

# PUBLIC PROCUREMENT AND STATE AID

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## OVERVIEW OF THE EU PUBLIC PROCUREMENT DIRECTIVES

1. The EU public procurement rules harmonise the rules and procedures for procurement undertaken by public authorities, including government departments, devolved administrations and local authorities.
2. New directives were adopted in 2014, which must be transposed into national law by 18 April 2016 to replace directives adopted in 2004, viz.:
  - a. Directive 2014/23/EU on the award of concession contracts, (2014) OJEU L 94/1 ("**Concessions Directive**")
  - b. Directive 2014/24/EU on public procurement, (2014) OJEU L 94/65 (the Commission refers to this as the "**Classical Directive**", but in practice the terms "**Public Contracts Directive**" or "**Public Procurement Directive**") are more commonly used)
  - c. Directive 2014/25/EU on procurement by entities operating in the water, energy, transport and postal services sectors, (2014) OJEU L 94/243 ("**Utilities Directive**")

See generally:

Cabinet Office, [Transposing EU Procurement Directives](#)

<https://www.gov.uk/guidance/transposing-eu-procurement-directives>

Welsh Assembly Government, Procurement

<http://gov.wales/funding/eu-funds/2014-2020/looking/procurement/?lang=en>

European Commission, Public Procurement

[http://ec.europa.eu/growth/single-market/public-procurement/index\\_en.htm](http://ec.europa.eu/growth/single-market/public-procurement/index_en.htm)

3. The application of the Directives is subject to specified financial thresholds being exceeded. From 1 January 2016, these are
  - a. contracts for goods and services: € 135,000 ( £ 106,047);
  - b. contracts for works: € 5,225,000 ( £ 4,104,394); and
  - c. concessions contracts: € 5,225,000 ( £ 4,104,394).

The GBP (sterling) thresholds are updated annually by the Commission. The thresholds for 2016 are set out in its Communication of 12 December 2015, (2015) OJEU C 418/1.

4. If these thresholds are not satisfied, public authorities must still comply with general principles of EU law, in particular:
  - a. equal treatment
  - b. transparency
  - c. non-discrimination
  - d. mutual recognition
  - e. proportionality

- f. the Treaty rules on the free movement of goods, the freedom to provide services and the right of establishment
5. Directive 2014/24/EU (public procurement) was implemented in England and Wales and in Northern Ireland through the Public Contracts Regulations 2015. The Concessions and Utilities Directives will be implemented through the Concessions Contracts Regulations 2016 and the Utilities Contracts Regulations 2016, respectively; these have not yet been adopted. Similar secondary legislation has already been adopted for Scotland.
6. The Public Contracts Regulations foresee the following different possible procurement procedures from which contracting authorities may choose, in accordance with Regulation 26:
- a. open procedure (Regulation 27): any interested economic operator may submit a tender in response to a contract notice. The successful bidder is selected once bids are received.
  - b. restricted procedure (Regulation 28): any interested economic operator may submit a request to participate in response to a call for competition, with the authority inviting selected operators to submit a tender. This a two-stage procedure: (i) bidders are short-listed after receipt of pre-qualification questionnaires and (ii) the successful bidder is selected after full tenders are submitted.
  - c. competitive procedure with negotiation (Regulation 29): any interested economic operator may submit a request to participate in response to a call for competition, with the authority inviting selected operators to submit a tender with negotiation thereafter to improve tenders. This is a two-stage process: (i) negotiations with all bidders after tenders are submitted and (ii) selection of the successful bidder after revised tenders are submitted.
  - d. competitive dialogue (Regulation 30): any interested economic operator may submit a request to participate in response to a call for competition, with the authority inviting selected operators to engage dialogue as to identifying and

defining the means best suited to satisfy the authority's needs. This is used where the authority cannot identify the solution to its requirements at the outset. After potential bidders complete pre-qualification questionnaires, dialogue occurs with bidders before formal tenders are submitted.

