State Aid Implications of Public Investment in Land Development & Social Housing

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Phedon Nicolaides*

I. Introduction

Two tasks which normally fall within the responsibility of local authorities are land development and provision of affordable housing to citizens (social housing). Public funding for any activity may constitute state aid if it satisfies the criteria of Article 107(1) Treaty on the Functioning of the European Union [TFEU]. The purpose of this paper is to examine the conditions under which public investment in land development for the construction of social housing may involve state aid and how it may conform with the state aid rules of the European Union (EU) and, in particular, those on services of general economic interest. The analysis carried out in this paper draws on recent decisions of the European Commission and rulings by EU courts.[1]

The academic literature on the subjects of state aid for infrastructure, social housing, or services of general economic interest has treated each one of them separately.[2] The aim of this paper is to analyse them together and holistically so that any solution concerning the compatibility with state aid rules can be valid simultaneously for infrastructure, land development, and social housing.

Article 107(1) TFEU prohibits state aid in any form whatsoever. As is well-established, a public measure constitutes state aid when it satisfies simultaneously four criteria: it transfers state resources to an undertaking, the transfer confers an advantage, the advantage is selective, and trade and competition are affected. An undertaking is any natural or legal person that engages in an economic activity. Local authorities do become undertakings when they carry out economic activities.

Therefore, the decisive elements in most land development cases are whether the beneficiaries are undertakings and whether they derive an advantage in the meaning of Article 107(1) TFEU. There is hardly any doubt that public funding for land development and social housing is selective because it is granted on the basis of individual measures.[3]

Key Points

- When public authorities develop land and award contracts to construction companies to build housing units for the purpose of achieving their social policy objectives, they must comply with the state aid rules of the European Union.
- Public funding of infrastructure and land development does not constitute state aid, provided that neither the infrastructure, nor the land is designed for the needs of specific undertakings.
- Construction companies which are selected competitively are unlikely to receive state aid. They are more likely to function as channels through which aid flows to final beneficiaries.
- The final beneficiaries are likely to be the social housing arms or departments of public authorities.
- State aid to support social housing can be made compatible with the internal market on the basis of the European Commission's decision 2012/21 concerning the compensation of providers of services of general economic interest.

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1 The Commission decisions cited in this paper can be accessed via the DG Competition's search engine of state aid cases which can be accessed at http://ec.europa.eu/competition/elojade/isef/index.cfm?clear=1&policy_area_id=3. The reader may also want to consult the so-called "analytical grids" on public funding of various types of infrastructure such as ports, airports, broadband, energy, sports or culture. They can be accessed at http://ec.europa.eu/competition/state_aid/modernisation/notice_aid_en.html

2 See, e.g., the following: Committee of the Regions, Assessment of the impact of current state aid rules on local and regional authorities and recommendations for changes, Brussels, 2012; E Sol and M van der Vos, 'Services of General Interest, State Aid and Social Housing in the Netherlands, Chapter 12' in J-C Barbier, R Rogowski and F Colomb (eds), *The Sustainability of the European Social Model* (Cheltenham: Edward Elgar Publishing 2015); EU Urban Agenda (Housing Partnership), *Guidance Paper on EU regulation & public support for housing*, document adopted at the 6th Partnership Meeting, Brussels (March 2017); DA Groetelaers, M Haffner, W Korthals Altes and T Tasan-Kok, *Providing Cheap Land for Social Housing: Violation of State Aid Rule of Single European Market?* (2014) OTB Research Institute for Housing, Urban and Mobility Studies, Delft University of Technology; G Vincent and E Marja, 'Tensions Between Social Housing and EU Market Regulations' (2014) 13:3 European State Aid Law Quarterly 463–469; PC Yábar, The application of state aid rules to the public financing of health care infrastructures, EIB Staff Working Papers (October 2013).

3 See, C-15/14 P, Commission v MOL. All cases cited can be accessed with the use of the search form of the Court of Justice http://curia.europa.eu/juris/recherche.jsf?pro=&nat=&oqp=&dates=&lg=&language=en&jur=C%2CT%2CF&cit=none%252CC%252CCJ%252CR%252C2008E%252C%252C%252C%252C%252C%252C%252C%252C%252C%252Ctrue%252

There is also little doubt that public funding of construction is capable of affecting trade and distorting competition. This is because construction can be carried out by undertakings with cross-border operations. However, as explained in the following section, not all transfers of public money fall within the scope of Article 107(1) TFEU.

