

parties—the seller and the buyer—must be profit maximizers.

Regarding committed investment, we note that this appears to have been one of the most complicated and controversial parts of the proposed modification. In general, the numerous comments we received on this issue can be roughly divided into those that consider any committed investment to disqualify the sale automatically from being found to be at fair market value, and those arguing that any committed investment will be fully reflected in the purchase price. For this final modification, we have not adopted either argument as a *per se* rule, but find that our determination in a particular instance of committed investment must be based on the specific facts of that case, analyzed in their totality.

We would first like to clarify that by the term committed investment, we are referring to a range of possible restrictions or requirements that the government, as the seller, imposes on the future operation of, or investment in, the company or its assets. Some commenters noted that there are some practices which, on their surface, may appear to be committed investment, but are in fact actions which are sometimes taken by private, commercial sellers as well. As a threshold issue, therefore, we will first examine any evidence presented by parties that purports to demonstrate that a particular action is fully consistent with the normal sales practices of private, commercial sellers in the relevant market, even if that action would otherwise appear to fall within the scope of typical committed investment practices that the Department has encountered. Where such a demonstration is made, we normally will not regard such a practice as evidence that fair market value was not paid.

With regard to the impact a committed investment has on a sale, we disagree with the proposition that the presence of any committed investment necessarily means the sale is not for fair market value. As noted elsewhere in this notice, our analysis of fair market value under this new methodology is based on a benefit-to-recipient standard. The key question is whether, in purchasing the company or its assets, the buyer got something of value for which the buyer did not pay. In the relatively straightforward, hypothetical case of a requirement to maintain the workforce size at current levels for three years, we agree that, normally, a potential buyer will incorporate the cost (if any) of that restriction into the price the buyer offers to pay. Although this price may be lower than what the buyer

would have been willing to pay absent the requirement, this does not necessarily mean that the buyer is receiving any net value that has not already been reflected in the transaction price.

In this hypothetical example, all other things being equal, our analysis and reasoning regarding this straightforward committed investment would resemble that of our analysis and approach to concurrent subsidies. Similar to concurrent subsidies, when making a finding that the value of the committed investment was fully reflected in the transaction price of an arm's-length privatization and, therefore, is fully extinguished in such a transaction, we will require the following criteria to be met: (1) The precise details of the committed investment were fully transparent to all potential bidders and, therefore, reflected in the final bid values of the potential bidders, (2) there is no implicit or explicit understanding or expectation that the buyer will be relieved of the requirement or commitment after the sale, and (3) there is no evidence otherwise on the record indicating that the committed investment was not fully reflected in the transaction price.

We also disagree, however, that a lowering of bid prices in the face of committed investments is necessarily a result of an increase in anticipated costs. In the hypothetical case above, our analysis and findings would likely be different if, for example, it were also shown that the government offers bidders an automatic discount¹⁵ in the sales price for buyers who make certain promises regarding future operation of or investment in the plant. In this more complex scenario, the buyer is very possibly getting a discount for doing something the buyer might have otherwise done without the discount, *i.e.*, the commitment or requirement does not impose any additional cost—and in fact may be viewed as revenue-enhancing. Possibly, under this scenario, the buyer has paid less for the company or assets than it otherwise would have paid had the government acted in a manner consistent with the normal sales practices of private, commercial sellers.

This hypothetical case can be further expanded to reflect a situation where the bidding pool begins with relatively few potential bidders, *e.g.*, three bidders. A requirement to maintain the workforce at a certain level for a specified number of years may affect the three bidders' assessments of expected

costs and revenues differently. For example, assume the first bidder would have maintained or even increased the workforce regardless of the stipulation; therefore, the requirement would likely have only a limited impact on that bidder's expected future profitability. The second bidder, however, has been very public in stating that the company has too many redundant employees, and that any minimum employment levels would negatively impact the future cost competitiveness of the plant. Likely, that bidder will lower his or her bid value accordingly. Assume the third bidder intended all along to purchase and then dismantle the plant, perhaps in order to shift the productive assets to another location or to eliminate competition from the marketplace. Very likely, such a minimum employment requirement would lead the third bidder to drastically reduce his or her bid amount, or even to drop out of the bidding process altogether. If the first bidder was generally aware of the business plans of the other two bidders, the first bidder could lower his or her bid amount, even though the requirement will impose no additional cost on him or her, and still win the bidding contest.

We recognize that these scenarios just presented are complex and hypothetical (though they are not necessarily unusual). They are useful illustrations, however, of possible instances where, as a result of the government's imposition of requirements or restrictions that private, commercial sellers would not normally impose, a buyer might pay a lower price for a company or its assets than that buyer would otherwise pay even though such requirements or restrictions impose no additional cost on the buyer. This shows why any fixed rule one way or the other, as suggested by many of the commenters, would be inappropriate when analyzing committed investment. Accordingly, we will examine, on a case-by-case basis, whether the presence of committed investment resulted in the buyer paying less-than-fair-market-value for the company or its assets.

As to the additional factors some commenters suggested, we have not incorporated any of them explicitly into our non-exhaustive list at this time because we do not expect that they will have broad applicability across most of the privatizations we examine. However, we may consider these and any other relevant factors on a case-by-case basis where they are pertinent to the analysis of a particular privatization.

¹⁵ For example, a credit towards the bid value keyed to the amount of the investment.