- e. innovation partnership: (Regulation 31) any interested economic operator may submit a request to participate in response to a call for competition, with the authority inviting selected operators to participate in developing an innovative product, service or works.
- f. negotiated procedure without prior publication (Regulation 32): exceptionally, suppliers may be approach directly to negotiate, without publication of an OJEU notice or call for competition.

#### **WHEN MIGHT PROCUREMENT APPLY IN THE STATE AID CONTEXT?**

- 7. There are numerous circumstances in which a transaction or project that involves public funding (whether funds of EU origin, under the EU Structural Funds, or of UK origin) or which might otherwise give rise to State aid issues may require a public authority (or a beneficiary) to follow the procedures laid down in the Public Procurement Directive or to apply an analogous tender procedure. Some of these are summarised below. They may arise as a matter of procurement law, to ensure compliance with the State aid rules or as a matter of contract law (for example under the terms of a funding agreement). In each case, a full State aid assessment is required for the funding provided.
- 8. This may therefore result in a public authority or a beneficiary (which can include a public authority) having to:
  - a. comply with the Public Contract Directive and the Public Contracts Regulations 2015, or
  - b. respect the principles deriving from the Treaties (transparency, non-discrimination, proportionality, mutual recognition and respect for the free

movement of goods, the freedom to provide services and the right of establishment), or

- c. implement a tender procedure, such that it can be demonstrated that the funding measure: does not involve State aid (for example because the transaction is on market terms); benefits from an exemption or constitutes compatible aid under Article 107(3) TFEU.

### **Projects involving the use of EU Structural and Investment Funds**

9. National governments (which include the Welsh Assembly Government, as a devolved administration) are responsible for managing EU Structural and Investment Funds ("**ESI Funds**"), i.e. the European Regional Development Fund ("**ERDF**"), the European Social Fund ("**ESF**"), the Cohesion Fund, the European Agricultural Fund for Rural Development ("**EAFRD**") and the European Maritime and Fisheries Fund ("**EMFF**").
10. Procurement issues may arise both at the awarding authority level and at the beneficiary level:
  - a. at the awarding authority level, the authority may award a contract to provide services, the consideration for which is funded by one of the ESI Funds. For example, a local enterprise partnership may award a contract to provide services to a disadvantaged section of the community, such as the long-term unemployed, that is funded by the ESF. To ensure no over-compensation this should be awarded using a tender process. This is considered below in the section in the sale of land and assets, to which analogous principles apply (see paragraph 32 et seq.) It may also fall within the scope of the rules on services of general economic interest (see paragraphs 23 et seq., below).
  - b. at the beneficiary level, the beneficiary of ESI Funds will be required to disburse them in accordance with EU law. This is considered in the following paragraphs.
11. Such funds are treated as 'State resources' for the purposes of State aid law, as the funds are under the control of the Member State. It is notable that one of the

fastest growing reasons for recovery of funding non-compliance with ERDF rules is the grant of funding in contravention of the State aid rules.

See generally, Department for Communities and Local Government, State Aid Law: European Regional Development Fund Guidance Note for Grant Recipients (January 2016) ESIF-GN-1-006

12. Article 6 of Regulation 1303/2013 provides that "*Operations supported by the ESI Funds shall comply with applicable Union law and the national law relating to its application ('applicable law')*": Regulation 1303/2013 laying down common provisions on the ESI Funds, (2013) OJ L 347/320. This repeals and replaced Regulation 1083/2006, Article 9(5) of which provided that "*operations financed by the [Structural] Funds shall comply with the provisions of the Treaty and of acts adopted under it*".
13. It is clear that "applicable union law" includes both the internal market rules and principles laid down in the Treaty and also the Public Procurement Rules. The internal market rules of the Treaty, including transparency, equal treatment and non-discrimination (see paragraph 4 above). These rules apply to contracts outside of the Public Procurement Directives: see Commission Interpretative Communication on the Community law applicable to contract awards not or not fully applicable to the Public Procurement Directives (2006) OJEU C 179/2.
14. This means that, even if the Public Procurement Directives do not apply, the beneficiary must use tenders processes that comply with these principles when implementing a project that is funded (in whole or part) by one of the ESI Funds. This is clear from national guidance published by both the UK Government and the Welsh Assembly Government:
  - a. the Welsh European Funding Office's guidance is that:

