



State aid in the management of the
European **S**tructural and **I**nvestment **F**unds
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State aid and cohesion policy

Basic State aid rules and impact on ESIF financing

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Disclaimer: The views expressed are those of the author and cannot be regarded as stating an official position of the European Commission.



Overview

- Relevance of State aid control for ESIF financing
- References to State aid rules in the ESIF legislation
- The main State aid rules
 - Notion of State aid
 - Need for notification / Compatibility check
- Assessment tool: analytical grids
- Using the grids: example research infrastructure
- Most frequent mistakes
- Sources of further guidance and support



Relevance for ESIF financing

- 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.



References to State aid in ESIF rules

- (1) Rules recalling the need for State aid compliance, e.g.
 - Article 6 CPR: Compliance with applicable Union and national law;
 - for financial instruments (Art. 37 CPR)

- (2) Cohesion policy rules using State aid terms, e.g.
 - 'undertaking in difficulty' in Article 3(3)(d) ERDF, or
 - Article 61(8) CPR



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(+’imputability’) +
- 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
- Leipzig-Halle judgment: 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. (however, ‘imputability check‘)
- Co-financing qualifies as State resources since it is under the control of Member States

Not ‘from State resources‘:

- EU resources in 'centrally managed' by EU (Horizon 2020, COSME, EFSI; other direct/indirect management)
- 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 (open, transparent, unconditional calls)
 - SGEI (Altmark case)



No advantage – Altmark case

The four (cumulative) criteria of the Altmark judgment

1. Entrustment act
2. Objective and transparent parameters for calculating compensation
3. No overcompensation
4. Public procurement or compensation based on costs of a well-run undertaking

(for social services see examples in guide at:

http://ec.europa.eu/competition/state_aid/overview/new_guide_eu_rules_procurement_en.pdf)



Selectivity

- Measure favours "certain undertakings or the production of certain goods"
- Material selectivity / regional selectivity
- De facto selectivity is sufficient
- Only measures of truly general application fall outside the scope (e.g some tax measures)

For ESIF financing, 'selectivity' is normally fulfilled



Potential distortion of competition + affect on trade between MS

- *Possibility* of distortion is sufficient
- No distortion in case of non-liberalised markets (often: water sector)
- **De minimis aid** is deemed not to distort competition and affect trade between MS
 - General de-minimis threshold (EUR 200 000/ over 3 years / per undertaking / per Member State)
 - transparency/monitoring requirements
- Only very few examples of lack of effect on trade (e.g. local museums, fairs, local ski-lifts)



Need for notification

- If State aid is present, MS need to notify, Art. 108(3) TFEU
- Exceptions to the rule: **notification exemptions**
 - General Block Exemption Regulation (GBER)
 - SGEI decision / Regulation 1370/2007 on land public passenger transport services
 - Measure under an notified scheme
- For ESIF, not notifying can be an "**error**" leading to financial corrections; 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:
 - (1) Regional aid
 - Area on the regional aid map ('a'- and 'c'-regions)
 - Investment aid (under the new GBER also some operating aid)
 - Aid intensity ceilings
 - Notification threshold (75% of maximum aid for EUR 100m project)
 - Transparency requirements



GBER

- Some other categories, e.g.:
 - SME investment and employment aid
 - Environmental protection
 - Risk capital
 - Research & Development
- In the GBER 2014-2020 many more exemptions have been added (eg cultural–, sports– other infrastructures, innovation measures, risk finance)
- **Article 58 GBER 2014-2020 provides for retroactive application**



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)



Most relevant Guidelines/Frameworks

In case of a State aid notification, these are the most important compatibility grounds for ESIF financing

- Regional Aid Guidelines (RAG)
- Environmental and Energy Guidelines (EEAG)
- Research, Development&Innovation Framework (RDI)
- Risk Finance Guidelines (RFG)
- Direct application of Treaty provisions



General principles of compatibility in the Guidelines/Frameworks

- 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 compatible only if it changes the behaviour of the aid recipient; if an investment is made even without the aid, the aid has no incentive effect
- Depending on applicable State aid rules, different requirements on how to verify the 'incentive effect'
- Signs of missing incentive effect:
 - If '**start of works**' occurs before handing in of the written application: no incentive effect
 - Possibly additional requirements: e.g. under the GBER 2014 for ad hoc aid to large companies
 - In case of notifications: full check of incentive effect via counterfactual analysis



