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**Committee of the Regions**

# **State aid in cross-border cooperation projects**

**This report was written by Jürgen Pucher and Christine Hamža  
(METIS GmbH).**

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# Contents

- Executive Summary ..... 1**
- 1 Overview of main EU State aid legislation used in ETC programmes ..... 5**
  - 1.1 De minimis ..... 10
  - 1.2 General Block Exemption Regulation (GBER) ..... 13
  - 1.3 Considerations on specific types of infrastructure and services ..... 18
  - 1.4 Revenue generation ..... 21
  - 1.5 Practical issues regarding State aid in ETC ..... 24
- 2 Survey among selected programmes ..... 29**
- 3 Conclusions ..... 37**
- 4 References ..... 41**

# List of Tables and Boxes

Table 1. Key criteria related to State aid.....	8
Table 2. State aid provisions of potential importance in ETC.....	9
Table 3. Specific provisions related to De minimis .....	10
Table 4. GBER – aid categories of potential relevance for ETC.....	13
Table 5. The Altmark criteria .....	20
Table 6. Approaches related to revenue-generation in projects.....	23
Table 7. State aid from the perspective of the PCM .....	26
Table 8. Strategic approaches of programme managements (MA, JTS) .....	27
Table 9. GBER options relevant for Interreg Baltic Sea Region (BSR).....	31
Table 10. Actors involved in knowledge management.....	37
Box 1. State aid in ETC programmes in 2007-2013 programming period.....	28

# Abbreviations

AA	Audit Authority
BSR	Baltic Sea Region
CBC	Cross Border Cooperation
ECJ	European Court of Justice
ERDF	European Regional Development Fund
ETC	European Territorial Cooperation
FLC	First Level Control
GBER	General Block Exemption Regulation
IP	Investment Priority
JS	Joint Secretariat
LP	Lead Partner
LRA	Local and Regional Authorities
MA	Managing Authority
MC	Monitoring Committee
NPA	Northern Periphery and Arctic Programme (Interreg V-B)
NWE	North West Europe Programme (Interreg V-B)
PCM	Project Cycle Management
PSO	Public Service Obligation
SGEI	Service of General Economic Interest
SME(s)	Small and Medium Enterprise(s)
TFEU	Treaty on the Functioning of the European Union ()

# **Acknowledgements**

This study has benefitted to a significant extent from the efforts carried out by Interact. The institution's recently published Question and Answers on State aid in ETC have been a valuable source in structuring the Study. Further on we would like to thank the representatives of those programmes that provided us with information. We fully respect their wish to handle the information with discretion since all persons surveyed have confirmed that State aid as a legal matter ranks among the trickiest elements in project management. Therefore any decision taken in practice bears a certain risk of misjudgement given that important factors can be omitted.

# Executive Summary

State aid is a legal matter which, even though it is based on clear principles, in practice is being governed by a number of secondary regulations and guidelines. Practice is acquired by the know-how gained in notification procedures with the European Commission and the decisions taken by the European Court of Justice (ECJ). Thus State aid is a field of legal expertise where experience-based know-how is particularly important for taking adequate and proportionate decisions.

Compared to other types of EU-programmes, European Territorial Cooperation (ETC) programmes are challenged by:

- the fact that the range of possible activities is usually rather broad and there are hardly any standardised project types;
- Funding volumes per partner are often quite small - thus from the perspective of national State aid authorities ETC is not a main concern.

## Responsibility versus access to expertise

It is mainly the Managing Authorities (MA) who bear the responsibility for a properly functioning system ensuring State aid relevance in projects. The responsibilities might be shared between Member States according to provisions laid down either in the cooperation programme or in separate memoranda between the Member States. In practice there is a clear gap between the responsibility taken and the access to expertise: national State aid authorities have limited capacities and thus it is often hard for programme authorities to get any advice on projects. A major systemic weakness is the general lack of expertise and capacity in the operative units of ETC programmes – this refers in particular to Interreg V-A where Joint Secretariats (JS) are usually rather small units compared to the transnational or interregional strands, and often the number of projects they are responsible for are considerable.

The experiences “on the ground” with external experts (legal advisers) are mixed. Their statements show that while in some cases external legal advice worked well and was considered helpful, it turned out to be unnecessary in other cases.

## De minimis and Block Exemption Regulations as key options

The main options applied by programmes in order to cope with economic responsibilities, i.e. activities which are State aid relevant, are in practice the

Block Exemption Regulations (BER) and De minimis. De minimis allows to work without modifications to the co-funding rate. Its key principle is that it is applied per undertaking per Member State, which allows for certain flexibility.

From the BERs the General Block Exemption Regulation (GBER) is in practice most frequently applied - several interviewees confirmed that the 'ETC-specific' Article 20 of GBER on Small and Medium Enterprises (SMEs) in ETC is in principle a very interesting option but they assume that the effort required in the assessment process will still remain considerable.

There has only been one case reported where a fully-fledged notification procedure has been carried out for an ETC project.

Specific types of infrastructure and services deserve particular attention. The Study points out the following cases:

- For research infrastructure a different perspective comes in: the *Framework for State aid in research, development and innovation* allows for the exemption of organisations or infrastructure which is used almost exclusively for non-economic activities.
- Transport infrastructure where State aid relevance has become a major point in particular concerns airports and ports. In ETC, ports in particular have frequently been the beneficiaries in transnational programmes – an extension of the BER is in discussion to clarify port activities to be exempted.
- Services of General Economic Interest (SGEI) as an evolving concept which is strongly shaped by national perceptions deserve particular attention – for such cases a specific 'extended' De minimis option is in place.

In cases where economic activities are relevant for State aid, the application of De minimis or BER exempts the beneficiary from the obligation to consider revenue generation. But revenues can also stem from non-economic activities: in case of net-revenue generating services or infrastructure, the intent of Regulations is to consider the ex-ante aspect. Depending on the financial volume of the project as well as the character of the revenues in practice several options for the handling of revenues exist.



## Practical issues

When considering the Project Cycle Management (PCM) it becomes apparent that consideration of State aid (and also of revenue generation) goes through all of the major stages:

- The understanding of the concept of State aid and its handling is particularly relevant at the stages of assessment as well as verification of expenditures.
- The principle of transparency is decisive for the guidance to applicants, the selection in the Monitoring Committee and subsequent contracting.

One approach could be avoiding any activities that are relevant to State aid: the main and safe options are the application of public procurement or to charge market prices from the end users. A frequently applied approach has been to resort to the publication and dissemination of results. But this might not be sufficient to eradicate State aid relevance since it could be rated even as crucial (economic) marketing activity or it could be interpreted as sector specific approach.

Section 2 is devoted to a survey among a limited number of programmes. The documents (programme manuals) present sound information: the interviewed programme managers from Joint Secretariats have expressed concern that any decision taken in practice entails a considerable risk of misjudgement.

The Study also presents a couple of cases from the previous programming period as well as approaches for assessing the current period.

## Conclusions

The considerations on State aid in ETC projects laid down in this Study point at a major challenge in terms of knowledge management. The challenge goes through all levels, i.e. from the European level over Member States to authorities involved in ETC programmes as MAs. For the due consideration of State aid, two elements of knowledge management are of particular importance.

First, the role of intermediaries such as Interact is crucial in order to:

- transform the expert language into key questions and information which can be used for awareness-raising, guidance and in order to develop a basic understanding to sort out critical cases from a large number of incoming projects;

- develop and manage a targeted repository of information which is easily accessible such as the Base Camp on State aid run by Interact.

Second, the option to have access to ad-hoc expertise at national level is crucial for the management of ETC programmes. It is neither feasible nor efficient to develop substantial capacities for the assessment of State aid relevant at programme level. Ideally, the officials working for the institution hosting the MA would have sufficient knowledge to sort out critical cases and pass them on to the national unit for a quick screening and decision. This way, the MA would be enabled to take a substantiated decision based on an adequate and proportional approach. However, this is currently not a reality for many ETC programmes.

Sound knowledge management and capacity-building rests on communication at eye level and mutual respect rather than on exercising control. Open and shared learning between the MA, Audit Authority (AA) and State aid units is currently the exception rather than the rule. Functioning systems for the efficient and effective implementation of State aid rules will in many Member States require new approaches for communication and interaction between the main bodies involved.