*"compliance with applicable EU rules and policies is a fundamental condition of the eligibility of expenditure for reimbursement from the Structural Funds"* (p.92), which includes the procurement rules, such that "*Beneficiaries must comply with all applicable EC, UK and Welsh laws/government policies when*

*letting contracts partly funded by the EU funds, including the UK Public Contracts Regulations 2015 that implements European Public Procurement Directives 2014" (p.93)*

WEFO, Eligibility rules and conditions for support from the European Structural Funds 2014 – 2020 (April 2015), pages 92 to 102

- b. the Department of Communities and Local Government's guidance (which applies only in England) is set out in its guidance, Procurement Law: ESIF Compliance Guidance Note (ESIF-GN-1-004, 16 July 2015), Chapter 6. This states that recipient of ESIF grant funding must demonstrate compliance with "*Treaty principles*", including equal treatment, transparency, non-discrimination, mutual recognition and proportionality. Even where there is no cross-border interest in a contract and the contract is not being let by a 'contracting authority', DCLG expects grant recipients to conduct open, fair and transparent procurement processes before awarding contracts and to select the winning bidder on merit.
15. The obligation to comply with the principles of transparency, equal treatment and non-discrimination requires beneficiaries to undertake "a degree of advertising sufficient to enable the services market to be opened up to competition": Case C-324/98 *Teleaustria v Telekom Austria*, EU:C:2000:669 (at [20]) and Case C-458/03 *Parking Brixen v Gemeinde Brixen and Stadtwerke Brixen* EU:C:2005:605 (at [49]).
16. Merely contacting potential suppliers directly is not sufficient, as it is selective and may be discriminatory: see Commission Interpretative Communication (paragraph 13 above), at point [2.1.2].
17. This is subject to the proviso that the contract "might potentially be of interest to economic operators in other Member States": Case C-231/03 *Coname v Commune di Cinglia de' Botti* EU:C:2005:487 (at [20]).
18. In order to demonstrate a failure to comply with the Treaty principles regarding procurement, it is necessary to substantiate that the contract might have been of 'cross-border interest', i.e. that the contract was of "*certain interest to an*

*undertaking located in a different Member State [which was] unable to express an interest in that contract": Case C-507/03 Commission v Ireland EU:C:2007:676 (at [33]). See also R (Chandler) v Secretary of State for Children, Schools and Families [2009] EWCA Civ 1011, at [30] and [36] (concerning procurement of contracts outside the Public Procurement Directive).*

19. Failure to comply with the public procurement rules constitutes an 'irregularity' that will lead to a 'financial correction' being imposed, i.e. a claw-back of some or even all of the ERDF funding received by the beneficiary. See Commission Decision of 19 December 2013 on the setting out and approval of the guidelines for determining financial corrections to be made by the Commission to expenditure financed by the Union under shared management, for non-compliance with the rules on public procurement: financial corrections for procurement irregularities (C(2013) 9527 final). Different corrections are applied for specific irregularities: see DCLG Guidance (paragraph 14.b above), Chapter 3.
20. An (admitted) failure to advertise contracts for a project which had received ERDF funding was considered by the High Court in *Mansfield District Council v Secretary of State for Communities and Local Government* [2014] EWHC 2167. The Council failed to comply with Treaty principles by not advertising contracts which were below the Public Procurement Directive thresholds. It did not address the issue of potential cross-border interest and instead directly approached prequalified bidders, in accordance with its usual practice for contracts below the EU thresholds, before issuing an invitation to tender. The Court upheld the imposition of a 25% correction for an irregularity: failure to even consider whether there was cross-border interest in the contract was itself a breach of the EU procurement requirements (at [43]).
21. In *Mansfield*, the Court concluded (at [57]) that:

*" the EU requirements are demanding and the onus is on the Grant recipient to get its own processes right. The help given by [DCLG] is, of course, always important, but the ultimate responsibility for complying with the procurement obligations lies on the Grant recipient"*

22. DG REGIO has published guidance on the application of the procurement rules to projects funded by the ESI Funds: European Commission, Public Procurement Guidance for Practitioners on the avoidance of the most common errors in projects funded by the European Structural and Investment Funds (2015).

