunalkredit Austria AG*, para. 62.

to the Commission is not required in such cases.<sup>126</sup> Where the Commission's requirements are not met, however, the sale may constitute an undue advantage within the meaning of EU State aid rules and must thus be notified to the Commission.

#### 4.2 Possibility of an Independent Expert Evaluation

If the compliance of the sale with market conditions is not 'directly' established through an open, transparent non-discriminatory and unconditional tender procedure, the Commission generally accepts the possibility that market conditions can be established on the basis of a generally accepted, standard assessment methodology.<sup>127</sup> This enables establishing the market price on the basis of an independent expert evaluation, carried out prior to the sale and based on generally accepted market indicators and valuation standards. The Commission has held in *Centrale del Latte di Roma* that the market conform purchase price can also be determined on the basis of an (*ex ante*) independent expert opinion, which has been confirmed by the Court in the *Seydaland* case.<sup>128</sup> In *Harlingen*, neither a tender nor an *ex ante* expert opinion was made by the Member State, but the Commission considered the *ex post* expert opinions that were produced after the privatisation. The Commission found that '*it is difficult to establish [...] the exact market value of the local land sale transaction that was agreed in 2004*', but ultimately found '*it plausible that the market value of the land was within the range*' determined by the *ex post* expert opinion.<sup>129</sup>

However, the Commission clearly prefers sales to be conducted through a bidding process rather than on the basis of a valuation.<sup>130</sup> It refers in this regard to the General Court's judgment in the *Bank Burgenland* case, where the General Court concluded that market prices established by valuation studies are not relevant if a proper tender has been carried out.<sup>131</sup>

#### 4.3 Less Formal Sales Processes

As set out in the Notion of Aid Communication, compliance with market conditions can not only be directly established through an open, transparent non-discriminatory and unconditional tender procedure but alternatively also through other equivalent assessment methods. However, the Commission will only accept a less formal sales process if it can be established via an alternative assessment method that the market conditions

126. This is consistent with a literal reading of the Guidance Paper. The Guidance Paper does not expressly state that no notification is required in these instances, however, the Commission foresees the need for a notification only where the conditions are not complied with.

127. Notion of Aid Communication, paras 101 et seq. with further references.

128. Commission Decision SA.9545 of 11 April 2000 *Centrale del Latte di Roma*, para. 88 (OJ L 265, 19.10.2000, p. 15); Judgment of the European Court of Justice C-239/09 of 16 December 2010 – *Seydaland/BVVG*, para. 39.

129. Commission Decision SA.34676 of 30 June 2015 – *Alleged sale of land below market price by the municipality of Harlingen*, para. 47.

130. See also Notion of Aid Communication, paras 84 and 97.

131. Judgment of the General Court in Joined Cases T-268/08 and T-281/08 of 28 February 2012 – *Land Burgenland v. Commission* [2012] ECR II-0000; ECLI:EU:T:2012:90, para. 72.

are met, in particular that the relevant process does not compromise the maximisation of proceeds. The Commission may agree to a direct sale if a bidding process (tender) would not achieve the best possible price, e.g., because there are only a limited number of potential bidders.<sup>132</sup> In such circumstances also a private seller would prefer not to use a tender.

Also, in the *Harlingen* case, the Commission has assessed whether a follow-up transaction to the privatisation by the buyer may be a proxy to determine whether the initial sale was at market terms. In the case at hand, the initial privatisation was in the wider context of a cooperation agreement where a municipality sold several plots and the buyer was obliged to take care of the ground exploitation for its own risk and account, and also construct the main access road and displace certain sport infrastructure. Shortly after the privatisation, the buyer sold some of the land at a higher price to a third party. The Commission concluded that the subsequent land sale was not fully comparable to the initial privatisation and thus does not constitute an appropriate proxy for determining the market price for the privatisation.<sup>133</sup> However, in other cases where subsequent transactions may be more comparable, these may be more suitable to serve as a proxy to determine that the privatisation was at market terms.

In addition, the Commission may accept restricted publications of the tender, provided that a representative group of bidders is approached in line with normal M&A standards and no potentially interested bidder is rejected during the course of the process. The Commission has informally approved in some instances a combined process, in which a so-called front runner is given the same information and time period as the remaining bidders, but at an earlier point in time than the other bidders.<sup>134</sup> In such instances, it is critical that the vendor can at the end choose between several comparable and equivalent offers, despite the difference in the timing for the individual bidders.

In its preference for tenders, the Commission may at some point benefit from considering that private investors commonly do not sell companies via tender. Given the overall emphasis in the Guidelines on duplicating private investor behaviour, the Commission's preference for tenders merits particular examination. Tenders may be preferred for State sales, for example, due to officials being less astute negotiators, less aware of commercial value, operating less directly as agents of parties wishing to maximise revenues and, overall, being less demanding than a private investor.