The paper is structured as follows. Since local authorities are hardly ever self-sufficient financially, the next section examines when transfers from central governments to local authorities for infrastructure projects and housing projects constitute transfer of state resources in the meaning of Article 107(1). Section III places the analysis in the wider context of public funding for public infrastructure because the development of infrastructure which lies outside commercial sites is a task for the state. However, public funding of specifically developed infrastructure can be state aid. Section IV focuses on the particularities of land development. Section V considers whether local authorities which provide social housing inadvertently receive state aid from their own land development funding and how such state aid may be made compatible with the internal market. Section VI asks whether local authorities may invest in social housing as private investors in conformity with the Market Economy Investor Principle. Section VII explains that developers are likely to act merely as a channel through which aid flows to the economic activities of local authorities. Section VIII summarises the main findings of the paper.

II. Intra-state transfers

A public measure falls within the scope of Article 107(1) TFEU when it involves a transfer of state resources from a public authority to an undertaking. A state resource is any resource that comes under the control of a public authority, meaning that the public authority may decide how that resource is used.

In addition, the decision to make the transfer must be attributed or imputed to a public authority.[4] Therefore, public funding is state aid when it involves resources controlled by the state and when the granting decision is taken by the state or on behalf of the state.

When a local authority uses its own resources or from its own budget to fund an economic activity, it transfers state resources to an undertaking in the meaning of Article 107(1). Those resources are controlled by a public authority and the decision is attributed to the state.

When local authority receives funds from the central government or an agency of the state in its capacity as a public authority implementing public policy in general, it is obviously not acting as an undertaking. Transfers between public authorities do not constitute transfer of state resources to undertakings.

Also payments between public authorities for services rendered to each other are not state aid.[5] Therefore, intra-state transfers fall outside the scope of Article 107(1) TFEU.

However, when the local authority obtains a grant from central government to implement an economic project, it receives state aid, if all of the other criteria of Article 107(1) are satisfied, because it acts as an undertaking.

What happens when a grant is paid by the central government or a state agency to a local authority for the specific purpose of funding infrastructure development or social housing projects? If the payment by the central government to the local authority is made exclusively for the purpose of financing activities of the local authority which are economic in nature, say the actual construction or management of housing units, then it constitutes a transfer of state resources to an undertaking. It makes no difference whether the beneficiary undertaking is the local authority itself in its capacity as manager of social housing.

The decisive element here is whether the local authority has discretion to decide how the grant from the central government is used. For example, the grant may go into the infrastructure budget of the local authority which can decide to use it to fund a non-economic activity linked to social policy, such as the construction of public pavements, parks, and other public spaces. Or, by contrast, it may decide to use it to support an economic activity such and the refurbishment of dwellings for social housing purposes. Since this choice is made by the local authority, the decision cannot be attributed to the central government and therefore the grant from the central government to the local authority is an intra-state transfer not linked to a specific economic use.

III. Public funding of infrastructure

Public funding of construction and remediation work on a private site or site which is commercially exploited is always considered to involve transfer of state resources

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4 See, Case C-329/15, ENEA, para. 20; and Case T-98/16, Italy v European Commission, para. 64–65.

5 See, e.g., Case N 117/2005 concerning an aggregated public sector procurement of broadband in Scotland and Case N46/2007 concerning the Welsh public sector network scheme.

that confers an advantage to the undertaking that owns or exploits the site, unless the granting authority acts as a private investor in conformity with the MEIP.[6]

Public infrastructure normally lies outside privately owned or commercially exploited sites. Public funding of infrastructure that is put to economic use, such as a toll road or toll bridge, constitutes state aid regardless of the fact that it may be owned by the state.[7] Economic use of infrastructure means that it is commercially exploited and users are charged for the right to use it or access it.

Public funding of infrastructure that is inseparably linked to an economic activity also constitutes state aid.[8] This is typically the case, for example, of a runway and an airport terminal.