Assessment tool – analytical grid

- Developed in 2012 after the Leipzig-Halle judgment to facilitate MS' assessment of infrastructure financing; update in 2015
- Grids cover the following areas:
 - ports, airports, RDI, culture, sports and multifunctional arenas, energy, waste, rail/metro/local transport, broadband
 - 2012 grid on 'water infrastructures' is still useful



Structure of the grids

1. Presence of State aid ("Instances in which the existence of State aid is excluded")

grid lists typical examples where support to the particular type of infrastructure may not qualify as State aid

2. Aid, but no need to notify ("Instances in which there is no need to notify for State aid clearance")

grid lists the most relevant grounds for notification exemption for the relevant type of infrastructure

3. Need for notification

grid indicates the most relevant applicable State aid guidelines / frameworks / Articles for the compatibility assessment



Using the analytical grids

Example of research infrastructures



Research infrastructures (1/5)

- Research infrastructures
 - Definition Art. 2(91) GBER 2014 and para 15(et seq) RDI Framework 2014 : Facility to conduct research
- **(1) Presence of State aid** – Typical reasons for which presence of State aid may be excluded in case of research infrastructures:
 - No economic activity
 - Only 'ancillary' economic activities



Research infrastructures (2/5)

- Ancillary economic activities

If economic use is only 'ancillary' the support for the whole infrastructure is considered 'no aid', (para 20 RDI Framework 2014, recital 49 GBER 2014)

- Criteria

- Activity directly related and necessary for operation of the infrastructure OR

- Intrinsically linked to the main non-economic use (same inputs)

- AND capacity allocated each year $\leq 20\%$



Example – research infrastructure (3/5)

Case: Setting up of a university laboratory; lab is expected to have economic and non-economic activities; same inputs are used for both activities; based on revenues economic activities will exceed 20%, based hourly use economic activities count only for a minor part.

- Check of the 'ancillarity' criteria:

- Are the economic activities 'necessary' for the operation of the infrastructure?
- In any event, same inputs will be used, i.e. it is 'intrinsically linked'
- Re threshold: revenues could be a basis but they are typically not a suitable method; hours of use often seem better for determining capacity share; other methods are also possible



Example – research infrastructure (4/5)

Variation of the case: economic activity is not 'ancillary' (e.g. not the same inputs or threshold exceeded)

- Para 18 RDI Framework 2014: where economic and non-economic activities can be clearly separated, the non-economic activities can be financed as 'no aid'
- For the economic part: possibility to provide financing as 'no aid' if no advantage is transferred (e.g. financed via a loan with a market rate)



Research infrastructure (5/5)

- **(2) Notification exemption**
 - Art. 26 GBER 2014 (investment aid for research infrastructures); main criteria:
 - Max 50% of eligible cost
 - aid \leq EUR 20m)
 - Open access for users
 - Art. 14 GBER 2014 (regional investment aid); additional criterion in Art. 14(11): open access
- **(3) If notification needed**, check typically based on RDI Framework 2014, or on RAG 2014



Sport infrastructures (1/3)

- Sport infrastructures: stadiums, multipurpose arenas, climbing halls, ski-lifts etc.
- Presence of State aid – missing if e.g.:
 - Recipients of support are 'no undertakings'; if there are (also) commercial users economic activity
 - possibility to use 'ancillarity concept' is uncertain (clarification in the Notion of aid-Notice?)
 - Possibly MEOP
 - No effect on trade if purely local character of facility
 - De minimis aid



Sport infrastructures (2/3)

- Notification exemptions
 - Art. 55 GBER 2014
 - Aid < EUR 15m, or total costs < 50m per project
 - Detailed further criteria, in particular on access+use
 - For determining aid amount: 'gap assessment'
 - Art. 14 RAG
 - Possibly SGEI decision
- In case of notification, assessment possibly based on RAG, SGEI Framework or under Art. 107(3)(c) TFEU directly



Example – multipurpose hall (3/3)

Case: A municipality constructs a multipurpose hall; the hall is run by an operator who is selected on the basis of a tender. Users are amateur sport clubs and cultural activities organised by the municipality. The hall has also a bistro&bar.

- Presence of aid
 - Economic activities? Only ancillary economic activities?
 - Effect on trade?
- Notification exemption
 - Art. 55 GBER 2014 or Art. 14 RAG can possibly be applied
- If notification, assessment on the basis of RAG (if applicable) or on the Treaty directly



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 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)



Further guidance and support

Support on analysing compliance of projects:

- Analytical grids

http://ec.europa.eu/competition/state_aid/studies_reports/state_aid_grids_2015_en.pdf

- Expert advice: Technical Assistance / REGIO's AMI expert list



Thank you for your attention!