In conclusion, early contact with the Commission can help to design the sales process in a way which is acceptable to the Commission and which will not raise any State aid issues at a later stage. However, the risk of a complaint by a third party cannot be completely excluded and must be evaluated on a case-by-case basis. The safest option remains a sale conducted through an open bidding process or, if appropriate, a sale on the stock exchange.

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132. See Commission Decision SA.28487 of 5 February 2013 – *Bayern LB*, Annex I, para. 29(1) (OJ L 109, 28.4.2015, p. 1) (Sale of LBS to Bavarian Savings Bank Association).

133. Commission Decision SA.34676 of 30 June 2015 – *Alleged sale of land below market price by the municipality of Harlingen*, paras 49 et seq.

134. For example, sale of DKB Immobilien AG by BayernLB pursuant to Commission Decision SA.28487 of 5 February 2013 – *Bayern LB*.

#### 4.4 Privatisations Being Imposed in Compatibility Decisions of the Commission

When companies, in particular banks, have been recapitalised by Member States, the Member States have often become major shareholders of the beneficiaries. In some of these decisions where the Commission found that State aid is compatible with the internal market, the Commission imposed commitments that required the Member States to resell their shareholding in the beneficiary after a certain time or required the beneficiary to sell a subsidiary.<sup>135</sup> In some of these decisions, the Commission also clearly laid out a specific timetable and certain steps in the privatisation process, such as ‘preparation of the procedure’, ‘submission of provisional bids’, ‘access to the data room’, and ‘bidder selection’ until a certain point in time. However, when the market conditions at the time of the envisaged sale were unfavourable, the Commission has also accepted a prolongation of the sales process. In this case, the Commission required that the modification of the restructuring plan (including in relation to timing aspects) is equivalent to ensuring the compatibility of the aid and does not entail any additional aid.<sup>136</sup> In the *KBC* case, the Commission already held in its approval decision on the restructuring plan that the target dates for the implementation of the planned divestments may be extended ‘*in particular when the divestments will not be implemented by these dates through no fault of KBC*’.<sup>137</sup>

The Commission also required the buyer to be independent from the seller, and the target to be renamed post-privatisation.<sup>138</sup> The Commission considered these commitments as necessary to limit distortions of competition.<sup>139</sup> While the Commission generally did not set any conditions for the purchase price (which shall be determined in the tender process), it has previously required a positive purchase price.<sup>140</sup> When comparing the State’s behaviour with the behaviour of a private seller, a ‘minimum purchase price’ condition to the sales process would likely be required, as a private seller would not accept any price, no matter how low it is, when selling an asset. Imposing a minimum price condition in a tender process would not conflict with the principles of State aid-compliant tender process, in particular the principle of non-discrimination, either. Alternatively, in case the sales process does not bring any attractive offers due to adverse market conditions, the sales process could also be abandoned and a prolongation of the time in which the sale has to be made could be

135. See, e.g., Commission Decision SA.43365 of 10 May 2019 – Amendment of the restructuring plan of National Bank of Greece approved in 2015, commitment 6; Commission Decision SA.47677 of 4 July 2017 – *New aid and amended restructuring plan of Banca Monte dei Paschi di Siena*, commitment 11; Commission Decisions SA.29338 and SA.44910 of 2 May 2016 – *Measures in favour of HSH Nordbank AG*, commitment 5.1.

136. Commission Decision SA.34539 of 30 March 2012 – *Germany, Amendment of the restructuring plan of Commerzbank*, paras 24 et seq.

137. Commission Decision SA.28841 of 18 November 2009 – *State aid implemented by Belgium for KBC*, para. 89.

138. See, e.g., Commission Decisions SA.29338 and SA.44910 of 2 May 2016 – *Measures in favour of HSH Nordbank AG*, commitments 5.6 and 5.8.

139. See, e.g., *Ibid.*, paras 139 et seq.

140. *Ibid.*, para. 31.

requested from the Commission (which is normally, as laid out above, accepted under certain conditions).

## **5 STATE AID RISKS FOR THE BUYER AND TARGET**

The buyer of a State-owned enterprise may be subject to State aid recovery claims in two cases: (i) the target company may have benefitted from unlawful aid prior to the privatisation, the recovery of which is requested from the buyer (or the target) after the closing of the transaction; and (ii) aid in favour of the buyer can result from the privatisation itself.

