State Aid and European Territorial Cooperation Questions and Answers

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Do you know how State aid rules apply to European Territorial Cooperation projects? In this document we have summarised a list of questions and answers on this topic. Some of the questions were gathered at our State aid workshop in Brussels on 24 June 2014, while others were drafted after the workshop with the help of ETC and State aid experts.

Please note that this is an INTERACT working paper. The field of State aid and its application to ETC is evolving over time and requirements can change as new interpretations of State aid law become available.

This working paper was written by INTERACT in cooperation with European Territorial Cooperation programmes. It was completed together with the ETC programmes Baltic Sea Region (with the support of the European policies research centre - EPRC), Central Europe, North West Europe, Interreg Two Seas and Germany-Netherlands as well as experts from Regione Friuli Venezia Giulia.

INTERACT is co-financed by the European Regional Development Fund (ERDF). It supports territorial cooperation between regions of the EU and is the hub for exchanging information and best practices among cooperation programmes. INTERACT also supports cooperation programmes at EU external borders.

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BASIC CONCEPTS

What is State aid?

The core issue for European Territorial Cooperation programmes (ETC) in dealing with State aid rules remains the definition of what a State aid actually *is*. This is the subject of a large volume of case law on which the European Court remains the sole judge, although the decisional practice of the Commission is an important guide. Also, for the first time, the Commission has developed a *Commission Notice on the notion of State aid* (still draft at the date of writing this document)[1], which provides useful information, including a set of concepts used throughout this document. By way of this *Notice* the Commission consulted Member States on a text to clarify the different elements of the notion of State aid. Article 107(1) TFEU defines State aid as a*ny 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 insofar as it affects trade between Member States*.The different elements of the notion of State aid are: 1) the existence of an *undertaking* (see below for definition of undertaking), 2) the imputability of the measure to the State, its financing through State resources, 3) the granting of an advantage, 4) the selectivity of the measure and 5) its potential effect on competition and trade within the Union. These criteria are cumulative, so *all five* elements of the State aid must be met for the measure to be considered aid.

One approach is to break this assessment into steps most relevant to ETC: Firstly, it is necessary to establish whether an ETC beneficiary *acts as an undertaking in the context of the project* since the State aid rules apply only if the beneficiary acts as an undertaking (see below). The second step is to apply the remaining criteria, whereby the decisive one in ETC should most often be whether or not an *advantage* is granted to the beneficiary (see below).

Criteria for State aid (all 5 must apply)	Is the criterion satisfied in Territorial Cooperation?
1. Undertaking / Economic activity	**Needs to be assessed:** Any products/services offered on a market? Or no market/no economic activity exists?
2. Transfer of state resources	**Always YES in European Structural & Investment Fund (ESIF) programmes, including ETC**
3. Advantage	**Needs to be assessed:** Does the measure give an economic advantage (a benefit) which an undertaking would not have obtained under normal market conditions? Or is there no advantage, e.g. it is merely a service at market price (e.g. obtained through public procurement or by a Service of General Economic Interest (SGEI) provided the SGEI meets the *Altmark criteria*[2])? If there is no advantage, there is no aid (see also Point 21**Error! Reference source not**

[1] The draft notice was open for consultation with Member States until March 2014 and can be downloaded at: http://ec.europa.eu/competition/consultations/2014_state_aid_notion/index_en.html.

[2] SGEI meeting the so-called Altmark criteria are not considered as receiving an advantage through public support. See Section *SERVICES OF GENERAL ECONOMIC INTEREST (*SGEI) of this document.

	found.).
4. Selectivity	Almost certainly 'yes' in ETC
5. (Potential) distorting effect on competition and trade within the Union	Always presumed 'yes', if there is an advantage

As can be seen, the presence of State aid in ETC will largely depend on whether the entity is engaged in an economic activity and, if so, whether the measure provides an advantage in respect of that activity. The analysis involved in reaching a conclusion on whether aid is present is not always straightforward - national and regional authorities are typically encouraged to refer to specialist State aid units in cases of doubt. Where a conclusion of *no aid* is reached, this must be justified with appropriate reasoning.

What is an undertaking?