# 1 Overview of main EU State aid legislation used in ETC programmes

The principles of State aid are defined in the Articles 107-109 of the Treaty on the Functioning of the European Union (TFEU). The basic definition of State Aid is found in Article 107 of the TFEU, which states; “*Any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods in so far as it affects trade between Member States.*”

## *The challenge underlying the assessment of State aid relevance*

State aid as such is a legal matter which is based on clear principles but de facto is governed by a number of secondary regulations and guidelines. Practice is in the end learned by the know-how gained in notification procedures with the European Commission and the decisions taken by the European Court of Justice (ECJ). The European Commission has a key role in reviewing existing aid and in deciding on plans to grant aid at the level of the Member States.

In order to address the call for more practice-related information, the European Commission has launched a public consultation to specify the concept of State aid in a more comprehensive manner seeking to address a broad public. The ‘*Draft Commission Notice on the notion of State aid pursuant to Article 107(1) TFEU*’ was subject to a consultation closed on 31 March 2014. The document contains a compilation of existing laws and refers to the ‘decisional practice’ of the Commission.

While the MAs and Member States representatives consider the note to be helpful, it still leaves room for interpretation and uncertainty. The document has not been approved and finalised yet, and it is therefore currently not legally binding.

Generally speaking State aid is a field of legal expertise where experience-based know-how is particularly important to take adequate and proportionate decisions.

## *The challenge in ETC*

State aid does have relevance in ETC programmes and projects more than it had been assumed so far. This is partly owed to the fact that:

- there is an increasing awareness for State aid relevance on the part of programme authorities;
- many programmes entering their third or even fifth programming period turn their attention to projects which include an increasing share of activities that can potentially be classified as economic ones;
- the growing interest of private actors raises the attention to the notion of undertakings; the programme period 2014-2020 aims to include SMEs in ETC.

The tendency calls for further detailed analysis of the State aid framework.

Compared to other types of EU-programmes, ETC programmes are challenged by:

- the fact that the range of possible activities is usually quite broad and there are hardly any standardised project types; activities at partner level might be State aid relevant and since these activities are not standardised it requires often considerable expertise to assess the potential State aid relevance and to apply adequate provisions.
- Funding volumes per partner are often rather small - thus from the perspective of national State aid authorities, ETC is not a main concern.

The access to expertise is in practice often difficult: national State aid authorities have limited capacities and thus it is often hard for programme authorities to get any advice on projects. Moreover the advice is often required on a short notice since the periods from the project application to the project selection are short when taking the perspective of an authority facing staff constraints.

A study launched by the German Federal Institute BBSR launched in 2011<sup>1</sup> came to the following conclusion based on a survey among programme representatives of transnational cooperation:

- *Legally binding advice is almost completely lacking. Clearer guidelines in terms of code of practice are expected, especially from the European Commission.*

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<sup>1</sup> Rupprecht, Werdermann 2011, p. 29.

- *There are discrepancies in practice between the responsible Directorates-General Regional Policy and Competition. Stronger coordination is called for.*
- *Regionally active programme actors and practitioners feel abandoned by their national authorities, while they themselves can only become active in a limited way.*

A major point is the lack of expertise and capacities in the operative units of ETC programmes – this refers in particular to Interreg V-A where JS are usually small in size compared to the transnational or interregional strands and the number of projects managed is often quite high. It is obvious that a large number of incoming applications with a comparatively small financial volume per project partner are a further impediment for a thorough assessment on potential State aid relevance.

Experience with external experts (legal advisers) has been mixed:

- For some programmes it has proven as a valuable help in the period of 2007-13, e.g. the Central Europe programme which has subjected a large number of projects to a screening by external State aid experts.
- In other cases – e.g. in the Slovak-Austrian programme (SK-AT programme) 2007-13 a pilot for assessment run by the MA did not provide convincing results; in the end ad-hoc advice from the national authority in Austria had been sought; in the Slovak Republic the responsible Ministry could provide in-house experience during the first years of programme implementation.

### *Responsibilities in State aid assessment*

The detailed role and responsibilities of programme bodies and Member States – represented in the Monitoring Committee (MC) – needs to be decided in detail at programme level. Granting and reporting State aid is ultimately the responsibility of national authorities.<sup>2</sup> In each Member State there is a national body or authority and the fact that the arrangements for the effective application of State aid rules (mainly ensuring administrative capacity) have become part of the so-called ex-ante conditionalities might improve the availability and accessibility of such expertise for the programmes. DG Competition as a main repository of knowledge is in practical terms hardly accessible to programme

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<sup>2</sup> Interact Q&A, 2015, p. 6.

bodies. Requests are channelled through Member States. A major point is that DG Competition does not consider hypothetical cases.

One important point is that at first, i.e. during the designation procedure<sup>3</sup> as well as at a later state, i.e. when dealing with the AA, it is mainly the MA who bears the responsibility for a properly functioning system to check State aid relevance in projects. Responsibilities can be shared between Member States according to provisions laid down either in the cooperation programme or in separate Memoranda between the Member States.

The MA might also have specific responsibilities in preparing options related to State aid relevant activities as well as in reporting.

Key criteria related to State aid

The level of preparedness in the programmes varies to a significant extent. The most advanced guidance documents have been found for Interreg V-B programmes, i.e. the transnational strand. Several MAs of ETC programmes provide guidance on State aid rules and possible solutions dealing with State aid relevant projects.

**Table 1. Key criteria related to State aid**

Criteria (all 5 must apply)	Criterion satisfied in ETC
Undertaking / economic activity	<p>This is the first criterion which requires due consideration and the assessment is not that easy. The guiding question is whether any products or services are being offered on a market.</p> <p>The key point is to decide whether the entity carries out an economic activity in the ETC project. Undertakings are entities engaged in an economic activity, regardless of their legal status and their principle aim to make profit. Economic activity is broadly defined as ‘offering goods or services on a given market’ (European Commission 2007). It might be helpful to consider whether the activities could be implemented by a private body or in order to make profit.</p> <p>There are no exhaustive lists either on economic or on non-economic activities. Typical examples of non-economic activities are state prerogatives such as public safety, general infrastructure, and primary activities of research bodies or education.</p>

<sup>3</sup> In brief the system check done by an independent body which is a pre-condition that a ETC-programme can disburse ERDF to beneficiaries.

Transfer of state resources	Yes (up to 85% from ERDF)
Advantage Does the measure confer an advantage on the undertaking?	This is the most difficult criterion to determine and it concerns whether there is a benefit that the undertaking would not gain under ‘normal market conditions’ or whether it is relieved of costs that it would normally have to meet. Where a transaction is carried out on market terms – determined, for example, on the basis of an open tender process – there is no advantage, and therefore no aid. Another option could be that the service is a Service of General Economic Interest (SGEI) meeting the <i>Altmark</i> criteria.
Selectivity Is the measure selective?	ETC programmes are by their nature selective.
Does it have the potential to affect competition and trade between the Member States?	ETC programmes are not intended to have purely local effects thus it is always presumed yes, provided there is an advantage

Source: *Interact Q&A, 2015, Factsheet 1 – State aid in Interreg Baltic Sea Region.*

### Main options to fund state-aid relevant activities in ETC

In ETC projects there are two general options to fund state-aid relevant activities: De minimis and the General Block Exemption Regulation (GBER).

The table below provides an overview on the main implications of these two options in terms of funding from the programme.

**Table 2. State aid provisions of potential importance in ETC**

State aid legal basis	Absolute ceiling	Comments
No aid (the activity is not economic or the support is not State aid relevant)	none	Standard co-financing rate
De minimis (general regulation)	In general EUR 200,000 in a 3-year period	Standard co-financing rate of the Programme
GBER Article 20 Aid for SMEs participating in ETC projects	EUR 2 million per undertaking, per project	50% of eligible expenditure
GBER – other Articles	Variable, depending on policy objective.	Variable, depending on policy objective, but lower than the standard co-financing rate of the programme.

Source: *Factsheet 1 – State aid in Interreg Baltic Sea Region.*

## 1.1 De minimis

De minimis aims to support economic entities with comparatively small amounts. The underlying assumption is that small amounts of support do not have a significant impact on competition and trade in the European Economic Area (EEA). De minimis is probably the preferred option in most programmes in the Interreg V-A, i.e. the cross-border strand where partner budget and project volumes are quite small and due to its relative simplicity in handling the option lends itself to be applied as safe option in case of doubts.