When public authorities exercise the prerogatives reserved for the state and construct public infrastructure, they do not act as undertakings in the meaning of Article 107(1).[9] The construction of freely accessible infrastructure is one of the duties of the state. Therefore, public funding of infrastructure that is open to all users on a non-discriminatory basis and without payment of an access fee does not fall within the scope of Article 107(1) TFEU.[10]

In addition, any economic activities which are inseparably linked to the non-economic activities of the state, such as the printing of passports or the operation of an internet site that provides information on public procurement procedures, also fall outside the scope of Article 107(1).[11] However, when economic and non-economic activities are separable, then a public authority that engages in an economic activity, regardless of the reasons for doing so, becomes an undertaking and any public funding of those economic activities constitutes state aid.[12]

The European Commission states in its Notice on the Notion of Aid that 'roads made available for free public use are general infrastructures and their public funding does not fall under State aid rules'.[13] The Commission has applied this principle in its decisional practice.

For example, in case SA.36019 concerning the construction of road infrastructure in the Vilvoorde-Machelen area, the Commission stated in para. 36 that 'the construction of infrastructure used for activities that the State carries out in the exercise of its public powers and which is not commercially exploited is in principle excluded from the application of State aid rules. The activity of providing adequate and safe road connections which are not commercially exploited but used by the society as a whole in a free and non-discriminatory manner falls within the public remit of the state, being thus exempted from State aid control.'

More recently, the Commission concluded that 'the infrastructure works relate to a public square and the public road network, which are not commercially exploited but used by the society as a whole in a free and non-discriminatory manner. Therefore, the infrastructure works and the related contribution of EUR 1,125,000 by the municipality of Meerssen, fall within the public remit of the State and are thus exempted from State aid control.'[14]

Similar conclusions were reached by the Commission in case SA.41935 concerning village renewal and infrastructure projects in rural areas of Germany. The infrastructure was open to the general public and its purpose was to meet the needs of citizens. No undertaking had preferential access to the infrastructure.

Indeed, public funding of public infrastructure must not confer an advantage to a specific undertaking in the sense that even though it is open for free to many users, it is designed to suit the needs of that specific undertaking.[15] In its recent decision concerning infrastructure in the municipality of Meerssen, the Commission verified that the publicly funded infrastructure (roads, pavements, parking places, etc.) was not designed in advance for the needs of any specific undertaking and that the undertakings which eventually occupied the developed site paid market prices as confirmed by an independent expert.[16] The Commission also confirmed that the infrastructure in the Vilvoorde-Machelen area was not tailored for the needs of specific undertakings.[17] The same conclusion was reached in the case of the investment by Jaguar Land Rover in an industrial park in Slovakia (SA.45359).

6 On the public funding of development work on private/commercial sites see, Cases SA.39177 concerning the port of Baja in Hungary and SA.46644 concerning the port of Lubeck in Germany. In both cases, the Commission concluded that the public funding was state aid.
7 See, Case C-518/13, Eventech; Commission decisions SA.36558, SA.38371 and SA.36662 concerning the Oresund bridge between Denmark and Sweden and the corresponding judgment in Case T-68/15, HH Ferries et al. v Commission; Commission decision SA.39078 on the Fehmarn Belt fixed link between Denmark and Germany and the corresponding judgment in Case T-631/15, Stena Line v Commission.
8 See, Case T-443/08, Leipzig-Halle v Commission.
9 See, Case C-118/85, Italy v Commission, para. 7.
10 See, Case C-518/13, Eventech.
11 See, Cases T-347/09, Germany v Commission, para. 29; C-138/11, Compass-Datenbank, para. 38; C-288/11 P, Leipzig-Halle v Commission; T-138/15, Aanbestedingskalender et al. v Commission, para. 35.
12 See, CaseT-347/09, Germany v Commission, para. 29.
13 OJ C 262, 19 July 2016, para. 220.
14 See, Case SA.46491 concerning state aid in the municipality of Meerssen, para. 41–42.
15 See, Case C-225/91, Matra v Commission, para. 29; and SA.45359 on land remediation for Jaguar Land Rover in Slovakia.
16 Case SA.46491, para. 51–57.
17 Case SA.36019, para. 40–47.

Until recently it was not clear whether expansion or improvement of public infrastructure to accommodate or stimulate private investment would amount to state aid. However, it is now settled that public funding to construct, expand, or improve public infrastructure in anticipation of private developments does not confer an advantage to those developers as long as the public infrastructure is open to all users. In other words, a public authority, when it exercises its duties, can take into account future needs for adequate public infrastructure such as roads, water distribution network, or sewage pipes. It is irrelevant that the increase in demand is caused by private developments. It is also irrelevant that a public authority improves its infrastructure in order to make its region more attractive to private investors.