State aid rules apply only if an entity acts as an undertaking. Undertakings are entities engaged in an *economic activity*, regardless of their legal status (they can be public bodies, charities, NGOs, associations or universities, as well as private firms) and regardless of whether they aim to make a profit or not.

The classification as an undertaking is specific to an activity, NOT the status of an entity such as public or private. The only relevant criterion to decide is whether or not the entity carries out an economic activity in the context of the ETC project. For example, research organisations and infrastructures (including public universities and private research institutes) can carry out both economic and non-economic activities in the context of an ETC project. As long as the costs and revenues of non-economic activities are separated from those of economic activities, the non-economic activities fall outside the scope of State aid. Non-economic activities of research organisations include their *primary* activities such as public education and independent research and development (R&D) (see below). Economic activities of research organisations include, for example, contract research or renting out laboratory facilities for a fee.

Do State aid rules apply to public bodies?

From the case law it follows that Article 107 TFEU does not apply where the State acts *by exercising public power* or where the entities act *in their capacity as public authorities*.[3] However, this does NOT mean that State aid rules do not apply to public bodies. In fact the rules apply to all public bodies that carry out an activity that meets the 5 criteria for State aid (see above).

A good starting point in deciding whether activities carried out by a public body could be relevant to State aid is to ask whether or not the activity constitutes and economic activity (see below). If the answer is no, then State aid rules do not apply because Criteria 1 (Undertaking / Economic activity) is not met.

Is there a list of economic activities?

There is no comprehensive list of economic activities as the term is very broad. *Economic activity* is broadly defined as *offering goods or services on a given market*. In thinking about this, it is useful to ask whether, in principle, the activity could be carried out by a private body in order to make a profit.

[3] See Point 18 of the DRAFT Commission Notice on the notion of State aid

Having in mind the rather broad definition of *economic activities*, the main assessment question to ask is whether the project partner concerned carries out activities in the project that can reasonably be assumed to be of economic nature. If the project partner carries out non-economic activities in the ETC project, there is no State aid issue for this partner. This applies also to organisations that normally (i.e. outside the ETC project) do in fact carry out activities of an economic nature. The contrary can also apply and remains one of the points to assess.

Is there a list of NON-economic activities?

There is also no exhaustive list of non-economic activities as this would also be rather long and could vary among Member States. In general terms, non-economic activities can include among others:

- Activities related to State prerogatives and public safety such as police, armed forces, air and maritime traffic control, anti-pollution surveillance as well as most welfare services such as education and long-term care.
- Public funding of general infrastructure such as public roads, bridges or canals which are made available for public use without any charge and not for commercial exploitation. This would include leisure facilities such as cycle paths, nature trails and associated signage, equipment and information, promenades, piers and picnic places to be used without charge.
- *Primary activities* of research organisations and research infrastructures, in particular: independent R&D for more knowledge and better understanding, including collaborative R&D and wide dissemination of research results on a non-exclusive and non-discriminatory basis (e.g. through publications or open access databases).
- Education for more and better skilled human resources, public education organised within the national educational system, predominantly or entirely funded by the State and supervised by the State.
- Other performance of public duty: Development of strategies, plans and tools by public authorities to help them in their normal tasks or raise their pool of knowledge. This includes also cooperation between public bodies to achieve these goals.

An entity engaged in non-economic activities in the framework of an ETC project is not acting as an undertaking and State aid rules do not apply.

What are small and medium-sized enterprises (SMEs) according to the General Block Exemption Regulation (GBER)?

A small and medium-sized enterprises (SME) is a particular case of an undertaking, which – like an undertaking - is NOT defined by its legal form. In the context of State aid, all undertakings meeting the criteria laid down in Annex 1 of the GBER[4] are SMEs: According to the definition in the GBER, an enterprise (including a small and medium-sized enterprise) is *any legal entity engaged in an economic activity, irrespective of its legal form. This includes, in particular, self-employed persons and family businesses engaged in craft or other activities, and partnerships or associations regularly engaged in economic activity. In order to qualify as an SME, the entity must be engaged in an economic activity.*