**Table 3. Specific provisions related to De minimis**

Sector	Ceiling
In general	EUR 200,000 in three fiscal years per single undertaking, per Member State
Freight transport	EUR 100,000
Fisheries and aquaculture <sup>4</sup>	EUR 30,000 and national capping on spending
Agriculture <sup>5</sup>	EUR 15,000
SGEI <sup>6</sup>	EUR 500,000 for SGEI that do not clearly meet the four Altmark criteria- see the considerations on SGEI in section 1.3

Source: Interact Q&A, p. 18.

The fact that De minimis applies per Member State would allow in principle for a new perspective which has been labelled as proportional approach.<sup>7</sup> It requires clear reasoning and a shared view among the participating Member States. In principle two Member States cooperating in an Interreg V-A programme could agree that the European Regional Development Fund (ERDF) granted to one beneficiary in a project counts for two Member States: for example a grant amounting to EUR 200,000 to a single undertaking could count for two Member States, i.e. EUR 100,000 per Member States. For the undertaking it would mean that it had received EU 100,000 from Member States A and EUR 100,000 from Member States B. Thus in accordance with the principle that De minimis is applied per Member States the undertaking could receive further grants.<sup>8</sup> In order to allow for this approach the Member States would have to take an initial agreement that each ERDF contribution is considered as split in equal shares

<sup>4</sup> Regulation (EU) No 717/2014.

<sup>5</sup> Regulation (EU) No 1408/2013.

<sup>6</sup> Regulation (EU) No 360/2012.

<sup>7</sup> Cf. Interact Q&A, 2015, p. 19.

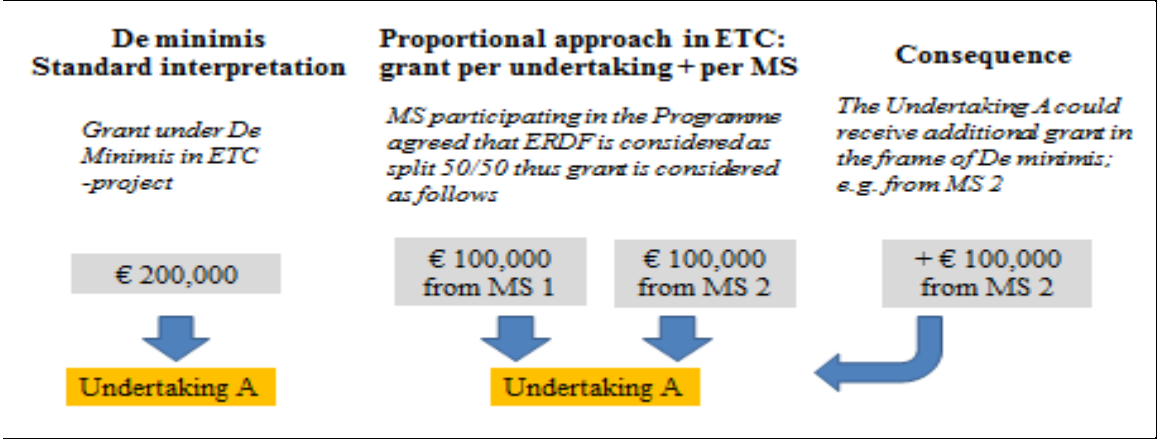
<sup>8</sup> E.g. from Member States A another grant amounting to EUR 100,000 – then the limit of EUR 200,000 for Member States A would have been reached; the total grant to the undertaking would amount to EUR 300,000.-; thereof EUR 200,000 from Member States A and EUR 100,000 from Member States B.



(50/50). As regards the split of shares, other options such as the relative shares according to the programme allocations per Member States could be considered.

It is evident that the proportional approach to De minimis would allow de-facto for grants which exceed EUR 200,000 per undertaking. For obvious reasons the approach has raised a lot of interest among the ETC programmes and had been subject to discussion in the Q&A initiated by Interact. In its responses the Commission has stressed that the option is not in contradiction to the legal framework for De Minimis and can be applied, provided that the participating Member States share a clear reasoning, i.e. that ERDF is considered as split according to shares as agreed between Member States. This view has been confirmed by DG Competition since Member States are not obliged to verify possible De minimis aid granted in other Member States. ETC programmes might apply this perspective thus making De minimis a quite attractive option. It is important to note that next to ERDF also eventual national public match-funding counts for the De minimis ceiling.

**Figure 1: Proportional approach to De minimis in ETC**



Source: own considerations.

Generally speaking there is no standard option for defining which Member States provides the De minimis support. Next to the proportional approach other options would point to the Member State where the undertaking is located, or the Member State acting as MA or the Member State which is the seat of the Lead Partner (LP).<sup>9</sup>

An important issue which causes problems in the implementation is the notion of ‘single undertaking’. In many cases it is not clear whether subsidiaries or departments are considered as different entities or one single entity. For this matter the approach as defined in Annex 1 in the General Block Exemption Regulation (GBER) is useful.

<sup>9</sup> Cf. Interact Q&A, p. 20.

In order to ensure that grants to a single undertaking do not to exceed the respective ceiling there are in general two ways:

- Member States organise a central register of De minimis support containing all information on De minimis support granted by any authority within the Member States such as is the case for CY, CZ, EE, GR, LT, PL, PT, SI and SK<sup>10</sup> - thus it becomes obvious that these are mostly EU-12 countries and only a part of all ETC programmes will be able to count on such registers.
- Enterprises are obliged to have their own information and are to deliver a self-declaration about other De minimis aid received within the three year period.

In the case there is no such register, declarations are required – in order to be presented eventually to other authorities, these have to be issued by the programme. In practical terms either the Member States or the MA have to issue the declarations which confirm the aid granted under De minimis to the undertaking. This should be done first during the contracting phase and eventually upon project end: a second declaration might have to be issued since the actual grant had been lower.<sup>11</sup>

De minimis excludes the following types of activities:

- Support linked to quantities exported, the development of an export network or operating costs associated with export activity<sup>12</sup>.
- Support which is conditional on using domestic over imported goods.
- Support for acquiring road freight transport vehicles by undertakings in the road haulage business.

One example should help to illustrate the practical implementation of De Minimis in a cross-border programme in the period of 2007-2013.

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<sup>10</sup> Cf. Interact Q&A, p. 22.

<sup>11</sup> Either due to a higher budget at the planning stage or costs declared ineligible during implementation.

<sup>12</sup> Cf. Interact Q&A, p. 23: examples are listed in recital 9 in Regulation (EU) 1407/2013: support which does not constitute export aid and thus can be granted De minimis aid includes e.g. participation in trade fairs, studies or consultancy services needed for the launch of a new or existing product.

In the SK-AT programme of 2007-2013 an undertaking had been procured by a major Austrian city in order to implement so-called eco-profit business plans, i.e. consulting services supporting SMEs in combining cost-savings and eco-friendly business management.

Based on the know-how and experience gained under this longer-term contract the undertaking initiated a cross-border project to bring the expertise to a Slovak city and to run a pilot programme for Slovak SMEs. In the project the undertaking acted as beneficiary. The potential of market expansion for the Austrian undertaking was evident. At the same time it was clear that without a pilot project and the adjustment of the approach to Slovak conditions no Local and Regional Authorities (LRA) in Slovakia would consider to run a similar programme – thus the incentive effect of the aid was also evident. Given these considerations, the aid was granted as De minimis to the undertaking.

## 1.2 General Block Exemption Regulation (GBER)

The aim of the General Block Exemption Regulation (GBER) is to avoid the need for notification of aid to the European Commission and its approval in advance of implementation. GBER is covering 42 categories which presume that specific conditions are met. Categories include for example regional aid, aid for research and development and innovation and aid for SMEs' cooperation costs linked to ETC projects. The latter was specifically designed to facilitate participation of SMEs in ETC projects. The GBER is particularly important to ETC as it permits programmes to provide aid in a transparent way without prior notification to the Commission. General principles governing the application of GBER are transparency, the incentive effect of the aid and cumulation.

The table below lists examples which have been chosen by various programmes (also presented in section 2).

