


Para [17 & 18] - [Exercise of public powers; Inseparability of an economic activity]

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Article	Para 17 & 18
Key words	Exercise of public powers; Inseparability of an economic activity;
Member State	BG
Question	<p>In relation to the points. 17 and 18 of the Section. 2.2. ‘Exercise of public powers” of the Commission Notice on the notion of State aid as referred to in Article 107(1) of the Treaty on the Functioning of the European Union (OJ, C 262 of 19.07.2016), we would like to ask the following questions:</p> <p>Could you please confirm our understanding that:</p> <p>1. An activity can be determined as falling within the public powers of a public entity only if the following cumulative conditions are fulfilled, and to be more specific, it is:</p> <p>1) identified as part of the essential functions of the State</p> <p>and</p> <p>2) laid down in a legal Act</p> <p>and</p> <p>3) for this activity, there is no free market.</p> <p>2. Please also confirm that, in the event that for a certain activity, one of the following two conditions 1) or 2) are met, but the condition 3) is not fulfilled, and to be more specific, if there is a market for this activity, it cannot be determined as falling within the public powers of a public entity.</p> <p>3. On the basis of the information referred to in paragraph 18 and the cases cited therein, with a view of establishing whether an economic activity, exercised by a public entity can be separated or not from the exercise of its public powers, please provide us with specific criteria on the basis of which the Commission shall assess whether this activity is connected with the exercise of those public powers and therefore does not fall within the notion of undertaking.^[1]</p> <p>3.1. Please confirm whether:</p> <p>The inseparability of an economic activity may be presumed only on the basis of the fulfilment of the following condition that:</p> <p>(a) the activity of the public body in relation to the exercise of its public powers and the economic activity cannot be accounting separable;</p> <p>or</p> <p>B) The inseparability of an economic activity may be presumed on the basis of the following conditions that must be met:</p>

1) the activity of the public body in relation to the exercise of its public powers and the economic activity are accounting separable;

but

2) the economic activity of the public body is ‘indivisible in nature’ and related to the exercise of its public powers, which means that without exercising this economic activity of the public body, it will not be possible to carry out the activities of the exercise of its public powers in entirety.

(C) In the event of failure to confirm the statement in B) and on the basis of the information in the Judgment of the Court of Justice of 12 July 2012, Compass-Datenbank GmbH, C-138/11, ECLI:EU:C:2012:449,

in the event that an economic activity is carried out for remuneration, the inseparability of the economic activity may be presumed where:

Situation 1) the remuneration is defined in a legislation/legislative act (e.g. Act)

or

Situation 2) the remuneration is defined directly or indirectly by the public body

4. In the event of failure to confirm the above mentioned proposals under question 1, 2 and 3, please indicate the correct interpretation on the questions raised.

[1] Judgment of the Court of Justice of 12 July 2012, Compass-Datenbank GmbH, C-138/11, ECLI:EU:C:2012:449, paragraph 38, and judgment of the Court of Justice of 26 March 2009, Selex Sistemi Integrati v Commission, C-113/07 P, ECLI:EU:C:2009:191, paragraph 72 et seq.

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COMP Reply	<p>While activities of public power, as referred to in point 17 of the NoA, will regularly be defined and laid down in a legal act, this is not strictly speaking a requirement – what matters is the nature of the activity. As regards the question whether for the activity in question there must not be a free market, it is true that if the Member State in question introduces market mechanisms for a certain activity, but continues to also carry those out itself, it cannot claim to exercise public powers anymore but is, in fact, carrying out an economic activity in competition with the private operators on the market.</p> <p>The question of whether an economic activity can be separated from the exercise of public powers (see point 18 of the NoA) does not, in principle, depend on whether they are separable in accounting terms. What matters is how closely linked the two activities are, which has to be assessed on a case by case basis. It is clear that where an economic activity and the exercise of public power are "indivisible in nature", i.e. where the economic activity is necessary for the exercise of public power, the activities as a whole are not considered to be economic in nature. The same also applies, however, where the economic activity is not absolutely necessary for the exercise of public power, but facilitates or significantly supports it (see the underlying facts in C-113 /07 P <i>Selex Sistemi Integrati v Commission</i>, para. 76, where providing assistance for the implementation of tendering procedures was considered not to be able to be separated from the public remit tasks carried out by Eurocontrol).</p> <p><i>Disclaimer: This reply does not represent a formal and definite position of the European Commission but is only an informal guidance provided by the services of DG Competition to facilitate the application of the GBER. It is therefore not binding and cannot create legal certainty or legitimate expectations.</i></p>
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¹ AT, BE, BG, CY, CZ, DE, DK, EE, EL, ES, FI, FR, HU, HR, IE, IT, LT, LU, LV, MT, NL, PL, PT, RO, SK, SE, SI, UK.