**Compensation provided to an undertaking entrusted with the provision of a service of general economic interest**

23. In Case C-280/00 *Altmark Trans and Regierungspräsidium Magdeburg v Nahverkehrs-gesellschaft Altmark* EU:C:2003:415, CJEU set down four cumulative criteria that must be satisfied if compensation paid to an undertaking for fulfilling a public service obligation imposed in respect of the provision of a service of general economic interest (“**SGEI**”) is not to constitute aid.

24. The fourth *Altmark* criterion is that:

*“ where the undertaking which is to discharge public service obligations, in a specific case, is not chosen pursuant to a public procurement procedure which would allow for the selection of the tenderer capable of providing those services at the least cost to the community, the level of compensation needed must be determined on the basis of an analysis of the costs which a typical undertaking, well run and adequately provided with means of transport so as to be able to meet the necessary public service requirements, would have incurred in discharging those obligations, taking into account the relevant receipts and a reasonable profit for discharging the obligations.”*  
(at [93]) (emphasis applied)

25. It is therefore clear that if the provider of the SGEI is selected following a procurement procedure in which the selection criteria is the lowest priced tender, no State aid arises in respect of the compensation paid by the public authority.

26. The Commission has provided further guidance on the fourth *Altmark* criteria: Commission Communication on the application of the State aid rules to compensation for services of general economic interest (2012/ C 8/02), (2012) OJEU C 8/4. The Commission’s guidance states that:

- a. “the simplest way” to meet the fourth *Altmark* criterion is to conduct an open, transparent and non-discriminatory procurement procedure in line with the Public Procurement Directive, so as to compare different offers and set compensation so as to exclude aid (at [63] and [64]).
  - b. either an ‘open’ or ‘restricted’ procedure would be acceptable, in the latter case provided interested operators are not prevented from tendering without valid reason (at [66]).
  - c. the following procedures do not satisfy the fourth *Altmark* criterion: ‘competitive dialogue’ or ‘negotiated procedure’ (due the discretion available to the contracting authority) or ‘negotiated procedure without publication of a contract notice’ (as this does not ensure the selection of the lowest cost tenderer) (at [67]).
  - d. regardless of the procedure used, the fourth *Altmark* criteria will not be satisfied if there insufficient genuine and open competition, e.g. if a specific infrastructure is required to provide the SGEI or if only one bid is submitted (at [68])
27. Where the *Altmark* criteria are not satisfied, there is prima facie an advantage and thus aid (subject to the other requirements of Article 107(1) TFEU being satisfied. If exemption under the SGEI Decision (Commission Decision C(2011) 9380 on the application of Article 106(2) TFEU to State aid in the form of public service compensation granted to certain undertakings entrusted with the operation of services of general economic interest, (2012) OJ L 7/3) is not available, the aid will need to be notified to the Commission (under Article 108(3) TFEU) for approval under Article 107(2) or (3) TFEU.
28. The Commission’s SGEI Framework sets out how it will assess the compatibility of compensation for providing an SGEI: Commission Communication, European Union framework for State aid in the form of public service compensation (2011), (2012) OJ C 8/15. At point [19], the Commission states that the compatibility of public service compensation that constitutes State aid is dependent on, inter alia, compliance with the Union public procurement rules, including “any requirements

of transparency, equal treatment and non-discrimination resulting directly from the Treaty and, where applicable, secondary legislation”.