**Table 4. GBER – aid categories of potential relevance for ETC**

Article in GBER	Subject	Comment
14	Regional investment aid for <u>initial investment</u> ;  In principle it covers investment and wage costs. Point 15 refers to ETC-programmes; aid intensity according to the regional aid map; if differences between regions occur the aid intensity	The term ‘initial investment’ is defined in more detail in recital 49 in Article 2:  <i>it refers to an investment in tangible and intangible assets related to the setting-up of a new establishment, extension of the capacity of an existing</i>

Article in GBER	Subject	Comment
	<p>of the region where major part of expenditure is incurred counts; minimum contribution from the beneficiary 25%</p>	<p><i>establishment, diversification of the output of an establishment into products not previously produced in the establishment or a fundamental change in the overall production process of an existing establishment; or an acquisition of assets belonging to an establishment that has closed or would have closed</i></p> <p>The Interact guidance from April 2015 points out that: <i>at this point the implications of the Article are not fully understood and programmes applying this Article should seek further guidance.</i><sup>13</sup></p>
20	<p><u>Aid for costs incurred by SMEs participating in ETC projects</u></p> <p>The eligible expenditure covers staff, overhead, external services and travel. Maximum aid intensity amounts to 50%</p>	<p>A valuable solution for ETC-programmes since it can be handled in practice quite easily. Given the aid intensity possible for SMEs in most parts of the EU the aid intensity offered with this option is clearly attractive.</p>
25	<p><u>Aid for research and development projects</u></p> <p>The eligible cost cover staff, equipment, external services (contractual research), and overheads.</p> <p>The aid intensity depends on the classification of the research activities: fundamental research (100%), industrial research (50%), experimental development (25%); aid intensity for the latter two categories may be increased up to 80% in case of collaboration, i.e. in case of ETC projects.</p> <p>Aid intensity for feasibility studies may amount to up to 50%</p>	<p>The activities correspond e.g. to the intents of Investment Priority (IP) 1b as described in the ERDF Regulation.<sup>14</sup></p> <p>Due to the collaboration clause the possible aid intensity, i.e. the funding rates are quite attractive.</p> <p>Obviously the classification of activities is crucial but might pose a challenge. It is important to note that the definition of fundamental research in recital 84 of Article 2 is quite restrictive: <i>experimental or theoretical work undertaken primarily to acquire new knowledge of the underlying foundations of phenomena and observable facts, without any direct commercial application or use in</i></p>

<sup>13</sup> Interact Q&A, 2015, p. 25.

<sup>14</sup> Cf. Regulation (EU) 1301/2013, Article 5.

Article in GBER	Subject	Comment
		<p><i>view.</i></p> <p>Thus in the majority of cases ETC projects will tend towards industrial research or experimental development.</p>
26	<p><u>Investment aid for research infrastructure</u></p> <p>Construction of upgrade of research facilities; prices charged for the use shall correspond to market prices; access shall be open for several users (which should be the case in any ETC project). The Regulation allows for an aid intensity up to 50% but a clear reasoning must be given for the shares of economic and non-economic activities</p>	<p>The investments correspond to the intents of IP 1a according to the ERDF-Regulation.</p> <p>The obvious critical point is the separation of economic and non-economic activities which take place in the new or upgraded facility. This might be difficult in case of large universities or shared facilities for applied research. It is evident that preferably the issue has to be discussed and solved prior to submission of the project since otherwise one has to expect lengthy clarification periods during the assessment phase.</p> <p>Next to this option there exists another major guidance related to State aid relevance for research infrastructure which is set out in the following sections of this Study.</p>
53	<p><u>Aid for culture and heritage restoration</u></p> <p>The Article covers a wide range of cultural heritage institutions from museums to live performance organisations but also education, folkloristic costumes and crafts etc. The eligible cost cover investment cost (provided that 80% of the infrastructure is used for cultural purposes), costs for projects, exchange and cooperation (thus implicitly addressing ETC) but also operating cost. Specific provisions refer to the publishing of music and literature (either a funding gap calculation or a maximum aid intensity of 70%).</p>	<p>The possible activities clearly correspond to the intents of IP 6c which is probably the most frequently addressed IP in the cross-border strand!</p> <p>The crucial point is that the Article requires a due consideration of revenues. Implicitly the required calculations have to be based on a sound knowledge of the sector. In case of <u>operating aid</u> the aid amount shall not exceed coverage of operating losses and reasonable profit over time – a fact which has to be ensured ex-ante through projections or a claw-back mechanism.</p>

Article in GBER	Subject	Comment
		<p>In case of investment aid the aid amount shall not exceed the difference between the eligible cost and the operating profit. Operating profit has to be deducted ex-ante based on projections or through a claw-back mechanism. A reasonable profit for the operator can be kept.</p> <p>For aid not exceeding 1 MEUR aid intensity might amount to a maximum of 80% of eligible cost.</p>
56	<p><u>Investment aid for local infrastructures</u></p> <p>The article <i>concerns infrastructure that contribute at local level to improving the business and consumer environment and modernising and developing the industrial base</i></p> <p>Ports and airports are excluded.</p>	<p>Provisions for the calculation of the aid amount are similar to those for investment aid under Article 53 in case of aid exceeding 1 MEUR.</p>

Source: GBER, Interact Q&A 2015, own considerations.

It is important to note that the definition of enterprise according to the GBER is any legal identity engaged in an economic activity irrespective of its legal form.<sup>15</sup> Thus also the definition of SMEs follows the criteria laid down in Annex 1 of the GBER.

GBER does not apply for:

- Fisheries and aquaculture.
- Primary agricultural production.
- Processing and marketing of agricultural products.
- Coalmines.

Activities excluded are:

- Aid to export-related activities or contingent on use of domestic over imported goods.

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<sup>15</sup> Also definitions according to national law (e.g. for tax purposes) are irrelevant in the context of aid granted under the GBER.

- Aid available to firms subject to a recovery order<sup>16</sup>.
- Aid to firms in difficulty.
- Aid which entails a non-severable violation of EU law.

### Administrative requirements

ETC programmes are free to choose the options which suit best to the intended projects. It is evident that the choice has to be first of all based on an agreement among programme partners, i.e. the Member States participating in the programme. It is a decision which should be taken under shared responsibility and thus it should be based on consensus. It is a decision which might have quite far-reaching consequences: if no suitable option is offered by the programme a project might not be eligible, or – if GBER options exist - the range of options has potential implications on the funding decision taken by the Monitoring Committee (MC). The actual choice for one or several options under GBER will most probably be based on experiences made in previous periods. The administrative pre-requirement is to inform the European Commission about the intent to apply one or several options and to specify the chosen options. In best case – from the perspective of transparency - the applicable options are set out in the Manuals for applicants or in the description of the conditions governing the Call.<sup>17</sup> This does not necessarily have to be done during programming or at programme start since according to the implementing rules this can be done up to 20 days after the aid has been granted (i.e. the ERDF contract on the project has been concluded).

The information has to be reported via the Commission's State aid notification software (SANI). This might be done at level of the Member States or it could be taken over by the MA responsible for the programme (upon consultation with the national State aid unit). According to the statement of a MA which has registered several options in the system, the SANI is focussed on mainstream programmes and parts of the general information required is rather difficult to be provided for an ETC-programme.

Further the information sheet generated on the programme has to be published on a State aid website (e.g. of the Member States where the MA is located).

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<sup>16</sup> Deggendorf principle.

<sup>17</sup> The implementing provisions of programmes differ to a huge extent across the EU – but for many programmes the description of the conditions governing the Call is an essential document in order to safeguard transparency and fair access for applicants.

## 1.3 Considerations on specific types of infrastructure and services

### Research infrastructure

As stated under the considerations related to Article 26 of the GBER it is essential whether the institution planning to carry out the activity performs non-economic or economic activities or both. In the latter case the shares of non-economic activities (falling outside the scope of State aid) and economic ones (which are State aid relevant) is decisive. With the *Framework for State aid in research, development and innovation*<sup>18</sup> the Commission has provided a reference document. The key provision is laid down in 2.1.20 in the document:

*Where the research organisation or research infrastructure is used almost exclusively for a non-economic activity, its funding may fall outside State aid rules in its entirety, provided that the economic use remains purely ancillary [...] the Commission will consider this to be the case where the economic activities consume exactly the same inputs (such as material, equipment, labour and fixed capital) as the non-economic activities and the capacity allocated each year to such economic activities does not exceed 20 % of the relevant entity's overall annual capacity.*

Thus in the case of aid to research projects or infrastructure the character of the institution acting as partner in the ETC-project is decisive: it is obvious that in some cases such information or a convincing statement which argues and justifies the share of economic and non-economic activities might be difficult to get but such evidence can be decisive for the grant decision.