In its decision on the Terra Mitica theme part, the Commission stated the following: 'Public powers can, as the Spanish authorities state, carry out work to develop their land. They can, for instance, fund infrastructure which will benefit the population as a whole. Moreover, the Commission considers that the reason for which such infrastructure is set up is indifferent, provided that it is done in the interests of the local community as a whole. . . . In the present case, the Commission therefore takes the view that, even if the land use and infrastructure plan had been adopted solely in connection with plans to build a theme park, what matters is to analyse which construction projects or infrastructure are of benefit to the community as a whole (including the park) and which are of use to the park only. It is only the latter which should be funded by the park.'[18]

A similar conclusion was reached in Commission decision 2015/508 concerning infrastructure works linked to a plant operated by paper company Propapier.[19] The decision reiterates the principles that were elaborated in the Terra Mitica case. The decision concludes in para. 164 that 'the various infrastructure projects financed by State resources in the newly extended industrial park where the Propapier plant is situated are not exclusively dedicated to the paper mill and therefore should not qualify as dedicated infrastructure and State aid to the benefit of Propapier.' In this case, the infrastructure works involved the construction of roads and a car park and the widening of a canal.

In the context of public infrastructure which is connected to a development on a private site, it is necessary to examine whether the links between the site and the public road network or rail network should be funded by the state or the site developer. There are no EU rules on this matter. The decisive issue is the relevant provisions in the national legal framework. If national law obliges the developer to fund such links, then public funding of the links would constitute state aid because it would relieve the developer of a normal cost. In the Vilvoorde-Machelen case mentioned above, the Commission also confirmed that the developer was not obliged under Belgian law to bear the costs of links to the public road network or for connecting pavements.

As a result of other recent decisions of the Commission, it is now clear that public funding of connecting links between public infrastructure and private sites is not state aid as long as it falls within the normal tasks of the state.[20] Such links may be access roads, rail connections, pedestrian bridges, etc.[21]

However, it is a well-established principle in the state aid case law that relief from costs arising out of obligations imposed by the state constitutes an advantage in the meaning of Article 107(1).[22] Therefore, relief of the costs of developers imposed on them by national or local regulations would also constitute an advantage. The decisive element in determining whether a local authority may bear the costs of constructing connections to the public road network, pavements, and other infrastructure outside construction sites is whether the developer in question has to meet obligations that would normally be specified in the planning or building permit.

In the Propapier case mentioned above, Propapier's plant was connected to a waste water treatment facility. Because public funding was also used to upgrade that facility and because the operation of the treatment facility was an economic activity, the Commission examined whether, first, the upgrading of the facility constituted 'bespoke development' and, second, whether Propapier, as a user, paid a price that corresponded to the market rate for the service it obtained.

Bespoke development is the construction of infrastructure (or the development of land) that suits the needs of a specific user or users who are known in advance. In para. 156–163 of the Commission's Propapier decision, it is stated that the waste water treatment facility was designed to meet the needs of multiple users producing different kinds of effluents, whilst access to the facility was open on a non-discriminatory basis.

18 Commission decision 2003/227, para. 64, OJ L91, 8 April 2003.
19 OJ L81, 1 April 2015.
20 See, Cases SA.39177 on the port of Baja; SA.46644 on the port of Lubeck; SA.36558, SA.38371 and SA.36662 on the Oresund bridge; SA.39078 on the Fehmarn Belt; and SA.45359 on Jaguar Land Rover Slovakia.
21 See, Commission decision C 21/2009 concerning the construction of a pedestrian bridge over a motorway adjacent to the passenger terminal of the port of Piraeus.
22 See, the judgment in Case T-538/11, Belgium v Commission, para. 74–78.

The Commission also assessed whether Propapier paid a market price on the basis of two methodologies: comparative and incremental. The comparative method compares the price paid by Propapier to the price paid by similar users to other treatment facilities. However, it could not ascertain that other prices were free of state aid, and therefore, it did not rely on that method for its assessment. According to the incremental method, the price has to exceed the costs borne by the facility for processing waste water. In this case the relevant costs were the share of the depreciation of the facility, maintenance expenses, and operating costs that could be attributed to Propapier. In addition, the facility charged a margin of 20 per cent of its invested capital to reflect an appropriate rate of profit. The Commission concluded, in para. 173–181, that Propapier, as a user, derived no advantage from the upgrading of the waste water treatment facility.

