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Directorate-General for Competition
Unit A3. State aid policy and scrutiny

Response to the Consultation on the Notice on the Notion of State Aid_HT.3639 – Notion of aid

Istituto Bruno Leoni (IBL) is an Italian think tank active in monitoring and promoting policies related to market opening, welfare state reforms and fiscal responsibility. As such, we have great interest in the development of the State aid discipline at the EU level. In fact we believe State aid discipline should be at the same time broadened and made more stringent, in order to prevent governmental interventions that may hinder, distort, or prevent competition. Under this respect we welcome the EU Commission's effort to clarify and modernize the concepts concerning the notion of State aid, within the boundaries set out by Article 107(1) of the Treaty on the Functioning of the European Union (TFUE).

Generally speaking, IBL supports both the approach and the aim and scope of the "Draft Commission Notice on the notion of State aid pursuant to Article 107(1) TFEU", which is being sent out for comments. However we believe that a number of details might be made either clearer or more rigid in order to reduce both the uncertainties on, and the exemptions from, the discipline on illegal State aid. The following document raises such specific points.

1. Notion of undertaking and economic activity

1.1. General Principles

The consultation does not provide a clear definition of undertaking. A lack of clarity in defining core terms leads to uncertain interpretations. The only clause that is provided to help and define an undertaking is relating undertaking to economic activity. But the very definition of an economic activity is a major source of uncertainty regarding the application of Article 107(1) TFEU. This leads to a degree of legal uncertainty throughout the entire Communication and Draft paper. We suggest an operational, unambiguous definition of what an economic activity (*prima facie*) is: An economic activity is any activity that can be provided under competitive conditions (with regard to both competition in the field and competition *for* the field); in its turn, an activity should be considered as an economic activity if a competitive setting legitimately exists, and is not under Antitrust or other disputes at the EU level, at least in one member State. Clearly defining these

terms would lead to a clearer understanding of the scope of the regulation and a clearer list of subjects which belong in the regulatory field. Under such circumstances, any member State willing to exert its powers over that same activity should be required to provide a detailed justification and explain the political, social, economic or other reasons that are driving it to suspend, limit or hinder competition.

1.2. Social security, Health care, Education and research activities

Several member states regulate the above sectors as non-economic activities, despite the possibility and the potential benefits of market opening. There may be historical, political or social reasons for that. At the very least, though, the funding of specific undertakings should be awarded in a transparent way and, if and where possible, under non-discretional, performance-based schemes. Nevertheless, the role of the State should be diminished in the field of health care. A classification of whether a healthcare service is a non-economic or an economic service should be carried out while taking into account the type and specification of all particular healthcare services. Not all healthcare services are crucial for the preservation of human life. Such services that are not crucial should be considered as an economic activity, thus allowing healthcare providers to compete in the services market.

1.3. Infrastructure

Infrastructure has been deemed to be exclusively within the scope of State powers. Such legal standards derive from two assumptions. One of them is that infrastructure development projects are, as a rule, too large to be carried out by the private sector alone and the other is that such projects are classified as public goods. Nevertheless it is rightly stated in the Communication that the construction of any type of infrastructure that is meant to be exploited economically, such as a commercial airport runway, is an economic activity in itself, which means that State aid rules apply to the way in which it is funded (*Leipzig/Halle* ruling). Although this ruling covers a very specific field of market, large infrastructure items—such as highways, ports, and airports—can and should be increasingly treated as economic activities and as such be open to competition. This is also consistent with the need to attract private finance given the public finance constraints in several member States. Regardless of the infrastructure regulation, ancillary economic activities—except when they are very limited in scope—should be regulated as economic activities and should not be provided outside a competitive framework.

2. State origin

2.1. Imputability

While it is reasonable that a measure being taken by a public undertaking should not be regarded per se as imputable to the State, a presumption of imputability should hold nevertheless. Public undertakings, even when they formally operate under market conditions, very rarely act regardless of what they expect to be the public controller's interest or will and very often are explicitly required to do so. A presumption of non imputability

should be limited to listed companies where public shareholders have a lower stake than 50%.

2.2. State resources

Under the State aid discipline, only advantages granted directly or indirectly through State resources are relevant. There are at least three grey areas where a clearer definition of State aid would considerably improve the ability to contrast socially harmful State intervention.

One of them is that of regulatory advantages. A government can effectively distort competition not just by subsidizing an undertaking, but also by creating conditions for it to extract economic rent that might be eliminated by open competition. For example, this happens when a cross-subsidization occurs within a conglomerate entity, whereby its business unit operates under public service obligation and (an)other unit(s) post profits in sectors where economies of scale or scope can be captured. Internal transfer prices should be closely monitored and regulators should require full transparency as well as prevent cross subsidization. To this end, accounting separation between the relevant business units may not be enough: legal separation may be required.

Another source of indirect State aid comes from the very existence of government-owned (or -controlled) companies bidding in public tenders set out by their own public shareholder. Even assuming that the inherent conflict of interest can be effectively regulated, private competitors might be crowded out by the very suspicion of it having an influence on the tender structure or outcome. Therefore public undertakings should be prevented from bidding for tenders set out by entities that have a stake in them.

Finally, a growing problem comes from State-driven redistribution between private entities. This is a very common practice in the energy sector, with feed-in tariffs and other policy instruments aimed at promoting renewable energy sources (RES). In order not be discriminatory or selective, such obligations should be designed in a way that makes them driven by the environmental, social, or other non-economic benefit they are deemed to deliver. For example, subsidy schemes that pay different prices to alternative technologies for the same output should be regarded as State aid.

3. Effects on trade and competition

3.1. Distortion of competition

It should not be forgotten that the instrument of State aid distorts competition and the market. Employment of such measures should be limited because the State's intervention into a liberal market discriminates certain members of the market environment while benefiting others. A general rule should be that no financial support can be provided by the State to undertakings competing within a liberalized market. Wherever a competition for the field model is employed, financial support should be provided through open, non-discriminatory tenders and conflicts of interest should be heavily regulated (see §2.2). State aid discipline should also encompass general rules regarding the length and the condition under which tenders are set up: an overly lengthy conces-

sion acts effectively as a barrier to entry and results in the equivalent of the grating of State aid.

Legal measures have to be taken in order to implement such regulations which create economic and social barriers for certain undertakings to be awarded fairly while others would suffer discrimination in the market. Moreover, strict legal regulations have to be imposed in order to prevent any possible conflicts of private and public interests.

Such conflicts might occur in the field State's recourse management. A situation whereby a government-owned or government-controlled company applies for and receives State aid is a clear example of how the State intervenes into the market. Such entities get access to taxpayers' money in two different ways—through the State budget and through State aid, and find themselves in a privileged position compared to other legal entities, especially private ones.