### Transport Infrastructure

Transport infrastructure has been requested as specific focus for this Study. A major point is that general infrastructure such as road, cycle paths or also railway networks fall outside the scope of State aid. These infrastructures are also generally speaking not considered as net-revenue generating infrastructure.

Transport infrastructure where State aid relevance has become a major point are in particular airports and ports. In recent years the Commission has investigated (corporate) tax exemptions for publicly-owned ports e.g. in BE, NL, FR. Currently the Commission is working on an extension of GBER *so as to cover*

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<sup>18</sup> Communication from the Commission 2014/C 198/01.



*non-problematic investments in ports and foster strategic investments in infrastructures that have the potential to create jobs in Europe.*<sup>19</sup>

In this context it is important to note that the services and infrastructures provided by a port are quite comprehensive and might even include elements which can be considered as SGEI such as fire protection or general safety provision.

In ETC in particular ports have acted frequently as beneficiaries in particular in transnational programmes such as South East Europe, North West Europe or CENTRAL.

A major ports project in the transnational North West Europe Programme 2007-2013 is so far the only known example where an ETC-project had undergone the notification procedure, i.e. a notification of the project as State aid by DG Competition. The project involved several major ports in DE, NL, BE and FR and next to the development of ICT tools also development and testing of specific infrastructure in collaboration with freight forwarders and distributors. The notification procedure was based on notable efforts of the State aid units of the participating Member States.

### **Services of General Economic Interest SGEI**

The term Services of General Economic Interest (SGEI)<sup>20</sup> refers to utilities or services that a Member States considers as public task such as water supply, waste water treatment, basic health care etc. This might at first sound a bit far-fetched from the perspective of ETC programmes but thinking of the numbers of cross-border projects related to the cooperation of fire brigades or in disaster management or health care it is evident that a considerable number of ETC-projects targets SGEI.

SGEI are an example where a major decision of the European Court of Justice (ECJ) had a major influence on the perception of the nature of services and the key elements to be considered. The decision of the ECJ has shaped the so-called Altmark criteria. If all of the four Altmark criteria are met the SGEI in question does not constitute State aid.

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<sup>19</sup> Cf. European Commission press release as of 21 January 2016 - IP/16/125.

<sup>20</sup> The section is based on the Interact Q&A, pp. 32-34.

**Table 5. The Altmark criteria**

Criteria	Considerations
Public Service Obligation (PSO)	The public service obligations have been clearly defined
Transparent approach to compensation	Parameters for the calculation of the compensation have been established beforehand in an objective and transparent manner
No excess compensation	The compensation does not exceed what is necessary to cover the expenditures incurred and a reasonable profit
Transparent calculation	If not chosen in public procurement the level of compensation has to be determined based on an analysis of the costs which a typical undertaking well-run would have incurred in discharging the obligation

Source: *Interact Q&A, 2015, p. 32.*

With a view to the eventual complexity of such calculations and approaches to determine an adequate level of compensation the De minimis for SGEI might be an interesting choice for programmes (see section 1.1). One has to see that – given the diverse nature of services which could be considered as SGEI – the notion and underlying perceptions are subject to change. *The concept of SGEI is evolving over time and there may exist considerable uncertainties in meeting the Altmark criteria.*<sup>21</sup>

An example from a cross-border programme in the period 2007-2013 might help to illustrate the potential relevance of SGEIs and State aid in ETC.

The project partnership consisted of two NGOs operating in the health care sector; inter alia the NGOs offer home emergency call systems in particular for elderly citizens. The project objective was to align the system requirements and to test a pilot for an advanced system which offered a higher degree of safety for the users. During the assessment phase the JTS consulted the activities briefly with the national State aid unit. There was an agreement that the services rendered could be classified as SGEI meeting the Altmark criteria thus falling outside the scope of State aid. The project became part of a sample audit performed by the AA and the Authority raised concerns regarding potential State aid relevance. In order to defend the initial assessment the MA launched a request for an external State aid expert.

Referring to the first criteria the expertise pointed out that transport services in health care are in general classified as SGEI and that the term SGEI includes also investments. Despite the fact that the PSO did not explicitly refer to home emergency call systems the obligations taken over by the beneficiary in terms of

<sup>21</sup> *Interact Q&A 2015, p. 33.*

the longer-term operation of the system did provide a strong justification to classify the services as SGEI. The expertise pointed also at the fact that the EJC accepts that also the general frame might be a sufficient justification for an SGEI even if the PSO is not that specific in its formulation. Referring to the second, third and fourth criteria major arguments derived from the fact that the detailed budget attached to the project plus the contractual requirement to report any revenues did provide sufficient transparency to justify that the criteria has been met. Additionally the expertise referred to the Monti-package<sup>22</sup> which allowed for an even less restrictive approach to the Altmark criteria (and to the obligation for the notification of aid in the context of certain SGEI) for a limited period - being in force for the period of project implementation (i.e. linked to the seize of the undertaking and the share of SGEIs rendered as part of the undertaking's activities). The expertise had been acknowledged by the AA.

## 1.4 Revenue generation

In case that economic activities are relevant for State aid the application of De Minimis or GBER exempts the beneficiary from the obligation to consider revenue generation.

Activities not covered by the De minimis or GBER generating net-revenue would have to consider the aspect of revenue generation.

### Revenue-generation in ETC projects

It is important to be aware that the concept of net-revenue generation refers to a specific type of operations which in a tentative first assumption has not occurred very frequently in ETC so far.

The definition of net-revenues is as follows:

*Cash in-flows directly paid by users for the goods and services provided by the operation, such as charges borne directly by users for the use of infrastructure, sale or rent of land or buildings, payments for service, less any operating costs and replacement costs of short-life equipment incurred during the corresponding period.*<sup>23</sup>

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<sup>22</sup> Referring to Decision 2005/842 (EC) which had been replaced by Decision 2012/21/EU.

<sup>23</sup> Art 61(1) of the Common Provisions Regulation; for more information see. Delegated Reg. (EU) 480/2014, Art. 15 – 19.

Thus, cases to which concept applies might comprise e.g. a cross-border training centre or an MBA which is implemented jointly as cooperation of several universities.<sup>24</sup>

In the period of 2014-2020 the Commission has introduced one major change in the consideration of projects generating net revenues. Given all the problems related to an ex-post monitoring of revenues after project completion as foreseen in the period 2007-2013 for this period it is intended to consider to the extent possible net-revenues ex-ante. Article 61 in the Common Provision Regulation (CPR) describes the handling of projects generating net-revenues. In principle several options for an ex-ante consideration exist:

- A lowered rate of public support (application of a flat rate net revenue percentage).
- Calculation of the discounted net revenue of the operation (also known as the funding gap method).

In principle these methods cover the aspect of net-revenue generation for the complete project life cycle, i.e. the project implementation (construction phase) and after completion.

If these methods cannot be applied Article 61 foresees a provision which is obviously not attractive to any programme management, i.e.

*The net revenue generated within three years of the completion of an operation, or by the deadline for the submission of documents for programme closure fixed in the Fund-specific rules, whichever is the earlier, shall be deducted from the expenditure declared to the Commission.*

Revenues which occur during project implementation and have not been considered as part of the approach to an ex-ante consideration of net-revenues have to be deducted before the final payment is done.<sup>25</sup>

The CPR also refers to projects with a total eligible cost below 1 MEUR. One of the implications of the exception is that these projects are exempt from the principle of deducting the net-revenues ex-ante.<sup>26</sup> In general, provisions on considering net revenue after completion do not apply to such projects.<sup>27</sup>

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<sup>24</sup> In such cases the question of revenues has to be considered, however it needs to be determined whether these are net revenues.

<sup>25</sup> Cf. Article 65(8) of the CPR.

<sup>26</sup> Cf. INTERACT Question and Answer, INTERACT website.

<sup>27</sup> Cf. Article 61(7) of the CPR.

The only real exception from any consideration of net revenues are operations with total eligible cost up to € 50,000.-, i.e. the Small Project Funds (SPF) which is a recurring element of many cross-border programmes in ETC.

Summing up these considerations, an MA of an ETC programme has to consider several distinct approaches to revenue generation in projects.