### **5.1 Recovery Order due to Unlawful State Aid Granted to the Company Prior to the Privatisation**

#### **5.1.1 *Economic Continuity***

In cases where assets of a company, which has received State aid before the privatisation, are sold to a third-party buyer (be it an existing company or a special purpose vehicle set up for that purpose), the Commission may address the recovery order to that third party buyer. This may be the case where the buyer has benefitted from the advantage stemming from the unlawful State aid to the company. In such a case, the Commission will conclude that there is ‘economic continuity’ between the company and the buyer and, as a result, the recovery order will be extended to the buyer. Even though the concept of ‘economic continuity’ was developed in relation to bankruptcy settings it may also play a role in privatisation scenarios, particularly where the sale may result in the privatised company becoming an empty shell company that is unable to satisfy a recovery order and the ‘re-emergence’ (or continuation) of essentially the same company in the market place.

The concept of ‘economic continuity’ in the context of privatisations tries to ensure an effective recovery in cases where the advantage obtained by the privatised company as a result of previously received State aid is passed on to the entity under the ownership of the purchaser because the purchaser continues the entity’s activity in the same manner. In the alternative scenario, the continued business would differ in nature and size, for example, since the privatised company would be restructured (in case it faced difficulties) or parts of the business sold to other (e.g., foreign) players. In other words, an advantage previously granted to the company could be recovered from the buyer if the aid has created a market position which is ‘bought and continued’ by the buyer.

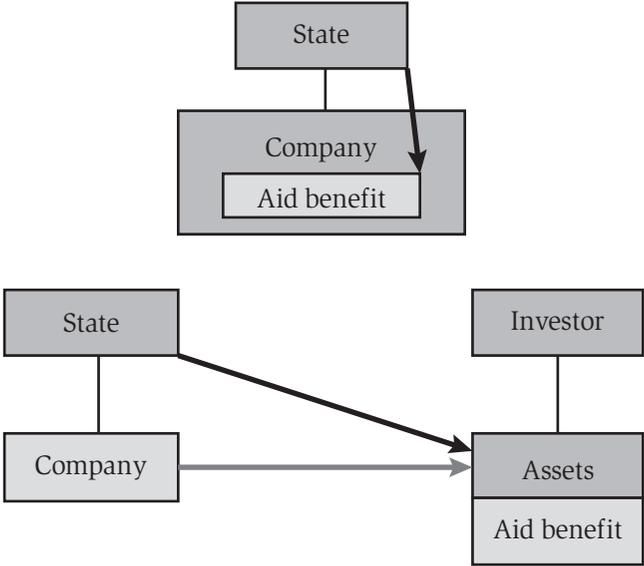
Figure 24.1 illustrates the usual situation, i.e., recovery from the company which received the aid, as compared to the situation of recovery from a buyer in case of economic continuity.

Pursuant to the European Courts’ case law and the decision-making practice of the Commission, economic continuity is determined on the basis of a series of

indicators, including the object and scope of the sale (assets and liabilities, maintenance of the workforce, block sale of assets), the transfer price, the identity of the shareholders or owners of the buyer and the acquired company, the timing of the sale (after the initiation of the Commission's preliminary or formal investigation, at the beginning of the procedure or after the final Commission decision) and the economic rationale of the operation.<sup>141</sup> These factors serve the purpose of assessing whether the business subject to a recovery order continues (or 're-emerges') as if there never had been a grant of State aid. The European Courts have confirmed these indicators, but have held that the Commission is not required to take all of them into account in every decision.<sup>142</sup>

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141. See Judgment of the European Court of Justice in Joined Cases C-328/99 and C-399/00 of 8 May 2003 – *Italy and SIM 2 Multimedia v. Commission* [2003] ECR I-4035; ECLI:EU:C:2003:252; Judgment of the General Court in Joined Cases T-415/05, T-416/05 and T-423/05 of 13 September 2010 – *Greece and Others v. Commission* [2010] ECR I-4749; ECLI:EU:T:2010:386; see also Commission Decision SA.26708 of 12 November 2008 – *Sale of assets of Alitalia* (OJ C 46, 25.2.2009, p. 6); Commission Decision SA.34547 of 4 April 2012 – *Reprise des actifs de SERNAM* (OJ C 305, 10.10.2012, p. 5); Commission Decision SA.37954 of 27 March 2014 – *Sale of certain assets of Larco General Mining & Metallurgical Company S.A* (OJ C 156, 23.5.2014, p. 1), confirmed by Judgment of the General Court in Case T-412/14 of 1 February 2018 – *Larko/Commission*, ECLI:EU:T:2018:55, Commission Decision SA.31550 of 1 October 2014 – *Nürburgring* (OJ L 34, 10.2.2016, p. 1) and Commission Decision SA.36086 of 30 June 2022 – *Measures implemented by Romania in favour of Oltchim SA*, paras 24 et seq.
142. In Judgment of the General Court T-123/09 of 28 March 2012 – *Ryanair v. Commission* [2012] ECR I-0000; ECLI:EU:T:2012:164, para. 156, the General Court stated: '[...] case-law does not require the Commission to take into account the whole of the above factors, as is demonstrated by use of the expression "may be taken into consideration"'; the General Court's assessment of economic continuity was confirmed by the Judgment of the European Court of Justice C-287/12 P of 13 June 2013 – *Ryanair v. Commission* [2013] ECR I-0000; ECLI:EU:C:2013:395; see also Commission Decision SA.34547 of 4 April 2012 – *Reprise des actifs de SERNAM*, para. 108.