To summarise so far, the principles that need to be considered in order to rule out that public funding of public infrastructure constitutes state aid are the following:

i. The construction of the infrastructure falls within the tasks of the state.
ii. The infrastructure is open to all for free (i.e. not exploited commercially).
iii. It is not designed to suit the needs of specific undertakings (i.e. intended for general use).
iv. National law does not require the developer of the site to which the infrastructure is linked to bear the cost of the connections.

When considering the specificities of improvement of infrastructure linked to sites where land is remediated or developed, it is clear that the construction or new infrastructure or the expansion and improvement of existing infrastructure lying outside sites of land development falls within the remit of the state which intends to make it freely accessible to the public for the benefit of the community.

In some cases, the infrastructure works are undertaken for the explicit purpose of 'unlocking' the residential development of the sites earmarked for social housing. This may indicate that infrastructure is designed to suit the needs of developers. This is not necessarily true. It follows from the Terra Mitica, Meerssen, and Jaguar Land Rover cases that a public authority may improve and expand existing public infrastructure in anticipation of future demand and increased use of infrastructure such as roads, pavements, and rail. Therefore, if the infrastructure works do not deviate from what a local authority normally does in relation to its general policy of urban development, it can be excluded that developers benefit from indirect aid.

At least two indicators have been used in recent Commission practice to determine whether developments were bespoke or not. First, the general urban or spatial development plan provides a benchmark with which to detect unusual publicly funded works. The Commission used this indicator to determine whether the construction of an industrial park in Slovakia was in fact bespoke development for the specific benefit of Jaguar Land Rover or whether it was congruent with the normal tasks of the public authority in question and the typical types of public works it carried out.[23]

Second, the development is bespoke if it meets the needs of a pre-identified user. The Commission used this indicator in both the Jaguar Land Rover case and the Propapier case. With respect to Jaguar Land Rover, the Commission examined whether the site was prepared to bear heavier loads than usual and whether connecting roads were wider than usual. With respect to Propapier, the Commission checked the range of chemicals that could be separated from the effluents that were received by the waste water treatment plant and excluded the possibility that the plant treated only chemicals linked to the manufacturing of paper.

Lastly, in both cases, the cost of any infrastructure that was exclusively used by Propapier or Jaguar Land Rover was paid fully by those companies. Jaguar Land Rover, for example, used exclusively part of a new multimodal terminal and paid for it.

IV. Public funding for land development and the preparation of a site for further commercial use

Land development and remediation works by public authorities may not fall within the scope of Article 107(1) TFEU. Public authorities may carry out work to change the state or condition of land in order to preserve it or in order to prepare it for further commercial development.

Nature conservation is a non-economic activity.[24] However, economic activities which are not inextricably linked to the non-economic task of nature conservation are classified as economic regardless of whether the organisations to which the task is assigned are public or private and regardless of whether they are for profit or not. Such economic activities are camping, fishing, or

23 See, Commission decision SA.45359 concerning Jaguar Land Rover.
24 See, Commission decision in Case NN 41/2005 concerning land conservation in the Netherlands and Commission decision in Case NN 8/2009, confirmed by the General Court in Case T-347/09, concerning nature conservation in Germany.

hunting.[25] It follows that a public authority that assumes itself the task of protecting nature is not engaging in an economic activity.

More recently, similar conclusions were reached by the Commission in cases SA.44011, SA.45645, and SA.46073 concerning projects for nature conservation and landscape maintenance in Thuringia, Saxony-Anhalt, and other areas of Germany. It is worth noting that in these three cases, the aid beneficiaries were not public authorities but private non-profit entities and associations. Since they also carried out economic activities, the Commission found that public funding did not contain state aid because the aid recipients kept separate accounts for their economic activities, which prevented their cross-subsidisation.

Land development normally goes beyond mere prevention of the deterioration of the top soil and the protection of flora and fauna. In practice, the purpose of land development is the preparation of land for further commercial exploitation. The preparatory tasks can be non-economic in nature because they may fall within the scope of official powers or the pursuit of public policy objectives such as the compulsory purchase of plots and their merging, the removal of polluted soil (when the polluter is not known or cannot be made liable for the pollution), the construction of public roads on the site, the laying of sewage pipelines, or the installation of public lighting. Normally such tasks are the responsibility of public authorities and are executed in line with urban and spatial development policy.[26]

The Commission considered in case N 644/A/B/2002 concerning land development in Germany that intra-state transfers did not constitute state aid. The funding was provided to local authorities to defray the costs of revitalisation of land.