**Table 6. Approaches related to revenue-generation in projects**

Case	Approach
Project generating net-revenues with eligible cost exceeding 1 MEUR	Ex-ante consideration leading to lowered support rate or lowered grant based on the funding gap method.  Ex-post deduction.
Project generating net-revenues with eligible cost below 1 MEUR	For such projects net-revenues occurring during implementation do not have to be deducted ex-ante nor is there the requirement to consider net revenues after completion.  An obvious risk is that a project initially having eligible cost of EUR 950,000 might end up with cost exceeding 1 MEUR.
Projects generating revenues during implementation	If not considered ex-ante as element of net-revenue generation such revenues have to be deducted.
Projects with eligible cost up to EUR 50,000	Revenues need not to be considered (in principle such revenues could even be used as part of match-funding).
Activities falling under Articles 53 or 56 of GBER	Ex-ante calculation required; details are set out in the respective Articles of the GBER but are in principle aligned with the provisions for ESIF according to CPR.

*Source: own considerations.*

A case in a cross-border programme in the period 2007-2013 had been a very specific facility as part of nature tourism (tree-top walk). Initially it was intended to apply the funding gap method: an approach which had proven to be very sophisticated in case of such a rather unprecedented attraction. Obviously calculation models did not exist and thus in the end the MA decided to treat the project according to provisions of Article 55.(4) of Regulation 1083/2006, i.e. *where, at the latest three years after closure of the operational programme, it is established that an operation has generated revenue that has not been taken into account [...] such revenue shall be refunded to the general budget of the European Union.*

## 1.5 Practical issues regarding State aid in ETC

Most of the programmes have just started with their first calls. When screening the programmes it shows that the majority of programmes still lacks concise information on the issue of State aid. A certain divide becomes visible between the transnational strand where several programmes have already elaborated already comprehensive guidance and the cross-border strand, albeit the latter with notable exceptions such as the programmes AT-DE. Section 2 will present the state of play for selected examples of programmes.

In order to set a clear path **INTERACT** puts effort in elaborating comprehensive guiding material related to State aid in ETC programmes. Already in 2011 INTERACT published papers regarding the main problems occurring in ETC programmes related to State aid. According to INTERACT the main issues are<sup>28</sup>:

- Difficulty in the definition of economic advantages of cooperation projects;
- Experts opinion about State aid applications are contradictory;
- Expertise in State aid regulation is scarce and often not available for ETC programmes;
- National and regional State aid schemes are even more difficult to apply for ETC projects where Member States of different cooperation partners differ in the legislative framework;
- Categories such as service of general economic interest are not clearly understood and often seen as economic activities;
- According to some MAs the effort dealing with State aid does not pay off.

The consequences resulting out of the difficulties which are still existing are that SMEs are less eligible and projects involving State aid are not approved. In cases where SMEs are eligible De minimis is automatically applied for. INTERACT has published an overview of the most common actions Member States and Programme management followed in the **2007-2013 programming period**.

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<sup>28</sup> Interact 2011, sharing expertise, State aid in European Territorial Cooperation Programmes Exemplary State aid cases in ETC programmes 04 July 2011.

### ***Box 1. State aid in ETC programmes in 2007-2013 programming period***

- Many ETC programmes eliminate State aid risks at the start, either during project development or project application assessment phases.
- State aid „gate keeper“ conditions are written down in programme documents and aim at eliminating State aid risky activities at the very beginning.
- Some ETC programmes allow private partners participation in projects under the condition that each private partner signs De minimis declaration, which is then submitted to the programme as an obligatory part of the project application pack. Some ETC programmes believe that unfortunately De minimis cannot be a solution to State aid since some partner states do not have central De minimis registers. This makes it impossible for programme authorities to carry out management verifications and ensure compliance with State aid rules by project partners from all partner countries. In this case granting funds under De minimis (also in cases that are not State aid) seems unfair to beneficiaries as funds under De minimis accumulate and beneficiaries may not be able to receive additional funds from other sources.
- Granting State aid to ETC project partners under existing national State aid schemes is a rare practice. Out of over 20 ETC programmes analysed, there is only one State aid relevant project which is implemented in a CBC programme under existing national State aid schemes. This approach requires that both Member States have similar State aid schemes approved. It seems easier to implement an ETC project under existing national aid schemes in CBC rather than transnational programmes.
- Granting State aid to ETC project partners under GBER is a rare practice. Out of over 20 ETC programmes analysed, there is only one State aid relevant project which is being implemented by a CBC programmes under GBER. As in the previous example, this approach requires that both Member States jointly send information summary to the Commission. It seems easier to implement an ETC project under GBER in CBC rather than transnational programmes.

*Source: INTERACT research.*

### **State aid in Project Cycle Management**

When considering the Project Cycle Management (PCM) it becomes apparent that consideration of State aid (and also of revenue generation) goes through all major stages. The table below outlines the major implications at the different stages of the PCM.

**Table 7. State aid from the perspective of the PCM**

Stage	Implications
Project generation and application	<p>The quality of written guidance and know-how of operative staff in JS and MA is decisive to raise awareness for / to detect potential State aid relevance at an early stage.</p> <p>In general State aid is subject to the principle of transparency – thus options to grant aid under e.g. De Minimis or the GBER should be explained and made public in the Manuals for Applicants and Beneficiaries. Templates for self-declarations related to De Minimis might also be useful at this stage.</p> <p>Related to revenue generation concise guidance as well as calculation sheets should be provided.</p>
Submission	<p>If State aid relevance is already clear at this stage self-declarations might be provided in case of the application of De Minimis.</p>
Assessment	<p>If State aid is not clear prior to submission it is an essential part of the assessment. In most cases external advice will be required – thus it needs to be considered in timing as well as in terms of cost; it is evident that support by external experts has to be procured in a very cost-efficient way.</p>
Selection	<p>MC should be duly informed about issues of State aid and revenue-generation since the MC should explicitly decide on the grant per beneficiary (in terms of grant amount and funding rate).</p>
Contracting	<p>The ERDF-Contract should make granting of State aid clearly visible (e.g. on the cover page of the Contract) and has to include respective specific provisions (e.g. on archiving of documents). Usually the date of issue of the Contract defines the date for granting the aid.</p> <p>In case of De Minimis the MA might have to issue the official statement on the amount granted to the beneficiary.</p>
Implementation and Control	<p>In case that a project respectively a partner’s budget includes economic and non-economic activities it must be clear for the designated controllers how these expenditures can be distinct from each other [since e.g. a different co-funding rate might have to be applied (GBER) or a ceiling has to be observed (De Minimis)].</p>
Closure	<p>A clear financial closure statement should be issued since e.g. in case of De Minimis a lower amount of eligible expenditure as initially planned by the beneficiary might be an important information (if the beneficiary seeks to acquire further grants under De Minimis).</p>

Source: own considerations.



It becomes quite clear that with a view to State aid and revenue generation the essential stages are the application as well as the assessment stage. At these stages two basic options exist.

**Table 8. Strategic approaches of programme managements (MA, JTS)**

Strategic option	Comment
Foresee the option of State aid relevance and apply one of the adequate provisions	One of the major drawbacks is that programme managements are quite often hesitant to apply such options due to lack of expertise
Assessment of relevance and proposing modifications to the project design in order to avoid State aid relevance	In many cases modifications to the project design might be one of the options in order to avoid the State aid relevance

Source: own considerations

The latter point might deserve a few explanations.

Avoidance of State aid

In some cases State aid relevance can be avoided if the project approach or the design or the character of activities is altered at an early stage. The following considerations might be helpful:<sup>29</sup>

- **Public procurement:** procuring a service eliminates State aid relevance for the subcontractor.
- **Benchmarking:** is still a tentative approach discussed in the Commission Notice on the notion of State aid – it might be used to demonstrate that project partners do not receive compensation above market prices. *For ETC this would mean to compare the terms and conditions of a service contract or purchase contract with similar transactions carried out by private operators. If the terms and conditions (in particular the prices) in private contracts are similar to the public funding provided to ETC partners, the ETC funding should normally not involve any State aid.*<sup>30</sup>

In practice the publication and dissemination of results have been considered as a frequent resort in order to avoid State aid relevance. But this might not be sufficient to remove State aid relevance since it could be rated even as crucial (economic) marketing activity or it could be interpreted as sector specific approach etc.

<sup>29</sup> Cf. Interact Q&A 2015, p. 12.

<sup>30</sup> Interact Q&A, p. 12.



## 2 Survey among selected programmes

The programme examples which have been chosen are mainly based on the availability of guidelines and elaborated programme documents and the willingness to provide information about the subject of State aid. The programme analysis based on interviews follows the three main questions:

- How is the access to State aid expertise organised?
- What are the examples of projects?
- What are the State aid related provisions of the programme and which templates and procedures to identify State aid relevance and/or net revenue generating after completion have been developed?

