



Dealing with State aid in Interreg programmes

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Overview

- Relevance of State aid control
- State aid in the ESI Funds legislation
- The main State aid rules
 - Notion of State aid
 - Need for notification / Compatibility check
- Assessment tool: analytical grids
- Modernisation
- Most frequent mistakes
- Examples
- References



Relevance for AAs

- All co-financed projects need to comply with State aid rules.
- EU contribution is subject to State aid control because Member States have discretion on the use of the funding.
- State aid rules apply to the full combined amounts of EU funding and public national co-funding.



State aid in the ESIF rules (1/3)

- Article 6 CPR: Compliance with applicable Union and national law; additional emphasis on State aid compliance in the rules for financial instruments (Art. 37 CPR)
- Article 2(13) CPR: Definition of State aid for the purposes of the CPR: aid falling under Article 107(1) TFEU which shall be deemed for the purposes of the CPR also to include de minimis aid
- Article 2 (10) CPR: Notion of 'beneficiary'; clarification that for State aid 'beneficiary' means the body which receives the aid



State aid in the ESIF rules (2/3)

Article 61(8) CPR: no ‘gap assessment’ for revenue generating projects, if:

- (a) De minimis aid [or]
- (b) Compatible State aid to SMEs, where an aid intensity or an aid amount limit is applied in relation to State aid [or]
- (c) Compatible State aid, where an individual verification of financing needs in accordance with the applicable State aid rules has been carried out



State aid in the ESIF rules (3/3)

- Article 146 CPR: Financial corrections do not prejudice MS' obligation to recover incompatible State aid
- Annex XI CPR: ex-ante conditionality (incl. State aid)
- Article 3(3)(d) ERDF: prohibition to grant State aid to 'undertakings in difficulty' as defined under Union State aid rules

[it is a separate cohesion policy check in addition to compliance with State aid rules – it can apply even if the relevant State aid rules do not have that requirement !!]



Main State aid rules



General concepts of State aid control

- Objective of State aid control is to avoid distortions of competition by preserving normal market conditions
- Article 107 TFEU: Any measure qualifying as State aid is prohibited, save as otherwise provided in the Treaties
 - Check for the presence of State aid
 - Check for grounds of compatibility/need to notify



Notion of State aid – Article 107(1) TFEU

List of cumulative criteria:

- Aid granted to "undertakings" +
- From State resources +
- Selectivity +
- Advantage +
- Potential distortion of competition & effect on trade between Member States

→ If no State aid, no need for a State aid notification



“Undertaking”

- **Entity carrying out any economic activity**
 - Irrelevant: legal form, way of financing, non-profit concept
 - Examples for non-economic activities:
 - public remit functions: e.g. police, state supervisory tasks
 - In case an activity is non-liberalised (e.g water sector)
- Leipzig-Halle judgment (T-443/08) : operating an airport is an economic activity; therefore the owner/operator of an airport qualifies as “undertaking”



“From State resources”

- Resources from Member States at whatever level: State, regions, municipalities, public companies etc.
- EU Co-financing qualifies as State resources since it is under the control of Member States (ERDF, ESF, CF, ...)
- Resources under the control of several Member States also qualify as ‘State resources’

Not “from State resources”:

- EU resources in direct management (Horizon 2020, COSME, EFSI)
- Private resources
- Resources of third countries (non EEA)



“Advantage”

- Economic benefit which an undertaking would not have obtained under normal market conditions
 - Check for normal market conditions,
 - Check for all potential aid beneficiaries
- **No advantage if**, for instance:
 - It can be shown that normal market price is paid ("benchmarking")
 - If there is significant private participation on similar terms (pari passu)
 - In general via tendering
 - Services of General Economic Interest (Altmark case C-280/00)



Selectivity

- Measure favours "certain undertakings or the production of certain goods"



Potential distortion of competition + effect on trade between MS

- *Possibility* of distortion is sufficient
- Only very few examples of lack of effect on trade (e.g. local museums, fairs, local ski-lifts)
- **De minimis aid** is considered not even potentially to distort competition and affect trade between MS



Need for notification

- General rule: If State aid is present, MS need to notify (Article 108(3) TFEU)
- Exceptions to the rule: in case of **exemption from notification**
 - General Block Exemption Regulation (GBER)
 - SGEI decision / Regulation 1370/2007 on land public passenger transport services
 - Measure under a notified scheme
- Aid that should be notified and is not is ‘unlawful’ (≠ ‘incompatible’)
- Special treatment of old infrastructure cases (COCOF note on ‘verification of State aid’)



GBER

- Aid measures under the GBER are exempted from notification and declared compatible
- Examples of some GBER categories:
 - Regional aid
 - SME investment and employment aid
 - Environmental protection
 - Risk capital
 - Research & Development



GBER

- In the GBER 2014-2020 many more categories have been added (e.g. cultural–, sports– other infrastructures, innovation measures, risk finance)
- **Article 58 GBER 2014-2020 provides for retroactive application (important especially for audits!)**



SGEI-Decision

- Measures under the Commission SGEI decision are exempted from notification and declared compatible
- Main criteria of the SGEI Decision
 - Entrustment act for SGEI incl. clearly defined tasks
 - Parameters for compensation established
 - No over-compensation
 - Aid below EUR 15m per year (normally 10 yrs max)



Compatibility check after a notification

Most important grounds for compatibility:

- Regional Aid Guidelines
- Environmental (and energy) Guidelines
- Research, Development & Innovation Framework
- Risk Finance Guidelines (formerly Risk Capital Guidelines)
- Aviation Guidelines
- Cinema Communication
- Direct application of Treaty provisions