29. Although, since the *Leipzig-Halle* judgment (Case C-288/11 P *Mitteldeutsche Flughafen and Flughafen Leipzig-Halle v Commission* EU:C:2012:821), public funding of infrastructure that will be exploited commercially will *prima facie* constitute State aid, unless the funding is provided in conformity with the market economy operator principle, it is possible that – in some circumstances – the operation of such infrastructure could constitute an SGEI. The Commission has published ‘analytical grids’ that assess when funding of various types of infrastructure may fall within the State aid rules and how the SGEI rules may apply to them. These have been published by the Department of Communities and Local Government.

See DCLG [State Aids Guidance](#) ERDF-GN-1-009 (November 2012).

30. As well as a general analytical grid, there are specific grids for airports, broadband, culture, ports, research and development and innovation, and water. Of particular relevance is the grid for broadband (grid 3). The Commission has published guidelines on the application of the State aid rules for broadband projects: [EU Guidelines in the application of State aid rules in relation to the rapid deployment of broadband networks](#) (2013) OJEU C 25/1. These contain a section on SGEIs (points [18] to [27]). Most broadband networks will not constitute SGEIs, as there is sufficient market provision. However, where there is and is likely in future to be insufficient market provision, a broadband network may constitute an SGEI. Funding must comply with the *Altmark* criteria or the SGEI Decision, to ensure that there is no over-compensation of the operator, or be individually exempted in accordance with the SGEI Framework. Accordingly, a proper procurement process is likely to be required to select the operator of the ‘SGEI Broadband Network’. The Commission’s Broadband Guidelines provide that, for funding to be compatible with the State aid rules, a competitive selection process must be used and the most economically advantageous offer must be accepted.

“Competitive selection process: *Whenever the granting authorities select a third-party operator to deploy and operate the subsidised infrastructure, the*

*selection process shall be conducted in line with the spirit and the principles of the EU Public Procurement Directives. It ensures that there is transparency for all investors wishing to bid for the implementation and/or management of the subsidised project. Equal and non-discriminatory treatment of all bidders and objective evaluation criteria are indispensable conditions. The competitive tender is a method to reduce budgetary costs, to minimise the potential State aid involved and at the same time reduces the selective nature of the measure insofar as the choice of the beneficiary is not known in advance. Member States shall ensure a transparent process and a competitive outcome and shall use a dedicated central website at the national level to publish all on-going tender procedures on broadband State aid measures.*

*Most economically advantageous offer: Within the context of a competitive tender procedure, the aid granting authority shall establish qualitative award criteria on which the submitted bids are assessed. Relevant award criteria may include, for instance, the achieved geographical coverage, sustainability of the technological approach or the impact of the proposed solution on competition. Such qualitative criteria have to be weighed against the requested aid amount. In order to reduce the amount of aid to be granted, at similar if not identical quality conditions, the bidder with the lowest amount of aid requested should in principle receive more priority points within the overall assessment of its bid. The awarding authority shall always specify in advance the relative weighting which it will give to each of the (qualitative) criteria chosen."*

Commission [Broadband Guidelines](#), points [78(b)] and [78(c)]

### **Financial support road or rail passenger transport services through the award of a 'public service contract'**

31. Regulation 1370/2007 on public passenger transport services by rail and by road, (2007) OJEU L 315/1, Article 5, requires (subject to a threshold of € 1m annual contract value or 300,000 km/year) competitive tendering unless the contract is awarded to an internal operator. These procedures "shall be open to all operators,

shall be fair and shall observe the principles of transparency and non-discrimination”.