Figure 24.1 Recovery of Aid from the Company That Received the Aid, and Recovery of Aid from the Buyer of the Assets, Where Economic Continuity of the Assets with the Company as Previous Aid Recipient Is Assumed



It follows from the case law that one way to avoid economic continuity is to make sure that the assets to be sold represent only part of the previous company or its activities.<sup>143</sup> The book value of the assets appears to be an appropriate tool to measure the relative importance of the assets sold. In addition, the assets must be sold at their market price to increase the likelihood that the advantage provided by the State aid (insofar as it raises the value of the company to bidders) is returned in the form of a higher purchase price.<sup>144</sup> As explained in section 3 above, a sale through an open, transparent, non-discriminatory and unconditional tender process to the highest bidder will typically result in the market price. However, in the context of a privatisation, this is not in itself sufficient to interrupt the economic continuity, as the aid element might well have been ‘consumed’ by the company/the economic activity (e.g., an aid received in the past to set up some business which is now loss making), and thereby might not result in a higher offer price by the buyer.

Where the assets represent a relatively large part of the previous company or its activities, the Commission will assess whether the buyer(s) of the assets have any economic link with the privatised company. In order to avoid liability on behalf of the buyer(s) for recovery of past State aid, there should be no economic link between them and the privatised company, i.e., the buyer(s) should be an independent entity.

143. See *supra* n. 94.

144. In addition, the assets must of course be sold at their market price to avoid aid being present in the sale itself (see previous section).

The Commission will further assess the timing of the sale. If the sale takes place after the initiation or conclusion of a State aid investigation, this indicates an intention on behalf of the parties to obstruct a (potential) recovery decision by the Commission.

Finally, the consideration of the economic rationale of the operation goes to ascertaining whether the buyer(s) of the assets will employ such assets in the same manner as the previous owner, or whether they will use them to follow their own industrial and commercial strategy. Accordingly, the Commission typically requires that the sale of assets takes place in an unbundled manner, to maximise the likelihood of the latter scenario.<sup>145</sup>

The Commission has assessed the indicators of economic continuity in detail in a number of cases, to determine whether the recovery obligation could be extended to the buyer of public assets.<sup>146</sup> Notably, the Commission has held that a sale of only part of the overall assets, in particular without the core business, and a different business model for the parts to be sold, will not result in the continuation of the economic activity.<sup>147</sup> Further, the Commission accepted a break in economic continuity in a case where: (i) the assets to be sold were limited; (ii) the assets were sold at market price in an open, transparent, non-discriminatory and non-conditional tender process; (iii) the buyer had no economic or corporate link to the privatised company; (iv) the decision to sell was taken prior to any potential negative Commission decision; and (v) the buyer had the possibility to use the assets within a different business model.<sup>148</sup>

However, the Commission has raised concerns in a decision to open a formal State aid investigation<sup>149</sup> that the object and effect of creating the new company was to avoid repaying the incompatible State aid and that the scope of the transferred activities, the price of the transferred assets, the identity of shareholders and the timing and economic logic of the operation all seemed to indicate that there was economic continuity between the company and its successor. The Commission therefore took the view that there must be 'genuine economic discontinuity' between the two companies to avoid recovery from the successor.

145. Commission Decision SA.26708 of 12 November 2008 – *Sale of assets of Alitalia* (OJ C 46, 25.2.2009, p. 6); Commission Decision SA.34547 of 4 April 2012 – *Reprise des actifs de SERNAM* (OJ C 305, 10.10.2012, p. 5); Commission Decision SA.37954 of 27 March 2014 – *Sale of certain assets of Larco General Mining & Metallurgical Company S.A* (OJ C 156, 23.5.2014, p. 1) and Commission Decision SA.31550 of 1 October 2014 – *Nürburgring* (OJ L 34, 10.2.2016, p. 1).