The cases which have been considered in the study differ in their type and territorial focus:

### Transnational programmes

- Baltic Sea Region
- Northern Periphery and Arctic Programme
- North West Europe

### Cross-Border

- Germany - The Netherlands
- France (Channel) England Programme
- Slovakia-Austria

Generally speaking MAs and programme managers in JS were reluctant to speak about State aid. The main reason is the fact that none of the persons in charge of assessing projects are sure whether State aid issues have been dealt with in the right way. According to interviewees the decision whether a project is State aid relevant is largely a matter of discretion. Thus the initial intent of the study to outline in more detail facts about project examples could not be met. All interviewees have requested that references to projects are kept on a rather general level.

According to programme managers in JS all projects are assessed whether they are revenue generating and whether they include State aid relevant activities.

Programme managers and First Level Control (FLC)<sup>31</sup> as well as the AA do largely share the opinion that each case of potential State aid relevance can be interpreted in many different ways. Even in the case where State aid experts have been involved, different opinions have been expressed. Interviewees stated that each project can be broken down into different activities and each level of analysis leads to a different discussion of State aid relevant aspects. In other words there is no legal security on how to assess State aid relevance in projects.

Experts are often available but according to interviewees, their input does not always help clarifying the maze. In case of uncertainty, the programme managers seek to contact State aid experts in the ministries of the respective Member State. However, this is not always an option and hardly feasible in cases where there are large numbers of incoming applications which need to be assessed. The INTERACT platform on State aid<sup>32</sup> has been named as another source of pragmatic expertise in case of uncertainty but it is currently rather an instrument to share approaches and documents than to discuss and share cases. According to the statements of programme managers the widespread lack of experience and pragmatic know-how in programme bodies extends also to FLC and AA. One of the presented cases points at the differing views between programme management and the AA: in the end the MA had to consult an external State aid expert to clarify the status of certain activities.

The survey has shown that during the programming period 2007-2013 a frequent resort for handling of ‘critical’ activities had been the use of De minimis. In the programme period of 2014-2020, the Block Exemption Regulations (BER) offer a broad range of options – table 4 in section 1 includes a list of examples. The example of the transnational programme for the Baltic Sea Region (BSR) shows that some programmes even offer a broader range of options covering the General BER, the BERs for Agriculture (ABER) as well as Fishery (FIBER).

Several interviewees confirmed that the ‘ETC-specific’ Article 20 of GBER is in principle a very interesting option but they assume that the effort required in the assessment process will still remain considerable: one could use the Article as a safety or fall-back option but obviously the correct approach is to clearly discern economic from non-economic activities. And it is the latter point which represents the actual challenge. As a consequence it might be necessary to apply different co-funding rates according to activities – an evident complication for further proceedings in the verification of expenditures. Summing up the

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<sup>31</sup> Term referring to the bodies performing the verification of expenditures incurred in the implementation of the project; in ETC programmers usually organised at level of the Member States.

<sup>32</sup> Interact Base Camp - a platform where representatives of ETC programmes are invited to share knowledge and documents.

statements it seems that no major simplification is expected from this new option.

In the end, the long-standing dream remains: the desirable approach would have been a general exemption for ETC – however, it has become obvious that this objective has not been achieved. There are concerns about a more rigorous assessment of State aid relevance in the programming period 2014-2020 by the European Commission since the topic has become subject to an intensified discussion.

Currently (January 2016), there are only a few programmes that offer clear and comprehensive information packages on their websites. Comprehensive guidance has been published for example for the Interreg V-B (transnational) Programmes Baltic Sea Region, North-West Europe, Northern Periphery and Arctic and for the Interreg V-A (cross-border) programmes France-England (Channel Programme) or Austria-Germany (Bavaria).

Examples for information provided by transnational programmes

Generally speaking, transnational programmes are slightly ahead in terms of information related to State aid issues. One of the best examples of clarity and transparency seems to be the Interreg V-B Baltic Sea Region programme. The programme website provides comprehensive information.

The programme offers the option of De minimis as well as an impressive catalogue of options from BERs which is presented in the table below. The Programme foresees a self-declaration of beneficiaries regarding State aid including e.g. also the De minimis support which they have already received in the preceding three years: in the event of the project being supported and the occurrence of State aid relevant activities, an official Declaration is to be issued.

**Table 9. GBER options relevant for Interreg Baltic Sea Region (BSR)**

Categories	Notification threshold	Maximum rate of award
GBER Regional aid	Varies by area: adjusted aid amount for a project with eligible investment of EUR 100m.	Depends on assisted area map and type of enterprise
GBER Investment aid in SMEs	EUR 7.5m per undertaking, per investment project.	20% of eligible costs for small enterprises; 10% for medium enterprises

Categories	Notification threshold	Maximum rate of award
<p>GBER</p> <ul style="list-style-type: none"> <li>▪ Aid for consultancy in favour of SMEs</li> <li>▪ Aid to SMEs for participation in fairs</li> <li>▪ Aid for cooperation costs incurred by SMEs participating in ETC projects</li> </ul>	EUR 2m per undertaking, per project.	50%
<p>GBER</p> <p>Research, development and innovation</p>	Fundamental research - EUR 40m; Industrial research - EUR 20m; Experimental research- EUR 15; Feasibility studies - EUR 7.5m.	<p>Fundamental - 100%; industrial - 50%; experimental - 25%; feasibility studies - 50%. Higher for SMEs, collaboration.</p> <p>Also relevant for Fisheries and aquaculture eligibility.</p>
<p>GBER</p> <p>Investment aid for research infrastructures</p>	EUR 20 million per infrastructure	50%
<p>GBER</p> <p>Aid for innovation clusters</p>	EUR 7.5m per cluster	50%
<p>GBER</p> <p>Innovation aid for SMEs</p>	EUR 5m per undertaking, per project	50% (100% and EUR 200,000 in three years for advisory services).
<p>GBER</p> <p>Aid for process and organisational innovation</p>	EUR 7.5m per undertaking, per investment project	50% for SMEs; 15% for large enterprises.
<p>FIBER</p> <p>Aid for R&amp;D in fishery and aquaculture</p>	Fundamental research - EUR 40m; Industrial research - EUR 20m; Experimental research- EUR 15; Feasibility studies - EUR 7.5m	<p>Fundamental - 100%; industrial - 50%; experimental - 25%; feasibility studies - 50%. Higher for SMEs, collaboration.</p>

Categories	Notification threshold	Maximum rate of award
GBER Training aid	EUR 2m per training project	50%-70%; also relevant for Fisheries and aquaculture eligibility.

Source: <https://www.interreg-baltic.eu/for-projects/state-aid.html>

The transnational programme North West Europe (NWE) foresees De minimis and Article 20 of the GBER as key options for activities relevant to State aid. Explanations in the Manual<sup>33</sup> are brief and concise. The Manual raises another important issue, namely that State aid relevant activities do not always occur at the level of the beneficiary but it might be handed down to recipients:

*The project might also involve granting State aid by the project partners “downstream” to other organisations. It means that the NWE subsidy will not be regarded as State aid, only the activities which are offered by project partners to undertakings. These activities might include offering free services to undertakings (e.g. SMEs) for which they would otherwise have to pay. In such a case State aid will be deemed to be granted by project partners and project partners will be required to meet the State aid requirements (e.g. ask for De minimis self-declarations, keep the register and inform SMEs about the amounts granted).*<sup>34</sup>

The Northern Periphery and Arctic Programme (NPA)<sup>35</sup> sees its general policy as either ‘no State aid’ or cases where De minimis or BER<sup>36</sup> can be taken into use. The Manual points at the following interesting issues:

- Services of General Economic Interest (SGEI): the differing notion of SGEI in the Member States – thus activities involving SGEI will have to be subject to a case-by-case analysis.
- De minimis: It refers to the option of the so-called proportional approach to De minimis as explained in Section 1.1.
- Block Exemption Regulation (BER): the main point of reference is the GBER – the Manual points out that the Articles in GBER frequently refer to the eligibility of expenditure and aid limits – the reference to eligible cost may require a countercheck with the Programme Eligibility Rules.

<sup>33</sup> Interreg North West Europe, Programme Manual Version 1.1 as of April 7, 2015.

<sup>34</sup> Ibidem, p. 75.

