

**Application of Articles 92 and 93 of the EEC Treaty to public authorities' holdings  
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(Public authorities' holdings in company capital)

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The Commission's position

The Commission has sent Member States a paper explaining its general approach to the acquisition of shareholdings by the public authorities and setting out Member States' obligations in the field.

'Public holding' means a direct holding of central, regional or local government, or a direct holding of financial institutions or other national, regional or industrial agencies (1) which are funded from State resources within the meaning of Article 92(1) of the EC Treaty, or over which central, regional or local government exercises a dominant influence.

The Commission has already had occasion in the past to consider the question of public holdings in company capital from the angle of policy on State aid; in most cases, in view of the particular circumstances, it has regarded them as constituting State aid. This position is spelt out clearly in the steel and shipbuilding codes.

The steel code states that 'the concept of aid includes ... any aid elements contained in the financing measures taken by Member States in respect of the steel undertakings which they directly or indirectly control and which do not count as the provision of equity capital according to standard company practice in a market economy' (Commission Decision No 2320/81/ECSC of 7 April 1981 establishing Community rules for aid to the steel industry: (2) recital II, last paragraph, and Article 1). Pursuant to that Decision the Commission has usually regarded any contribution of capital to companies as State aid.

The shipbuilding code contains a formula identical to the one in the steel code (Council Directive No 81/363/EEC of 28 April 1981 on aid to shipbuilding: (3) last recital and Article 1(e)).

1. The Treaty establishes both the principle of impartiality with regard to the system of property ownership (Article 222) and the principle of equality between public and private undertakings. This means that Commission action may neither penalize nor favour public authorities which provide companies with equity capital. Nor is it for the Commission to express any opinion as to the choice companies make between methods of financing - loan or equity - whether the funds are of private or public origin.

Where, applying the guidelines laid down in this paper, it is apparent that a public authority which injects capital by acquiring a holding in a company is not merely providing equity capital under normal market economy conditions, the case has to be assessed in the light of Article 92 of the EC Treaty.

2. Four types of situation can be distinguished in which public authorities may have occasion to acquire a holding in the capital of companies:

(a) the setting up of a company,

(b) partial or total transfer of ownership from the private to the public sector,

(c) in an existing public enterprise, injection of fresh capital or conversion of endowment funds into capital,

(d) in an existing private sector company, participation in an increase in share capital.

3. On this basis four cases can be distinguished.

3.1. Straightforward partial or total acquisition of a holding in the capital of an existing company, without any injection of fresh capital, does not constitute aid to the company.

3.2. Nor is State aid involved where fresh capital is contributed in circumstances that would be acceptable to a private investor operating under normal market economy conditions. This can be taken to apply:

(i) where a new company is set up with the public authorities holding the entire capital or a majority or minority interest, provided the authorities apply the same criteria as provider of capital under normal market economy conditions;

(ii) where fresh capital is injected into a public enterprise, provided this fresh capital corresponds to new investment needs and to costs directly linked to them, that the industry in which the enterprise operates does not suffer from structural overcapacity in the common market, and that the enterprise's financial position is sound;

(iii) where the public holding in a company is to be increased, provided the capital injected is proportionate to the number of shares held by the authorities and goes together with the injection of capital by a private shareholder; the private investor's holding must have real economic significance;

(iv) where, even though the holding is acquired in the manner referred to in either of the last two indents of Section 3.3 below, it is in a small or medium-sized enterprise which because of its size is unable to provide adequate security on the private financial market, but whose prospects are such as to warrant a public holding exceeding its net assets or private investment;

(v) where the strategic nature of the investment in terms of markets or supplies is such that acquisition of a shareholding could be regarded as the normal behaviour of a provider of capital, although profitability is delayed;

(vi) where the recipient company's development potential, reflected in innovative capacity from investment of all kinds, is such that the operation may be regarded as an investment involving a special risk but likely to pay off ultimately.

3.3. On the other hand, there is State aid where fresh capital is contributed in circumstances that would not be acceptable to a private investor operating under normal market economy conditions.