146. *See, e.g.*, Commission Decision SA.32554 of 3 September 2013 – *Restructuring aid for Hypo Group Alpe Adria*, paras 111 et seq. (OJ L 176, 14.6.2014, p. 1); Commission Decision SA.37954 of 27 March 2014 – *Sale of certain assets of Larco General Mining & Metallurgical Company S.A*, paras 40 et seq. (OJ C 156, 23.5. 2014, p. 1) and Commission Decision SA.31550 of 1 October 2014 – *Nürburgring*, paras 231 et seq. (OJ L 34, 10.2.2016, p. 1).

147. *See, e.g.*, Commission Decision SA.32554 of 3 September 2013 – *Restructuring aid for Hypo Group Alpe Adria*, paras 111 et seq. (OJ L 176, 14.6.2014, p. 1).

148. Commission Decision SA.37954 of 27 March 2014 – *Sale of certain assets of Larco General Mining & Metallurgical Company S.A*, paras 40 et seq. (OJ C 156, 23.5. 2014, p. 1).

149. Commission Decision SA.21420 of 9 July 2014 – *Aid to SEA Handling/Setting-up of Airport Handling* (OJ C 44, 6.2.2015, p. 30).

### 5.1.2 *Means of Protection for the Buyer*

The buyer can be protected from a recovery of past aid by including a warranty provision in the purchase contract. In fact, a private investor would not invest in a company without limiting its own liability regarding unexpected legacy issues.

However, the Commission may oppose the application of the MEVP in this context as the warranty would cover the risk associated with aid already granted in the past.<sup>150</sup> Such provisions could be considered to undermine the effectiveness of State aid control because the advantage would remain with the buyer and not be returned to the State from an economic point of view if the latter compensates the buyer for the recovery. Therefore, a warranty provision could be regarded to circumvent the recovery.

However, this reasoning does not apply to a constellation in which the seller is not the State and the liability for aid granted before the sale is rather taken over by a private seller. The aid would be returned to the State, notwithstanding the fact that the recovery would ultimately not be at the disadvantage of the buyer but the seller. Since the aid would be recovered, the transfer of the recovery risk from one private company to another does not conflict with the objectives of State aid control and would in fact correspond to the behaviour of a private investor.<sup>151</sup> Nevertheless, it is not clear whether the Commission would accept this reasoning, as a warranty provision between two private persons on the transfer of the recovery risk has not been the subject of any decisions yet.

Finally, it might be possible to contractually limit the buyer's liability for the recovery of past aid to the target company's liquidation value. After all, the economic advantage in favour of the buyer, buying a company that becomes insolvent due to the recovery of past aid, can only amount to the liquidation value at the time of the sale. If it turns out – in the worst-case scenario – that the target company is worthless due to the recovery of past aid, the buyer cannot have obtained an economic advantage bigger than zero. As a result, a recovery claim against the buyer of more than zero seems unjustified,<sup>152</sup> although this line of argument has never been tested.

## 5.2 **The Privatisation Itself Leads to Incompatible State Aid in Favour of the Buyer**

Even in the absence of economic continuity, any potential State aid could be recovered from the buyer if assets are sold below their market value. If the Member State does not sell to the highest bidder but accepts an offer with a lower purchase price, this could constitute State aid to the buyer in the amount of the difference between the lower

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150. *See supra* n. 16.

151. *See* von Bonin, A. (2013). 'Aktuelle Fragen des Beihilferechts bei Privatisierungen', *Europäische Zeitschrift für Wirtschaftsrecht*, (2013) 7: 247-252.

152. *Ibid.*

purchase price and the maximum price which could have been achieved based on other offers or an independent expert evaluation.<sup>153</sup>

Due to this risk, buyers often try to include protection provisions in purchase agreements, whereby the seller assures that the sales process does not violate EU State aid law. These warranty provisions intend to give the buyer a claim against the public vendor for the reimbursement of any amount that the Commission orders to be recovered in a State aid decision. Alternatively, the buyer may seek to include a provision that gives a withdrawal right from the sales contract in case it is found to be violating EU State aid rules.<sup>154</sup>

However, it is clear that neither a warranty nor a termination provision could change the fact that State aid has been granted to the buyer which must be recovered. The Commission therefore takes the position that provisions such as the ones discussed are generally inadmissible, as they circumvent the recovery decision and ultimately lead to a situation in which the incompatible distortion of competition prevails.<sup>155</sup> The Commission takes the view that the effective indemnification of the buyer by the State (as the seller) by way of a warranty provision is clearly contrary to Member States' obligations to effectively implement Commission decisions and to collaborate with the Commission. The Commission argues that such a warranty provision would ultimately lead to the buyer indirectly keeping the advantage through the reimbursement from the State. Based on current practice, a warranty provision therefore risks violating State aid rules and being null and void pursuant to national law.