### **Sale of land, shares or other assets by a public authority, including privatisations**

32. Public authorities have substantial holdings of land, buildings, other real estate and other assets. These may include shareholdings in companies, joint ventures and the like.
33. The same principles apply when a public authority is selecting companies to provide goods or services to it, for example to provide services to be provided to disadvantaged sections of the community that are funded by the European Social Fund (for example, services to the disabled or long-term unemployed to help them back into work)
34. In 1997, the Commission published guidance on how the State aid rules would apply to the sale of land and buildings: Commission, Communication on State aid elements in sales of land and buildings by public authorities, (1997) OJ C 209/3. Although now quite old, it remains informative.
35. In its view, sale through an unconditional bidding procedure would be at market value and not involve aid where:
  - a. it is sufficiently well publicised: i.e. repeatedly advertised (nationally or, for high value sites, internationally) so as to come to the notice of all potential buyers.
  - b. it is open and unconditional: i.e. the buyer is free to use the land as he wishes, although conditions may be imposed under general law (e.g. planning, environmental protection) or if they are imposed on and can be met by all possible bidders.
  - c. the sale is to the highest bidder.
36. The Commission has also published guidance in its draft Notice on the notion of aid pursuant to Article 107(1) TFEU (2014), paras [91] to [99]. In its view, no aid arises where the sale (or purchase) of assets, goods and services is undertaken in

compliance with the principles of the Public Procurement Directives, *even in cases where those Directives are not as such applicable*. Therefore, the tender procedure must be:

- a. *open*: all interested and qualified bidders must be able to participate
  - b. *transparent*: all interested and qualified bidders must be provided with the same information at each stage of the tender procedure and in sufficient time. In addition, the selection and award criteria must be clear and the procedure must be sufficiently well-publicised (which will depend on the nature of the assets, goods and services and may require advertising throughout the EU or even internationally).
  - c. *non-discriminatory*: all bidders must be treated equally and without discrimination. The selection and award criteria must be specified in advance, so that bidders are compared and assessed objectively. There must also be no discrimination on grounds of nationality.
  - d. *unconditional*: bidders must be free to use the assets, goods or services for their own purposes. This does not prevent the application of obligations arising under general law (including planning legislation), but the imposition of other 'special obligations' for the benefit of either the authority or the general interest would mean that the tender would not be 'unconditional'.
  - e. *competitive*: there must be sufficient competition for the contract. This cannot be the case where there is only one party that can submit a credible bid.
37. The Commission considers that, in order to satisfy all of these requirements, the authority can only use either the 'open procedure' or the 'restricted procedure' under the Procurement Directives, in the latter case subject to the proviso that interested potential tenderers are not prevented from tendering without valid reason. However, 'competitive dialogue' and the 'negotiated procedure' do not generally meet these requirements, as the contracting authority has a wide discretion in which parties may participate. According to the Commission, only in (unspecified) 'exceptional circumstances' can these procedures meet the requirements of an

'open, transparent, sufficiently well-publicised, non-discriminatory and unconditional' tender procedure. However, the 'negotiated procedure without publication of a contract notice' cannot do so. See draft Notice on the notion of aid pursuant to Article 107(1) TFEU (2014), para [93]. The same presumably holds true also for the 'innovation partnership' procedure.

38. Two judgments of the General Court exemplify how these principles should be applied.
39. The first, in Case T-244/08 *Konsum Nord v Commission* EU:T:2011:732, concerned the sale of land for a supermarket in the Swedish town of Åre. It confirms that a higher bid is not necessarily a 'comparable' bid that determines the market price of an asset.
40. The municipality had sold the land to Konsum for a price considerably lower than that offered by Lidl. The Commission concluded that this was a sale at less than market price and thus involved State aid. The sale was part of a larger series of transactions to implement the municipality's plans to redevelop the Åre town centre, which included Konsum selling some property to a property company that would redevelop the town centre and buying other property from the municipality. Konsum would not have sold its property had it been unable to buy the other land, on which it would build a new store.
41. The Commission decision was annulled. The General Court considered that the higher offer by Lidl was not a credible bid: it was merely an expression of interest, was not unconditional, was submitted very late and was not comparable to Konsum's offer, as it would not have enabled the municipality to implement its development plans: see paras. [72] to [76]. The General Court was clear that, when comparing alternative bids, it is important to consider the specific circumstances of the bids (at [73]). The included the municipality's urban planning requirements, which linked together the two legally independent transactions (at [54]).
42. Accordingly, the Commission was wrong to find that Lidl's bid was comparable to that made by Konsum and its decision was annulled. In April 2013, the Commission

then adopted a second decision, finding that the transaction did not involve any aid (Case SA.20112 *Sweden: Konsum Jämtland Ekonomisk Förening*).