The category SME is made up of enterprises that meet certain criteria: An SME employs fewer than 250 persons and has an annual turnover not exceeding EUR 50 million, and/or an annual balance sheet total not exceeding EUR 43 million. Detailed instructions are provided in Annex 1 of the GBER. According to the definition of SME in the GBER, some ETC project partners can be considered SMEs. The definition is rather wide and the following attributes of organisations are **irrelevant**: The legal status as private or

[4] Regulation (EU) No 651/2014 of 17 June 2014 declaring certain categories of aid compatible with the internal market in application of Articles 107 and 108 of the Treaty.

public (also economic operations of municipalities can be SMEs!) and whether or not they are profit-oriented (NGOs, non-profit organisation, etc. can be SMEs!). The definition also covers self-employed persons or family businesses and partnerships or associations regularly engaged in an economic activity.

Note: This definition of enterprise (including SMEs) can be confusing as many people understand that enterprises (and SMEs) are specific legal forms of businesses. For example, SMEs can also be defined by national laws (e.g. for tax purpose). In the context of State aid, however, the legal form according to national law is NOT relevant. What is relevant is whether or not the entity is engaged in an economic activity and meets the criteria for small and medium-sized outlined in the GBER.

What are NOT SMEs in the meaning of the GBER?

All organisations NOT falling under the definition outlined above are NOT SMEs. Any organisation NOT engaged in an economic activity is NOT an enterprise and thus cannot be an SME. State aid rules distinguish between small and large enterprises. Large enterprise means an undertaking, which does not fall within the definition of small and medium-sized enterprises. Some rules in the GBER are different for SMEs and large enterprises. For example, Article 20 of the GBER (*Aid for cooperation costs incurred by SMEs participating in ETC projects*) does not cover large enterprises.

ETC PROGRAMMES AND STATE AID

1. KEEPING AN EYE ON PERSPECTIVE AND PROPORTIONALITY

Many ETC programmes are very concerned that trying to fit territorial cooperation projects in the framework of State aid rules has distorted the way resources are spent by the programmes. The main concerns are:

- Increase in administrative burden on the side of applicants, first level control(FLC), managing authorities (MA), joint secretariats (JS), certifying authorities (CA) and audit authorities (AA). Dealing with State aid rules not only requires some State aid expertise (actually the more the better), it also necessitates very detailed information in project applications that allow State aid assessments against the roles of partners and their activities in the projects. State aid assessments in ETC can be very cumbersome and lengthy and frequently lead to ambiguous results. Since it is not possible to add personnel to e.g. FLC or MA/JS, time spent on trying to clarify State aid in the context of ETC drains away resources from other activities.
- Difficulties for programmes in meeting their programme goals. Overly burdensome administrative tasks already leave very little resources for many programmes to deal with content and programme strategy. Adding to this, innovation is now a major focus for many ETC programmes as is entrepreneurship and regional economic development. Many programmes welcome this development but say that in their geographic areas these goals cannot be met without funding also activities that are potentially of economic nature. Hence State aid becomes a bigger issue.
- Doubts that ETC projects lead to significant distortions. Can ETC projects lead to a real distortion of the market given the multi-country focus and the comparatively small amounts of subsidies provided by ETC programmes? It is obvious that some ETC projects can take place in a market but no-one knows how big the issue of market distortion by ETC really is. At the same time, cooperation seems to (partially) counterbalance potentially distorting effects by carrying know-how across borders and promoting equal access to knowledge in Europe. Certainly ETC is – if at all - a tiny player in the huge realm of competition in Europe. Yet the same rules apply to ETC as they do to large players.

These concerns are very valid but they are just the tip of the iceberg. Below the surface looking at potential reasons for the current situation, lies a much bigger issue. In ETC, many feel that European cooperation is a value in itself and could be a guiding principle on which to build a bright and sustainable economic, social and environmental future in Europe. At the same time, dominant economic theories currently start from very different view points, including the belief that free competition – more than anything else - benefits everyone and leads to a better society.

The differences in perceptions are hardly surprising as ETC deals with cooperation on a daily basis and people in ETC have many opportunities to experience benefits of cooperation. Support for cooperation also comes from unexpected sources such as positive psychology, game theory and the failure of dominant economic theories to address major issues such as climate change and social inequalities. It has yet to be understood how the border between cooperation and competition can be re-drawn to open new future possibilities for Europe.