However, a buyer has a legitimate interest in seeking to protect itself against a possible recovery order and from other unforeseen events.<sup>156</sup> It follows that some form of warranty provision should be admissible under the EU State aid rules, provided that it does not strictly circumvent the objective of recovery. For instance, in a situation where the buyer withdraws from the contract due to the State aid 'contaminated' sales process. In such situations, compensation payable by the State (acting as seller) to the buyer (e.g., for specific costs it has incurred in the purchase process) would not circumvent recovery of State aid, but would rather put the buyer back into its original position.

Moreover, the exercise of the buyer's right to withdraw from the contract is arguably in line with the EU State aid rules, since it would not result in the aid

153. Commission Decision SA.20727 of 30 April 2008 – *Bank Burgenland*, paras 166 et seq. (OJ L 239, 6.9.2008, p. 32).

154. See Commission Decision SA.20727 of 30 April 2008 – *Bank Burgenland*, para. 38 (OJ L 239, 6.9.2008, p. 32) with regard to warranties and the right to withdraw from the contract. In that case, the warranty clause foresaw a right to withdraw in favour of the acquirer in case the adjustment of the purchase price would not be possible by reimbursing the recovery amount according to State aid rules.

155. This corresponds to the Commission's general case practice, see, e.g., Commission Decision of 25 March 1992 – *Hytasa I*, section VII (OJ L 171, 26.6.1992, p. 54) and Commission Decision of 18 September 1996 – *Hytasa II*, section IV (OJ L 96, 11.4.1997, p. 30); see on this topic Petritsi, Eliza (2007). 'Warranty/Indemnity Clauses in Sales and Purchase Agreements: State Aid Per Se or Invalid?', *EStAL*, (2007) 4: 605-614.

156. See also von Bonin, Andreas (2013). 'Aktuelle Fragen des Beihilferechts bei Privatisierungen', *Europäische Zeitschrift für Wirtschaftsrecht*, (2013) 7: 247-252 regarding possible approach.

remaining with the buyer (if the contract is terminated relatively quickly).<sup>157</sup> Rather, unwinding the contract requires that the buyer returns all benefits received under the contract. However, the Commission has yet to explicitly address the question of whether a separate withdrawal right in the event of an adverse sales process is permissible under the EU State aid rules.<sup>158</sup>

In summary, a warranty provision cannot protect the buyer from repaying any aid which amounts to incompatible State aid.<sup>159</sup> However, the right of the buyer to withdraw from the contract and to be compensated for the non-performance of the contract arguably does not run contrary to the State aid principles and should therefore be acceptable.

### 5.3 Potential State Aid Risks for the Seller

While the seller does not face a recovery risk if the purchase price in a privatisation was considered below market level by the Commission (or a national court), the seller faces the risk – like the purchaser – that the transaction is considered null and void if it infringes State aid law. However, there may also be cases where the purchaser in a sale of a public company or asset is a publicly owned company as well (i.e., besides a public seller the transaction also involves a public buyer). In such a scenario, State aid could also be granted to the seller if the purchase price exceeds the market level. A tender process would likely not be well suited to determine the market price in such a scenario: In case the publicly owned bidder offers the highest purchase price, this could be considered an indication that the offer is above the market level. Of course, if the public bidder's offer would be below the offer of another (private) bidder, giving the award to the public bidder would amount to foregone revenues for the public seller. Therefore, in such a public-to-public sale scenario, the best option to determine the market price may indeed be an expert opinion.

Also, there may be individual cases where a company that previously received State aid is privatised and commitments in previous State aid decisions also included the seller. In such a case, the seller does not only have to contribute its part to meet the commitments relating to the seller but generally also has an interest that these previous commitments are adhered to post-privatisation by the target and the purchaser.

### 5.4 Private Enforcement in Privatisation Cases

There have been a few privatisation cases where competitors brought claims against the Member States and/or the purchasers to enforce State aid law. In the *Bank*

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157. *Ibid.*

158. In *Bank Burgenland* there was only one warranty clause which was not severable (i.e., separable in a way that one part of the clause could still apply despite the other illegal or unenforceable part of the clause) and the Commission therefore regarded the whole clause as inadmissible, *see supra* n. 104.

159. This is in line with the argumentation of the Commission in its Decision SA.20727 of 30 April 2008 – *Bank Burgenland*, para. 158 (OJ L 239, 6.9.2008, p. 32).