43. The second, in Cases T-268 etc/08 *Land Burgenland and Austria v Commission* EU:T:2012:90, concerned the privatisation of an Austrian bank. It was not sold to the highest bidder (an Austro-Ukrainian consortium, which had bid € 155 million, substantially more than the chosen bidder (an Austrian financial services group, which had bid € 100 million).
44. The General Court upheld the Commission decision that this involved State aid. As preliminary point, it confirmed that an open, transparent and unconditional tender procedure is not required in every situation in order to determine the market price: it is only one means of doing to, but where one is used it must satisfy the conditions laid down by the Commission (at [63] to [66]). It then held as follows:

*"the market price of an undertaking, which generally depends on the interplay of supply and demand, corresponds to the highest price that a private investor operating in normal competitive conditions would be prepared to pay for that undertaking... When a public authority intends to sell an undertaking belonging to it and makes use of an open, transparent and unconditional tender procedure to do that, it can therefore be presumed that the market price corresponds to the highest offer, provided that it is established, firstly, that that offer is binding and credible and, secondly, that the taking into account of economic factors other than the price is not justified, such as the off-balance-sheet risks existing between the offers." (at [69] and [70]) (emphasis added)*

and

*"In principle, the private market-economy vendor will opt for the highest offer, regardless of the reasons which led the potential buyers to submit offers of a certain amount" (at [89]) (emphasis added)*

45. The General Court concluded that the Commission had correctly concluded that there was no basis for the Austrian authorities' rejection of the consortium's bid as

lacking credibility, which had been based on a lack of certainty over the consortium's financial status (both to finance the acquisition and to provide liquidity post-acquisition) (at [83] to [91]) and ability obtain regulatory approval (at [113] – [140]). A private investor, acting as a shareholder and not as a public authority (which may have other interests in that capacity), would have accepted the consortium's bid, which was financeable and likely obtain approval.

46. The General Court's judgment was upheld by the Court of Justice in Cases C-214 etc./12 P *Land Burgenland and others v Commission* EU:C:2013:682.
47. The *German Incubators* case provides a further example of how the use of tender procedures can avoid the provision of State aid: *Germany: Construction or extension of business, technology or incubator centres for small and medium-sized enterprises 2004 – 2006 ('German Incubators')* (3 May 2005). This involved the use of public funding to construct and operate industrial, technology or 'incubator' premises which would be let (at below market rents) to SMEs. Each centre would be owned by a 'provider' (usually a municipality or a not-for-profit organisation), which would receive public funding to construct the centre. Each centre would be constructed by a private company, selected by tender, in accordance with the public procurement rules. Each centre would be managed and operated, for up to 15 years, by a private company, selected by tender, in accordance with the public procurement rules and remunerated at market rates. For this reason, the Commission concluded that the centres and their managers received no aid. The 'providers' did not receive any aid due to a claw-back mechanism that would apply once the centres reverted to their ownership and operation after 15 years. The SMEs users did receive aid, but this was exempted as *de minimis* aid.

### **Remediation of land by a public authority before private development**

48. Where a public authority remediates contaminated land or installs utility and transport infrastructure before its development by a private entity, it is possible that there may be aid. However, in Case SA.36346 *Germany: GRW land development scheme for industrial and commercial use* (2014), the Commission found that there was no aid because grants were limited to the costs of remediation (including land clearance, environmental decontamination and demolition of old buildings) and

installing the new infrastructure (roads, landscaping, utility connections etc.), and neither the developers nor end purchasers of the land received any advantage.