A similar conclusion was reached in case SA.36346 concerning the GRW framework for land development also in Germany. The Commission considered that public funding for the remediation or revitalisation and overall preparation of land (e.g. decontamination, connection to utilities, etc.) for further commercial development was not state aid for the following reasons:

i. The recipients of the funding were local authorities which were also the owners of the land. Where land was privately held, it first had to be sold to the authority that undertook the remediation works.
ii. Bespoke development of the land was not allowed. The preparation of the land was not carried out for the needs of a specific user.
iii. The developers who commercially exploited the remediated land were selected competitively.
iv. The final owners or users of the land paid a market price.

The Commission decision on this case is silent on whether the local authorities involved made a profit from the land remediation activities. However, it can be inferred from para. 37–38 of the Commission decision that indeed they sold the land they developed at a profit. Therefore, the fact that land remediation was a profitable activity was not enough to turn the public authorities involved into undertakings. In fact, it was an essential requirement for preventing indirect aid from being passed on to the eventual users of the remediated land.

The more recent Commission decision on the land development for Jaguar Land Rover in Slovakia is also instructive. The Commission examined in detail the works carried by Slovak authorities to prepare the site that would eventually be occupied by Jaguar Land Rover. The principles applied in this case are the same as those developed in previous cases. An added detail is that although the construction of links to roads and utilities was financed by the state, the actual connection of the site to utilities (water, sewage, electricity, and telecommunications) would be paid by Jaguar Land Rover in compliance with the standard provisions of Slovak law.

When it comes to the specific cases of development of land for social housing, there are unusual state aid complications. This is because local authorities have a dual role: they are the funders of land development, whilst they are also involved in the commercial exploitation of the dwellings that will be built. The question whether local authorities, in their role as managers of social housing, act as undertakings and whether they benefit from the publicly funded remediation works is addressed in the following section.

V. State aid consequences of local authorities acting as managers of social housing

The concept of undertaking is activity-based. It does not depend on the legal status or objectives of the entity concerned.[27] A local authority, such as a municipality or provincial council, becomes an undertaking whenever it engages in an economic activity.

25 See, Case NN 8/2009 and the distinction made by the Commission between that case and Case NN 41/2005 where no economic activities existed.

26 See, Case SA.36346 on the GRW framework, para. 34.

27 See, e.g., the judgments in Cases C-35/96, Commission v Italy, para. 36; and C-180/98, Pavlov, para. 75.

The construction and/or management of social housing is an economic activity.[28] The Commission decision 2012/21 exempting compensation for public service obligations also covers social housing.[29]

Article 1 of decision 2012/21 states that

'This Decision sets out the conditions under which State aid in the form of public service compensation granted to certain undertakings entrusted with the operation of services of general economic interest is compatible with the internal market and exempt from the requirement of notification laid down in Article 108(3) of the Treaty.'

Article 2 defines the scope of the exemption:

'This Decision applies to State aid in the form of public service compensation, granted to undertakings entrusted with the operation of services of general economic interest as referred to in Article 106(2) of the Treaty, which falls within one of the following categories:

> . . . (c) compensation for the provision of services of general economic interest meeting social needs as regards . . . , social housing, . . . ;'

In order for compensation to constitute state aid in the first place, social housing must be economic in nature. Therefore, public funding for the construction and/or management of social housing is state aid even though, under the conditions laid down in decision 2012/21, it is compatible with the internal market.

Since a local authority, as manager/operator of social housing, is an undertaking, it may derive an advantage from the transaction between the developer to whom remediated land is sold and itself. The developer builds dwellings or social housing units. The remediated land belongs to the local authority as a public authority, whilst the dwellings are exploited commercially, even if their exploitation falls within the local authority's social policy.

