Question:

According to the User guide to the SME Definition drawn up by the European Commission in relation to providing general guidance to entrepreneurs and other stakeholders in the application of the SME definition, an enterprise is not an SME as defined (provided in Commission Recommendation 2003/361/EC of 6 May 2003 concerning the definition of micro, small and medium-sized enterprises[1] as published in the Official Journal of the European Union (OJ L 124, 20.5.2003, p. 36)) if 25 % or more of its capital or voting rights are directly or indirectly owned or controlled, jointly or separately, by one or more public bodies. The reason for that provision is that public ownership may give such undertakings certain advantages, namely financial ones, over undertakings financed by private capital. Moreover, it is often not possible to calculate the relevant staff and financial data of public authorities (state or local/municipal ones). This rule does not apply to persons referred to in Article 3(2) (a) to (d) of Commission Recommendation 2003/361/EC. The total participation of such persons in an enterprise may not be more than 50 % of its voting rights. If they are above 50 %, the enterprise cannot be considered an SME.
Based on the above please confirm our understanding that an enterprise where 25 % or more of the company's capital or the number of votes in its general meeting are controlled directly or indirectly, together or separately by one or more public bodies (state and/or municipal), the same cannot be considered as a small mid-cap or mid-cap company, but is a large enterprise.

Answer:

We confirm your understanding. The definition of small mid-caps includes an express reference to Articles 3-6 of Annex I. This, as such, includes Article 3(4) of Annex I, where the rule that an entity in which a public body controls 25% or more of the capital or voting rights cannot be considered an SME, is laid down. The underlying reason of this provision is, as you also pointed out in your question, that public control can give entities certain advantages, which would not justify that they are still considered as an SME (i.e. an entity for which its size constitutes a handicap).

In addition, according to the jurisprudence of the Union Courts, the purpose of any assessment of whether an undertaking constitutes an SME or not is always to ensure that measures intended to benefit SMEs genuinely (and only) benefit undertakings for which their size actually represents a handicap, and to ensure that the SME definition is not circumvented by purely formal means (C-91/01 Italy v Commission, para. 50; C-110/13 HaTeFo, para. 33; T-137/02 Pollmeier, para. 61). Given that the qualification as "small mid-cap" makes entities eligible for certain benefits that large enterprises are not eligible to (just as is the case with the qualification as an SME), the underlying logic of this jurisprudence seems also relevant for the interpretation of the notion of "small mid-cap".

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.

[1] The recommendation is available at the following address: https://eur-lex.europa.eu/eli/reco/2003/361/oj