*Burgenland* case, the Commission had found that the privatisation of Bank Burgenland to *Grawe* as the second highest bidder involved State aid. When the highest bidder required the reversion of the privatisation from the national courts, the claim was dismissed as the recovery of the aid was ensured by other means, namely by *Grawe* paying to the Member State the difference between its own offer and the highest bidder's offer. The Austrian Supreme Court then argued that the privatisation does not involve State aid anymore, as the Commission's decision only ordered the Member State to recover the aid, but not the way in which the aid has to be recovered.<sup>160</sup>

The perception drawn from individual cases that national courts are generally reserved in private enforcement cases to impose interim measures, reverse privatisations, or award damages, and that there are in fact few cases brought before national courts, is supported by empirical evidence. A study published by the Commission in 2019 concluded that despite an overall increase in private enforcement cases before national courts (not only relating to privatisations), courts rarely concluded that unlawful aid has been granted and awarded remedies. In 66% of the identified cases across all Member States, the courts rejected the claims. Overall, 8% of private enforcement cases brought before national courts had a 'concession/privatisation of State-owned land/property at more favourable terms than market conditions'.<sup>161</sup>

## 6 MEANS OF ESTABLISHING SUFFICIENT LEGAL CERTAINTY

As can be seen from the discussion above, the Guidance Paper and the Notion of Aid Communication fail to resolve all issues relating to the application of State aid to privatisations. In particular, not all of the issues which may arise in the privatisation context (e.g., how the buyer can protect him or herself against State aid risks) are covered and the Guidance Paper cannot, as acknowledged by the Commission, be regarded as a statement of law.

In view of the complex State aid issues arising in relation to privatisations, there is a clear need for legal certainty, in particular for potential investors. Investor interest will largely depend on the extent to which the potential buyer is able to exclude any potential recovery claim against him following the acquisition of the assets to be privatised. This has become particularly obvious during the implementation of the privatisation programmes in the Programme Countries. For example, investors' interests were often subject to a Commission decision explicitly stating that the sale would not lead to the economic continuity of the company and that the sale was not an attempt to avoid repayment of incompatible State aid in order to avoid the obligation to repay past aid will be passed on to the buyer.<sup>162</sup> The State aid-related risks therefore

160. See *Austrian Supreme Court*, 25 March 2014, 4 Ob 209/13h.

161. *Commission*, Study on the enforcement of State aid rules and decisions by national courts, pp. 7 et seq., 67.

162. See in particular a decision regarding the Programme Country Greece: Commission Decision SA.37954 of 27 March 2014 – *Sale of certain assets of Larco General Mining & Metallurgical Company S.A.*, paras 40 et seq.; another decision which goes in the same direction, but does not concern a Programme Country is Commission Decision SA.31550 of 1 October 2014 – *Nürburgring* (OJ L 34, 10.2.2016, p. 1).

likely caused some delays in the implementation of the overall privatisation programmes. However, at the same time, ensuring compliance with the State aid rules can also contribute to the long-term viability of the privatised company, in those cases where this might otherwise be a concern.

Some privatisations have been completed successfully. Greece had established the Hellenic Republic Asset Development Fund (TAIPED, formerly HRADF) in 2011 which is responsible for the privatisation of State-owned companies.<sup>163</sup> According to the Commission's second review of the Third Economic Adjustment Programme for Greece from June 2017, the privatisation proceeds between 2017 and 2060 were estimated at about EUR 17 billion.<sup>164</sup> However, the outbreak of the COVID-19 pandemic led to delays in the implementation of the privatisation programme. Therefore, the estimated proceeds for 2020 of EUR 1 billion amounted to merely EUR 40.3 million.<sup>165</sup> Currently, work is ongoing to bring major assets to sale by the end of 2022. In particular, the privatisation of DEPA and several regional ports is expected to close by the end of 2022, and the project Egnatia motorway will reach a financial scope of EUR 1.5 billion.<sup>166</sup>

By contrast, in Portugal, most of the state-organised enterprises that were intended for this purpose have been privatised.<sup>167</sup> Portugal successfully completed the privatisation of the ANA Aeroportos de Portugal SA which operates, among others, the main airports in Portugal as well as the postal company, CTT. However, the privatisation of the air carrier TAP was partially reversed in 2016, with the Portuguese State now owning 50% of the shares.<sup>168</sup>

In order to maximise legal certainty, past State aid issues should be resolved prior to the privatisation. The sales process has to be structured in a way which avoids any new State aid problems for the buyer.

In practice, an informal dialogue with the Commission early in the process and proactive measures undertaken to abolish or amend past aid measures can be important to successful privatisation projects. In particular, it can be helpful to receive informal statements from the Commission that the privatisation does not raise any State aid concerns, e.g., in the form of a so-called comfort letter. Such statements are not foreseen in the rules of procedure governing State aid proceedings, but are likewise not excluded and do happen in practice. Nevertheless, it is not entirely clear and may differ on a case-by-case basis to what extent parties can rely on such informal

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163. Commission's fourth review of the Second Economic Adjustment Programme for Greece from April 2014, ISSN 1725-3209 (online), pp. 27 et seq.