The local authority must clearly separate its two roles so as to prevent aid from being granted to its economic activities. Its own public policy objectives cannot remove any assistance to its economic activities from the scope of Article 107(1) TFEU.[30]

As explained in the previous section, in order to prevent the granting of state aid to developers using improved/ameliorated land, the developers must be selected competitively and must pay a market price for the land they buy from local authorities. By contrast, a local authority acting as a public authority does not choose itself through a competitive process to be the manager of social housing. Therefore, it is necessary to ask whether the local authority in its capacity as an undertaking obtains an advantage from its funding of the land development in its capacity as a public authority.

The dwellings are built by the developer. The developer, being an undertaking, is not a public authority. Therefore, its resources do not count as state resources. If the construction of dwellings is funded purely by the resources of the developer, the local authority cannot be considered to benefit from state aid when it takes possession of them.

If the land is sold to the developer at a market price and later on the developer sells housing units to the local authority at a market price, and the two transactions are contractually distinct, then no one obtains any abnormal advantage and, therefore, on one receives state aid. How the local authority subsequently manages the social housing is considered below.

What happens, however, when the two transactions are linked? For example, a local authority can enter into an agreement with a developer to sell remediated land to the developer on the condition that the developer places at the disposal of that authority a certain number of units after their construction is completed.

Assume that the remediated market value of land is 100. Further assume that the developer builds 50 dwellings, whose construction costs 4 each. Suppose that 15 of those dwellings are designated as social housing units and must be transferred to the local authority. The total cost of the project is 300 [=100 + (50 × 4)]. If the market value of each unit is the sum of the value of the land and the cost of the construction, then each unit is worth 6 [=300/50]. The developer will lose 90 [=15 × 6] by transferring 15 units to the local authority. Therefore, when it enters into a contract with the local authority it will be willing to pay only 10 for the land it acquires from that local authority.

The selection of the developer through a competitive process does not alter this fact. The most efficient construction company would be willing to bid only 10 for the land.

The outcome is that the local authority forgoes revenue of 90 in the land transaction. Since, it receives 15 housing units worth 90, it seems that in the end it comes out equally well off. However, from a state aid perspective, the local authority as a public authority loses 90, whilst the local authority as manager of social housing gains 90. In terms of the budget of the authority the effect may be neutral, but in reality, state aid of 90 is granted to the economic arm of that authority.

28 See, Cases C-133/12 P, Woonlinie et al. v Commission and C-415/15 P, Woonlinie et al. v Commission and related Commission decisions.

29 OJ L7, 11 January 2012.

30 See, the judgments in Cases T-268/08, Land Burgenland v Commission and C-214/12 P, Land Burgenland v Commission; and, more recently, C-579/16 P, Commission v FIH.

VI. Does investment in social housing conform with the MEIP?

Since the local authority and the developer enter into an agreement that is the result of a competitive selection of the developer, the question arises as to whether the local authority acts as a market economy investor.

The answer is in principle 'yes', provided that the local authority aims to earn a commercial return from its investment.

In the numerical example in the previous section, the local authority, acting as a public authority selling remediated land, loses revenue from the sale of the land. In principle, it can wait to be compensated until it receives the housing units and starts exploiting them commercially. Such an arrangement would be free of state aid under the following two conditions.

First, the local authority must eventually receive the full amount that corresponds to the market value of the land at the moment it is sold to the developer. In addition, it must receive the interest it forgoes by not being able to deposit the proceeds of the sale in a bank and a margin to compensate it for the risk it assumes that the developer may in the meantime go bankrupt and may not be able to complete the transaction. However, since, it does not get any money, but instead it gets housing units, the number of units it eventually receives must be adjusted upwards so that their total value corresponds to the forgone sale revenue plus interest plus a risk margin.

Second, since at the same time, however, the local authority is investing as an undertaking in the commercial exploitation of housing units, it must carry out an *ex ante* business plan that demonstrates, on the basis of realistic assumptions and credible methodology, that the revenue from renting or selling those housing units is expected to generate profit that would satisfy a hypothetical private investor in a similar situation of similar size and risk.[31]

In practice, it is difficult to construct a commercially viable scenario where a profit-seeking investor invests in social housing which is then rented out at affordable prices to low-income persons. First of all, the social policy objective of making housing available at 'affordable' prices to those who cannot pay the going market rates is not consonant with the aims of a profit-seeking investor. And second, if there were a market for that kind of housing, it would have already provided it.

