Position paper
Comments on the upcoming Communication on State aid

Brussels, 15 January 2016

E3PO represents at EU level the private operators of public infrastructures and services, EU wide or in some MS, in the following sectors: highways and access to roads, car parks, drinking water and sanitation, catering, public transport of passengers (rail, road), waste treatment, energy efficiency services, and district heating networks.

In the sectors covered by E3PO’s members, the annual creation of value, by several thousands of companies, is considerable: a more than 200 billion € turn-over and over 1,600 million jobs. These activities are very different, with a high diversity as regards the level of investments, the number of users that benefit from these services, the market share, and the economic and technical conditions. The services offered by companies represented in our membership are provided within a legal or contractual frame of public-private partnerships.

State aid rules are crucial for PPP operating companies represented by E3PO, since accurate control on public aid is one of the best ways to guarantee that the functioning of SGEI markets comply with the Treaties’ principles of competition and internal market.

The Commission will adopt in 2016 a Communication on State aid that aims at clarifying the key concepts relating to the notion of State aid. E3PO welcomes such an exercise and would like to take the opportunity to seek further clarification, in connection to the recently reviewed Directives on Public Procurement and Concessions (Directives 2014 23/24/25), currently under transposition into national law.

1. More clarity is necessary on the situations where contracting authorities can directly award activities/tasks to the public sector without competitive tendering: need to precisely describe these cases of exclusion from the rules of the Public Procurement and Concessions Package

The Directives on Public Procurement and Concessions permit entities controlled or operated by the public sector to be active on the competitive market (with a maximum of 20% of their turnover) without competitive tendering. This covers in-house entities and entities practicing “horizontal” or public-public cooperation.

The decision to open up the market for competition is the discretionary choice of local authorities. However, the identification of an undertaking as an operator of services of general economic interest (SGEI) is strictly based on the economic character of the activity performed. To determine whether there is an SGEI or not, public authorities must refer to settled case law, which states that any activity that consists in supplying goods and/or services in a particular market is an economic activity.
E3PO supports the Commission’s views in point 14, which reiterates an important principle: **in-house provision of services does not rule out the existence of an economic activity nor of a possible distortion of competition.** The same is applicable to public-public cooperation and should be mentioned in the Communication.

Points 14 and 189 should therefore **explicitly mention, in addition to in-house services, the case of “horizontal cooperation”**.

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**Point 14.** The decision of a public authority not to allow third parties to provide a certain service (for example, because it wishes to provide the service in-house, or because it wishes to perform a public-public cooperation in the terms of Directives 2014/23, 2014/24, 2014/25) does not rule out the existence of an economic activity. In spite of such market closure, an economic activity can exist where other operators would be willing and able to provide the service in the market concerned. More generally, the fact that a particular service is provided in-house has no relevance for the economic nature of the activity.

**Point 189.** The fact that the local authorities assign a public service to an in-house provider, or in the frame of a public-public cooperation in the terms of Directives 2014/23, 2014/24, 2014/25 (even if they were free to entrust that service to third parties) does not as such exclude a possible distortion of competition. However, a possible distortion of competition is excluded if (i) a given service is subject to a legal monopoly (established in compliance with EU law)247 and is not in competition with similar (liberalised) services and (ii) the service provider cannot be active (due to regulatory or statutory constraints) in any other liberalised (geographical or product) market.

2. **Systematic control/ mandatory reporting at national level on the respect of State aid rules in cases of in-house and public-public cooperation**

In the case of in-house services and situations of public-public cooperation, the Directives on Public Procurement and Concessions do not apply. Due to the difficulty in assessing their scope, there is a risk of these derogations being applied in a large sense and not only according to a strict interpretation.

In light of this legal uncertainty, a thorough application of State aid control to situations excluded from the provisions in the Directives on Public Procurement and Concessions is imperative.

It is important to ensure that State aid control targets all economic actors, and not only the private sector.
Public entities operating material or services through a “horizontal cooperation”, such as in-house entities, cannot be excluded from the control of State aid. The lack of control is not justified and de facto incites public authorities to opt for an internal management model or for public-public cooperation.

A first step would be for the Commission to request a mandatory reporting at the national level with regard to State aid rules on public-public cooperation actions and on actions that result in the use of in-house services, when above or equal to the thresholds of the Public Procurement and Concessions directives.

3. **A competitive and transparent tender should rule out the existence of State aid**

- A competitive procedure for awarding a public contract or concession should presume the absence of State aid and should therefore not be subject to State aid control.

All transparent and non-discriminatory award procedures compliant with the principles of the Directives on Public Procurement and Concessions should rule out the existence of State aid. This should be mentioned in points 91 and 93. Inversely, activities granted from a public entity/authority directly to an undertaking or to another public entity/authority and without the Directives applicability, should presume the existence of an advantage within the meaning of Article 107 (1) TFEU. **Such cooperation should hence be notified according to 108 (3) TFEU.**

- Consequently, there should be no State Aid control in projects financed by both EU Funds and revenues generated by the project (blended projects)

The Leipzig-Halle judgment has necessitated a procedure for State aid control for revenue generating projects already subjected to EU Regulation 1303/2013. **Projects that involve EU Structural Funds and generate revenues are being subject both to EU Internal market rules, notably on Public Procurement and Concessions, and to EU Structural funds rules. They should explicitly be considered excluded from State aid control.**

- **Need to ensure control of compensation for public services according to the Altmark judgment criteria**

Conversely, point 72 should specify that in all cases where a compensation of public service costs benefits an entity which operates without a prior process of competitive tendering, a State aid control according to the criteria of the Altmark judgment is necessary. This control is sometimes practiced in Member States and its efficient realisation should be ensured.
- The importance of the Market Economy Operator test (page 21 and following)

In our opinion, it should be further clarified that the MEO (Market Economy Operator) test should be compulsorily applied when (point 76) “public authorities directly and indirectly carry out economic transaction in any form”, with the addition “in all cases where the Directives on Public Procurement and Concessions do not necessitate competitive tendering.” The explicit mention of such transactions being subject to the EU State aid rules would add legal certainty.

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Point 72. As regards compensation for costs incurred to provide a service of general economic interest, the Court made clear in the Altmark judgment that the granting of an advantage can be excluded if four cumulative conditions are met. This reasoning should also concern all cases where the Directives on Public Procurement and Concessions do not require competitive tendering.

Point 91. If the sale and purchase of assets, goods and services (or other comparable transactions) are carried out following an open, transparent, sufficiently well-publicised, non-discriminatory and unconditional tender procedure, in compliance with the principles of the Public Procurement Directives (even in cases where those Public Procurement Directives are not as such applicable), it can be presumed that those transactions are in line with market conditions. The non-applicability of the Directives on Public Procurement and Concessions suggests the existence of an advantage within the meaning of Article 107 (1) TFEU.

Point 93. A tender has to be open to allow all interested and qualified bidders to participate in the process. As regards the characteristics of the tender, an 'open procedure' in line with the requirement of the public procurement rules is certainly acceptable, but a 'restricted procedure' can also be considered sufficient to establish the market price, unless interested operators are prevented from tendering without valid reasons. The non-applicability of the Directives on Public Procurement and Concessions suggests the existence of an advantage within the meaning of Article 107 (1) TFEU.

Point 76. The Union legal order is neutral with regard to the system of property ownership and does not in any way prejudice the right of Member States to act as economic operators. However, when public authorities directly or indirectly carry out economic transactions in any form, they are subject to the Union State aid rules. The Market Economy Operator Test should be applied in situations where the Directives on Public Procurement and Concessions do not necessitate competitive tendering.