49. The 'developers', who would remediate the land and construct the new infrastructure, were selected through open, transparent and non-discriminatory tender processes in accordance with the rules on public procurement. Accordingly, the developers received market remuneration for remediating the land, which they did not use themselves.
50. The purchasers of the land were selected through open, transparent and non-discriminatory tender processes in accordance with the Commission's rules on the sale of land. They thereby paid the market price and did not receive an advantage.

### **General Block Exemption Regulation**

51. The General Block Exemption Regulation, Regulation (EU) 651/2014, (2014) OJEU L 187/1, exempts a number of categories of aid from the notification and suspension obligations imposed by Article 108(3) TFEU ("**GBER**").
52. For certain categories of aid, the exemption provided by the GBER is available only if the beneficiary is selected using an open, transparent and non-discriminatory selection procedure, viz:
  - a. regional urban development aid (Article 16)
  - b. risk finance aid (Article 21)
  - c. investment aid for energy efficiency projects in buildings (Article 39)
  - d. operating aid for the promotion of electricity from renewable sources (Article 42)
  - e. aid for broadband infrastructures (Article 52)
  - f. aid for sport and multifunctional recreational infrastructures (Article 55)
  - g. aid for local infrastructures (Article 56).

## **SYNTHESIS – WHAT SHOULD A PROCUREMENT EXERCISE LOOK LIKE IN ORDER TO COMPLY WITH BOTH THE STATE AID AND THE PUBLIC PROCUREMENT RULES?**

53. In some circumstances, it will be obligatory to follow the procurement rules, whether the procedures set down in the Public Procurement Directive (if the applicable thresholds are met) or the general Treaty principles (if they are not). Where this is the case, the relevant procedures must be followed as a matter of either procurement law or (where the beneficiary is in receipt of funding from the ESI Funds) general Treaty principles; in the latter case, this applies both to beneficiaries in the public and private sectors.
54. Nevertheless, in these circumstances, to be compliant also with the State aid rules, a contracting authority can make use only of either the 'open procedure' or the 'restricted procedure'. Other procedures (such as 'competitive dialogue' and the 'negotiated procedure' cannot be used, even if they would be permitted under the Public Procurement Directives.
55. Under State aid law, the use of a procurement process may demonstrate that either:
  - a. a measure does not constitute aid, for example because, in the case of an SGEI, it satisfies the *Altmark* criteria (such that there is no over-compensation) or because the measure is on market terms and satisfies the market economy operator principle; or
  - b. if a measure does constitute aid, it is compatible aid, for example under the SGEI Framework or (in the road and rail passenger transport sector) the requirements of Regulation 1370/2007 are met.
56. To satisfy the requirements of State aid law, a procurement process must be:
  - a. open to all potential interested bidders;
  - b. sufficiently well publicised, i.e. it is advertised; it is not sufficient merely to contact potential bidders directly and to then draw up a shortlist;
  - c. transparent in terms of the information provided to bidders;

- d. transparent, in that the selection and award criteria must be objective and published
  - e. non-discriminatory, in that all bidders are treated equally and the selection and award criteria are applied in the same way to all bidders and without discretion; and
  - f. unconditional, in that bidders are not restricted in their use of assets and are not subject to unusual obligations that not all potential bidders can satisfy, although this does not prevent the application of generally applicable laws and regulations, including planning legislation and policies.
57. In addition, the process must actually be competitive. In other words, there must be more than one credible potential bidder and, ideally, several credible bids should be received.
58. Finally, either the lowest price or 'most economically advantageous tender' must be selected as the winning offer, provided that, in the relevant economic and legal circumstances, the bids are comparable. A lower offer can only be accepted where there is doubt as to the credibility of the highest bid, for example because it may not be certain (e.g. it is only an expression of interest), it may not be financeable or the bidder may not obtain all necessary regulatory approvals. However, there must be real evidence to support this. In this regard, care must be taken to ensure that bids are in fact comparable.

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