164. Compliance Report, The Third Economic Adjustment Programme for Greece, Second Review, June 2017 (online), p. 24.

165. European Commission, Enhanced Surveillance Report, Institutional Paper 150, Greece, June 2021 (online), p. 44.

166. European Commission, Enhanced Surveillance Report, Institutional Paper 164, Greece, November 2021 (online), pp. 45 et seq.

167. European Commission, Post-Programme Surveillance Report, Institutional Paper 006, Portugal, Spring 2015 (online), p. 18.

168. European Commission, Post-Programme Surveillance Report, Institutional Paper 051, Portugal, Autumn 2016 (online), p. 23; European Commission, Post-Programme Surveillance Report, Institutional Paper 036, Portugal, Summer 2016 (online), p. 36.

statements, as the content would not be legally binding in court. In addition, the Commission has not always been willing or able to take an informal position in advance of the privatisation, e.g., where the issues are particularly complex. In such cases, it may be necessary to notify the privatisation structure, with a view to obtaining the desired legal certainty through a ‘no aid’ decision.

In addition, it can create legal certainty if the Commission explicitly states in a negative decision that any potential recovery of incompatible State aid will not concern the buyer of the assets (or its subsidiaries) as the Commission has done in its *Nürburgring* decision.<sup>169</sup> The parties had made the sale of the *Nürburgring* assets conditional upon the existence of a non-challengeable Commission decision, declaring that the aid would not be recovered from the buyer of the assets. The Commission concluded that due to the absence of economic continuity between the company and the buyer, this construction did not have the purpose of circumventing the recovery, but merely existed with the purpose of an orderly liquidation of the business.<sup>170</sup> As the Commission therefore decided not to extend the recovery order to the buyer<sup>171</sup> the privatisation route was ultimately a successful way to avoid recovery for the buyer. The irony of the *Nürburgring* case has turned out to be that the Court still held that the privatisation process amounted to State aid because the conditions that were set in the tender process had not been adhered to (as laid out above).

## 7 CONCLUSION AND OUTLOOK

Privatisation will remain an important pillar of economic policy in the EU Member States in the years to come, not least because EU Member States will have to sell their shareholdings in many of the companies that were nationalised over the last years, as mentioned above. The benefits to the EU Member States from privatisation have been substantial in many cases. The decision practice of the EU institutions remains to acknowledge that States may have broader economic incentives than those reflected directly in a particular enterprise’s operation or that some of the private rationales for limiting the geography of asset purchasers could also be used by the State.

From a State aid law point of view, most legal questions on the applicability of State aid rules to privatisations, how companies can be privatised in a State aid compliant way or what are the consequences if State aid rules are not correctly applied have been settled in the case law – at least in theory. While it is, for example, clear that a tender process for a privatisation must not include conditions which a private vendor

169. Commission Decision SA.31550 of 1 October 2014 – *Nürburgring*, paras 262 and 285 (OJ L 34, 10.2.2016, p. 1).

170. *Ibid.*, para. 265 (OJ L 34, 10.2.2016, p. 1); neither the General Court nor the European Court of Justice decided in substance on the question whether this conclusion by the Commission was in line with State aid law, as the appellant was not considered to be individually concerned by the decision not to extend the recovery order to the buyer, see Judgment of the General Court T-373/15 of 19 June 2019 – *Ja zum Nürburgring e.V./Commission*; paras 57, 71; judgment of the European Court of Justice C-647/19 P of 2 September 2021 – *Ja zum Nürburgring eV/Commission*, paras 37, 38.

171. Commission Decision SA.31550 of 1 October 2014 – *Nürburgring*, Art. 3(2) (OJ L 34, 10.2.2016, p. 1).

wouldn't include under comparable circumstances, it is not obvious what conditions fall under this test. In practice, novel questions on how to design privatisation processes in the context of a specific asset regularly emerge, and will bring further clarifications in the decision practice over the coming years.

In addition, there is the new EU Foreign Subsidies Regulation. It requires notifications to the Commission of privatisation transactions if there is an acquisition of control of a company with EU turnover of at least EUR 500 m and the acquirer and target, together, have received financial contributions from one or more non-EU States of more than EUR 50 m in the three years preceding the transaction. In addition to the classic State aid assessment, this will require an assessment of the effect of potentially distortive foreign subsidies on the internal market in a privatisation scenario.