<sup>35</sup> Northern Periphery and Arctic Programme, Programme Manual, Version 4, September 2015, p. 98.

<sup>36</sup> Including GBER, ABER or FIBER.

- Layer of State aid: it is also important to discern between project beneficiary and end user (recipient); thus it could happen that ‘two layers’ of State aid relevance appear – e.g. one of the Articles of GBER at the level of the beneficiary acting as undertaking while the De minimis might be used for end users (e.g. since no market price is being charged for services rendered to SMEs).

### Examples for information provided by cross-border programmes

A lot of cross-border programmes do not have an official website so far and detailed provisions for programme implementation are still at the preparatory stage. Project calls - if any - just started and so far there are no cases available to establish an overview how the programmes are dealing with State aid issues in this period.

For example one of the Interreg V-A programmes does have a strong focus on innovation and deals mainly with private organisations. Although projects are to a very low percentage reporting net revenue generating, a high percentage falls into State aid regulations due to the type of undertaking and the intended activities. The critical type of activities concerns mainly pre-market research and product or process innovation. Therefore the programme has to offer solutions for State aid issues. During the period 2007-2013 the programme managers in JS have gained experience in the assessment of such activities.

The following case might serve as an illustrative insight into practice: a project is developing new products for micro- and nano-technology through multiple clusters companies. This is done through research, experimental development, production and process technology. The products aim to reduce and integrate electronic, mechanical and sensory functionalities in microsystems. The project generates jobs. It is State aid relevant due to the fact that the majority of the project applicants are undertakings and activities in the project are seemingly economic (commercialisation of the research results is intended). The project application will be assessed and a suitable solution related to State aid will be found together with the programme management.

Another cross-border programme has faced a similar challenge. For State aid relevant activities the Programme offers De minimis and several options under GBER. In the first wave of incoming project applications those for Investment Priorities (IPs) 1A and 1B<sup>37</sup> have been ranked as those with the highest potential relevance for State aid. External expertise had been requested and the result of the screening has been presented in the MC – thus seeking to ensure

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<sup>37</sup> According to Regulation (EU) 1301/2013, Article 5.



transparency from the part of the MA and at the same time providing an opportunity for awareness-raising and shared learning in the MC. The expert pointed at the three guiding questions in such cases:

1. Does the project actually target RDTI activities?
2. Is it possible to make a clear distinction between economic and non-economic activities?
3. Can the cooperation be labelled as effective cooperation?<sup>38</sup>

The screening of projects by the expert who has long-standing expertise on the field led to a differentiated assessment and project-specific advice on a list of issues for further clarification. The brief assessments point at the pre-requirement to have a clear judgement on the type of RDTI activities involved, i.e. whether it has to be classified as fundamental, industrial or experimental RDTI activity. The project-related questions raised by the expert are exemplary and point at the various ramifications of such assessments: e.g. in one case the expert requests a clear separation between economic and non-economic activities (related to a RDTI infrastructure targeting experimental development); in another case the project description fails to give a concise separation between the activities focussed on infrastructure and those focussed on cooperation which is essential for an adequate assessment, and so forth.

The France (Channel) England Programme offers guidance on State aid on its website. According to that guiding document, there is a vast interest in supporting SMEs – a fact which to some extent increases the likelihood of economic activities (and thus State aid relevance).

The chosen approach is the use of options provided under the GBER and De minimis. The JS offers general advice at the application stage. The officials responsible for project appraisal are those deciding whether a project faces any risks of State aid. In those cases where the appraisal points at the potential occurrence of economic activities, the person responsible for State aid questions carries out a more comprehensive assessment of any possible State aid relevance. The project selection sub-committee has the final decision about the project and whether the risk of State aid is acceptable. In addition the programme authorities advise applicants to consult external advice in order to clarify issues before the project starts. The programme provides clear and detailed guidance allowing for a self-assessment with examples of State aid

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<sup>38</sup> The question refers to GBER, Article 2, Recital 90: ‘*effective collaboration*’ means collaboration between at least two independent parties to exchange knowledge or technology, or to achieve a common objective based on the division of labour where the parties jointly define the scope of the collaborative project, contribute to its implementation and share its risks, as well as its results. [...] Contract research and provision of research services are not considered forms of collaboration.

relevant projects. In case a project runs a risk of state, the State aid guidelines propose the following solutions:

1. Modify the project in a way to eliminate the risk of State aid
2. Apply one of the exemptions according to GBER (among the list of options offered by the Programme).
3. Ensure that the aid granted complies with the limits set out in the De minimis Regulation.<sup>39</sup>

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<sup>39</sup> France (Channel) England Programme Guidance Note 11 State Aid.

### 3 Conclusions

The considerations on State aid in ETC projects laid down in this Study point at a major challenge in terms of knowledge management. The challenge is relevant across all levels, i.e. from the European level over to Member States and on to the level of the MAs involved in ETC programmes. The latter group consists mainly of ministries and LRAs. The following table shows the main underlying challenges by level involved in knowledge management.

**Table 10. Actors involved in knowledge management**

Level	Body	Considerations on major challenges
European	ECJ DG Competition DG Regio	State aid as a legal matter is evolving; interpretation of the ECJ is in the end decisive and shapes legislation; legislation is quite comprehensive and rests on secondary regulations and guidelines.  The bodies have limited or no capacity to provide ad-hoc advice to programmes.
Intermediary	Interact	Intermediaries seek to raise awareness among the programme bodies and to foster the exchange of information, experiences and know-how.
National	State aid unit	These units have often a small number of persons with long-standing expertise (which is in the end the most effective resource for adequate judgements); in many cases a general lack of staff has to be conceded; Compared with risks in mainstream programmes (having more significant financial volumes) and more pressing cases of special interest the issues related to ETC are considered as a minor problem.
Programme	MA, JS, FLC, AA	Lack of experience due to small number of cases; the problem is particularly marked in case of the cross-border strand where JS are comparatively small, project volumes tend to be small and project numbers high (in particular in EU12/EU12 programmes).

Source: own considerations.

The main regulatory framework consists of several documents such as the De Minimis Regulation. Looking at the Block Exemption Rules, besides the GBER, ABER<sup>40</sup> and FIBER<sup>41</sup> might also be of interest. Further, the *Framework for State aid in research development and innovation* and the *Guide to the application of the EU rules on State aid, public procurement and the internal*

<sup>40</sup> BER for agriculture - Regulation (EU) 702/2014.

<sup>41</sup> BER for fishery and aquaculture as e.g. applied in BSR - Regulation (EU) 1388/2014.

*market on SGEI*<sup>42</sup> provides valuable information. In view of getting a detailed insight into State aid, a comprehensive set of documents with interlinked would need to be studied. Each document is clear and concise but nevertheless, the challenge is to match the information with project reality and to put the knowledge into practice. When guiding applicants or when receiving an application, in the end, it is often difficult to distil the decisive (economic) activities and to choose the adequate provisions.

It is evident that with regards to State aid two elements related to knowledge management are of particular importance. First, the role of intermediaries such as Interact is crucial in order to:

- transform the expert language into key questions and information which can be used for awareness-raising and guidance, as well as in order to develop a basic understanding to sort out critical cases from a large number of incoming projects;
- develop and manage a targeted repository of information which is easily accessible such as the Base Camp on State aid run by Interact; it is evident that considerations on cases would be very useful but, looking at the experience in the Consultant programme, bodies are rather hesitant to provide such information.

Second, the option to have access to ad-hoc expertise at national level is crucial for the management of ETC programmes. It is neither feasible nor efficient to develop substantial capacities for the assessment of State aid relevant at programme level. Ideally, the officials working for the institution hosting the MA would have sufficient knowledge to sort out critical cases and pass them on to the national unit for a quick screening and decision. This way, the MA would be enabled to take a substantiated decision based on an adequate and proportional approach. However, this is currently not a reality for many ETC programmes.

Also the fact that capacity-building related to implementation of State aid rules has become part of the ex-ante conditionalities might not induce a quick change in the situation for many programmes. In fact, sound knowledge management and capacity-building rests on effective communication at eye level and mutual respect rather than on the exercising of control. Open and shared learning between MA, AA and State aid units is currently rather the exception than the rule. Functioning systems for the efficient and effective implementation of State

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<sup>42</sup> Commission staff working document.

aid rules will, in many Member States, require new approaches for communication and interaction between the main bodies involved.



## 4 References

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