General principles of compatibility

- Contribution to an objective of common interest
- Need for State intervention (market failure)
- Appropriateness of the aid measure
- **Incentive effect**
- Proportionality of the aid (aid limited to the minimum)
- Avoidance of undue negative effects



Incentive effect

- State aid is only compatible if it changes the behaviour of the aid recipient; if an investment is made even without the aid, the aid has no incentive effect
- Signs of missing incentive effect:
 - If '**start of works**' occurs before handing in of the application form: no incentive effect
 - Possibly additional requirements: eg for ad hoc aid to large companies additional documents have to be submitted and large companies need to wait for positive assessment by granting authority
 - In case of notifications: full check of incentive effect via counterfactual analysis



Modernisation: Notion of aid notice (NOA)

- Published on 19/5/2016 (2016/C/262/01)
- Guidance document explaining the criteria when support qualifies as State aid describes situations when support is not considered as State aid
- It is based on ECJ jurisprudence and the Commission's decisional practice



NOA : most relevant parts

- Specific guidance for infrastructure financing
 - "No aid " – general infrastructures which are free of charge
 - "No aid" – natural monopolies
 - "No aid" – expanding the concept of 'ancillary' economic use
- Confirms the approach taken in 2012 COCOF guidance for infrastructure projects (gives legal certainty for MS)



NOA : most relevant parts

- Tenders are in general sufficient to exclude the presence of aid except :
 - in case of negotiated procedure without publication of a contract notice
 - tenders where only one bid is submitted
- Clarifications about 'public remit' activities



Modernisation : de minimis rules

- New general de minimis Regulation adopted in December 2013
- Main criteria, including threshold remain unchanged (EUR 200 000 except road freight transport EUR 100 000)
- Important points of reform :
 - clarification that de minimis threshold counts per MS
 - clarification that the threshold applies to single undertakings (i.e. whole group, definition provided)
 - abolition of restriction for 'undertakings in difficulty'



Most frequent mistakes

- “Non-profit organisations cannot be recipient of State aid”
- “The amount is below EUR 200 000, it must therefore be qualified as de minimis aid”
- The de minimis threshold is exceeded because aid is awarded to a company group for which other members already received de minimis aid
- “Infrastructure support cannot involve State aid”



Most frequent mistakes

- "Work" has already started before the application for aid is handed in
- "Only the amount granted before the 'handing in of the application form' is irregular"
- Aid is granted to an 'undertaking in difficulty'
- The compatibility basis requires an SME and the aid recipient does not qualify as an SME
- The investment is not maintained for a sufficiently long period (durability requirements)



Example 1

A group of communes provides infrastructure on the banks of a river to facilitate walks (bridges, pathways, picnic areas, etc.). Management of the infrastructure (maintenance and ticket sales) is conferred free of charge by the group to a private entity. The investment made by the group of communes is financed from the main budget (€ 200 000 without borrowing).

Comments by EC services

To establish if this activity distorts or not the trade between Member States; the location — how near it is to a border — must be taken into consideration when examining this criterion. If it were decided that the activity affects trade between Member States, the beneficiary of the State aid would have to be identified (not necessarily the same as the beneficiary within the meaning of Regulation (EU) No 1305/2013). Based on the above, the beneficiary for the purposes of State aid would be, in this case, the private entity making use of the infrastructure free of charge. In any case, given the amounts invested, it is highly likely that the aid (defined as the value of the ‘amount not paid’ by the private entity compared with the amount that would have been paid in normal market conditions, taking into account any obligations that fall to it in terms of maintenance, etc.) would be below the threshold set in Regulation (EU) No 1407/2013 (*de minimis*) and would therefore not constitute State aid.



Example 2 (1)

A commune renovates a building in order to set up a public service centre and remote office space (work space for businesses and employees with related services). The € 1 million investment is taken from the commune's main budget without borrowing. The project does not generate net income.

Comments by EC services

We must first establish the extent to which the building will be used for economic purposes. If part of the infrastructure — as the question implies — is used for non-economic public services (see point 17 of the Aid Notice), the funds invested in the renovation work fall outside the scope of State aid in respect of that part. If another part (the remote office space) is used for economic purposes (by offering services for which there is a market), we must then determine whether this use exceeds 20 % of the building's total capacity. Where this is not the case, this economic use is considered subsidiary to the non-economic use and all the financing falls outside the scope of State aid rules (point 207 and footnote 305 of the Aid Notice).



Example 2 (2)

Where the part of the building used for economic purposes exceeds 20 % of the building's total capacity and no rent is charged (or if the rent is lower than market rates), the businesses or self-employed persons using the remote office space services would be considered to be the State aid beneficiaries, provided that all the conditions for determining State aid are met. In that case, we would need to determine whether the advantage that might be conferred (in the form of no rent or reduced rent) falls under the de minimis Regulation.



Need help ?





- **GBER REGULATION**
<http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32014R0651&qid=1494577593290&from=EN>
- **DE MINIMIS REGULATION**
<http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32013R1407&qid=1494578019979&from=EN>
- **Guide to the application of the European Union rules on state aid, public procurement and the internal market to services of general economic interest**
http://ec.europa.eu/competition/state_aid/overview/new_guide_eu_rules_procurement_en.pdf
- **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**
[http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52016XC0719\(05\)&from=EN](http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52016XC0719(05)&from=EN)
- **GUIDANCE NOTE TO THE COCOF - VERIFICATION OF COMPLIANCE WITH STATE AID RULES IN INFRASTRUCTURE CASES**
http://ec.europa.eu/regional_policy/sources/docoffic/cocof/2012/cocof_12_0059_01_en.pdf
- **Analytical Grids on the application of State aid rules to the financing of infrastructure projects**
http://ec.europa.eu/competition/state_aid/studies_reports/state_aid_grids_2015_en.pdf



Thank you for your attention!