This is the case:

(i) where the financial position of the company, and particularly the structure and volume of its debt, is such that a normal return (in dividends or capital gains) cannot be expected within a reasonable time from the capital invested;

(ii) where, because of its inadequate cash flow if for no other reason, the company would be unable to raise the funds needed for an investment programme on the capital market;

(iii) where the holding is a short-term one, with duration and selling price fixed in advance, so that the return to the provider of capital is considerably less than he could have expected from a capital market investment for a similar period;

(iv) where the public authorities' holding involves the taking over or the continuation of all or part of the nonviable operations (4) of an ailing company through the formation of a new legal entity;

(v) where the injection of capital into companies whose capital is divided between private and public shareholders makes the public holding reach a significantly higher level than originally and the relative disengagement of private shareholders is largely due to the companies' poor profit outlook;

(vi) where the amount of the holding exceeds the real value (net assets plus value of any goodwill or knowhow) of the company, except in the case of companies of the kind referred to in the fourth indent of Section 3.2. above.

3.4. Some acquisitions may not fall within the categories indicated in Sections 3.2 and 3.3 so that it cannot be decided from the outset whether they do, or do not constitute State aid.

In certain circumstances, however, there is a presumption that there is indeed State aid.

This is the case where:

(i) the authorities' intervention takes the form of acquisition of a holding combined with other types of intervention which need to be notified pursuant to Article 93(3);

(ii) the holding is taken in an industry experiencing particular difficulties, without the circumstances being covered by Section 3.3; accordingly, where the Commission finds that an industry is suffering from structural overcapacity and even though most such cases will be within the scope of Section 3.3, it may consider it necessary to monitor all holdings in that industry, including those coming under Section 3.2.

4. Leaving aside the fact that the Commission has at all times the right to request information from the Member States casebycase, the obligations devolving on Member States in the light of the Commission's practice to date and the approach outlined here should be set out anew and specified in detail.

4.1. In the case referred to at 3.1, there is no need to place any particular obligations on Member States.

4.2. In the cases referred to at 3.2, the Commission would ask Member States to inform it retrospectively by means of regular, and normally annual, reports on holdings acquired by financial institutions and directly by public authorities. The information given should include the following at least, possibly as part of the financial institutions' reports:

(i) name of the institution or authority which acquired the holding,

(ii) name of the company involved,

(iii) amount of the holding,

(iv) capital of the company before the holding was acquired,

(v) industry in which the company operates,

(vi) number of employees.

4.3. As regards the cases referred to in Section 3.3, since these do constitute State aid, Member States are required to notify the Commission pursuant to Article 93(3) of the EC Treaty before they are put into effect.

4.4. With regard to the cases referred to in Section 3.4 in which it is not clear from the outset whether or not they involve State aid, Member States should inform the Commission retrospectively by means of regular and normally annual reports in the manner described in Section 4.2.

In cases of the kind described in Section 3.4 where there is a presumption of State aid, the Commission should be informed in advance. On the basis of an examination of the information received, it will decide within 15 working days whether the information should be regarded as notification for the purposes of Article 93(3) of the EC Treaty.

4.5. Without prejudice to the Commission's right to ask for information on specific cases, the obligation to supply regular retrospective information only applies to shareholdings in companies where one of the following thresholds is exceeded:

(i) balancesheet total: ECU 4 million,

(ii) net turnover: ECU 8 million,

(iii) number of employees: 250.

The Commission may review these thresholds in the light of future experience.

5. Member States also use certain forms of intervention which, while not having all the features of a capital contribution in the form of acquisition of a public holding, resemble this sufficiently to be treated in the same way. This is the case notably with capital contributions taking the form of convertible debenture loans or of loans where the financial yield is, at least in part, dependent on the company's financial performance.

The criteria in Section 3 also apply in respect of these forms of intervention, and Member States are under the obligations set out in Section 4.

6. In certain cases the Commission has authorized aid measures which also include the acquisition of holdings in certain circumstances. The various procedural clauses in the authorization decisions are not affected by the provisions in this paper.

7. This paper also applies to holdings in agricultural undertakings. It may be adapted to take account of any new circumstances arising from the accession of new Member States.

(1) This includes public undertakings as defined in Article 2 of Commission Directive 80/723/EEC of 25 June 1980 on the transparency of financial relations between Member States and public undertakings (OJ L 195, 29.7.1980).

(2) OJ L 228, 13.8.1981.

(3) OJ L 137, 23.5.1981.

(4) Excluding the straightforward takeover of the assets of a company which has become insolvent or gone into liquidation.