One may counter-argue that perhaps any subsidy to social housing can be considered compatible with the internal market on the basis of Commission decision 2012/21. This is in principle possible, but it requires, first, that the intervening authority defines a precise public service obligation and imposes that obligation on an identified person. In order for a public service obligation to be well-defined, the intervening authority must demonstrate that the market cannot provide the service in question.[32]

The need for a proper definition of the public service obligation and the fact that some kind of market failure or inadequacy must be established bring us back to the question whether the authority that seeks to provide affordable social housing can claim that it acts as a private investor. It is obvious that there is a glaring contradiction between the claim of acting in compliance with the MEIP and the claim of acting to supply affordable housing.

Before concluding this section, it is necessary to consider whether the public funding of land development can 'unlock' private investment, as mentioned in Section III, so that a local authority can legitimately claim that it acts as a private investor when it manages social housing.

When a local authority improves infrastructure and develops land for further commercial exploitation, it carries out its state duties. Indeed, the purpose of public investment in infrastructure and land development is to 'unlock' private investment later on. There is nothing intrinsically contradictory in land development and commercial exploitation of the land, as long as economic activities are not subsidised.

A local authority which is involved in both non-economic and economic activities must separate its roles acting as the state and acting as a private investor.[33] At any rate, even if land development makes possible the construction of housing units, it does not relieve the local authority that invests in housing from the obligation to prove that it expects to earn a commercial return.

VII. Do developers receive any direct or indirect state aid?

When developers are selected through competitive procedures and the contracts for the construction of the housing units are concluded on commercial terms, they receive no state aid.

In addition, they should not obtain any other side benefits, such as coverage by local authorities of costs that should normally be borne by developers.

31 On the behaviour of private investors see the judgments in Cases T-319/12, Spain v Commission; and T-1/15, SNCM v Commission.

32 On the proper definition of a public service obligation see Cases C-91/17 P, Cellnex Telecom v European Commission and C-114/17 P, Spain v European Commission.

33 See, Cases T-268/08, Land Burgenland v Commission and C-214/12 P, Land Burgenland v Commission; and, more recently, C-579/16 P, Commission v FIH.

As explained in previous sections, if there is any under-pricing of the land sold to developers, it is likely to correspond to the value of the social housing units that are transferred to the social housing arms of local authorities. So, developers are probably only channels through which aid flows from the public tasks of local authorities to the economic activities of such authorities.

VIII. Conclusions

The review of the case law and decisional practice of the Commission and the analysis carried in this paper lead to the following conclusion concerning the principles that apply to the public funding of infrastructure, land development, and construction of social housing.

First, public infrastructure is infrastructure that is open to all users. Its construction falls within the remit of the state, reflecting the general needs of society. Open public infrastructure is not exploited commercially. Normally, it lies outside private sites or commercially operated facilities. Public funding of public infrastructure does not constitute state aid.

Second, the public funding of the development or remediation of public land for commercial exploitation does not constitute state aid as long as the remediation tasks fall within the remit of the state, they are not tailored to the needs of any undertaking, and the land is sold at a market price on non-discriminatory terms.

Third, the construction of links between a private project and the public road network or other public networks is normally the responsibility of local authorities. If the relevant local or national law does not oblige developers to bear the costs of the links, then their public funding by those authorities does not constitute state aid.

Fourth, the construction and operation/management of social housing are economic activities.

Fifth, public funding of social housing is likely to constitute aid which can be made compatible with the internal market if it complies with the requirements of Commission decision 2012/21. Claims that the funding authority invests on terms that conform with the MEIP need to be proven on the basis of a credible *ex ante* business plan.

On the basis of the above principles, the following should be verified in order to ensure either the absence of state aid or its compatibility with the internal market:

i. The public infrastructure and land remediation are not tailored to specific features or needs of housing projects.
ii. Developers are not obliged to pay for the links to the public infrastructure.
iii. Developers pay a market price for the remediated land.
iv. If the land is contributed to the project without payment by the developer, a credible *ex ante* study must be undertaken that demonstrates that a commercially acceptable profit will be paid to the selling local authority.
v. If the land is sold to the developer at a price below market level on the condition that social housing units built by the developer are transferred to the social housing arm of the local authority, the amount of under-pricing must correspond to the value of the units. If it is larger, the developer receives state aid.
vi. The local authority that obtains social housing units for which it does pay directly is likely to receive state aid indirectly transferred to it via the sale of land to the developer. Such state aid needs to be granted in conformity with Commission decision 2012/21 on compensation of SGEI providers.

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