DG Competition has made a very encouraging and welcomed step by including Article 20 in the General Block Exemption Regulation (GBER) for SMEs participating in ETC programmes (see Point 17). The purpose of this Article is to make cooperation easier while at the same time helping ETC programmes to comply with State aid rules. This Article can help solve many issues and should be used by ETC programmes also to provide DG COMP with more information about the nature of ETC projects and their potential to distort the market. Given the current lack of documented State aid cases in ETC, more information is key in making further assessments and potentially increasing exemptions for ETC in the future.

Another positive example is a renewed cooperation among ETC programmes to jointly find doable solutions to comply with State aid rules and meet cooperation goals - and this Q&A is an example of this cooperation. This Q&A obviously has no legal value whatsoever, but it can be seen as a continued effort to develop a common understanding and shared approaches.

ETC programmes have no other choice but to apply a sense of proportion to the way they work. Knowing that it is not feasible to completely avoid the possibility of financial errors, the primary focus must of course remain on addressing primary error sources. Risk assessments can help programmes to find out what these error sources are, where and when they are likely to occur and how deal with them.

Finally, keeping an eye on perspective can mean to keep in mind that the goal of ETC is cooperation. All ETC programme bodies walk a fine line between what programmes need to be and what they are allowed to do.

2. RESPONSIBILITIES FOR STATE AID ASSESSMENT

2.1 What are the responsibilities of Member States and Managing Authority in assessing whether or not project activities fall within the scope of State aid?

The role of the Member States (Monitoring Committee) and the Managing Authority/Joint Secretariat need to be decided programme by programme. Granting and reporting State aid is ultimately the responsibility of national authorities. In each Member State there is a body responsible for State aid and Member States can contact DG Competition directly to ask for advice.

In many ETC programmes, the Joint Secretariat undertakes a State aid assessment with or without the help of State aid experts (see also Point 3.1). In some programmes also a self-assessment of State aid relevant activities by applicants themselves is foreseen. In these cases, the MA/JS undertake plausibility checks of the self-assessments. Self-assessments can cover issues such as the potential economic nature of activities and should focus on questions that applicants can answer without State aid expertise (see also Point 3.2).

The results of these assessments are later provided to the Monitoring Committee, which does or does not undertake further assessments (e.g. through consultations with national experts). In any case the Monitoring Committee ultimately confirms the decision when approving the project.

2.2 Can national State aid authorities provide support to programmes and applicants?

In the past, many ETC programmes did not have sufficient access to national State aid experts. ETC deals with comparatively small funds and has therefore never been a priority of overloaded national State aid units.

In the future national resources to deal with State aid in European Structural and Investment fund programmes, will likely be enhanced as a consequence of the need to fulfil *ex-ante conditionalities*.[5]

Ex-ante conditionalities foresee *the existence of arrangements for the effective application of Union State aid rules in the field of the ESI Funds*, namely:

- *Arrangements for the effective application of Union State aid rules;*
- *Arrangements for training and dissemination of information for staff involved in the implementation of the ESI funds;*
- *Arrangements to ensure administrative capacity for implementation and application of Union State aid rules.*

[5] *Ex-ante conditionalities* are requirements that have to be met by countries managing ESIF funds. See Annex XI of Regulation (EU) No 1303/2013 for a list of these requirements.

2.3 Even though ETC is not subject to ex-ante conditionalities, ETC programmes can benefit from the measures undertaken by Member States to fulfil these requirements. How do I get into contact with national State aid authorities or DG Competition?

In case a programme needs to establish contact with national State aid authorities, permanent representations at the European Commission can be a good starting point. They usually have contact details of State aid experts since most communication between DG Competition and Member States in the field of State aid is channelled via the permanent representation.

Also, a State aid consultation network of Member States and DG Competition exists (European Competition Network – Electronic Transmission - ECN-ET)[6], which can be contacted by national State aid experts (e.g. ministries). Programmes can check with the relevant ministry if they can access ECN-ET via the ministries.

Most direct contact to DG Competition is handled via Member States. ETC programmes can also contact DG Competition. Please note, however, that DG Competition cannot carry out assessments of hypothetical cases. In order to deliver answers, DG Competition needs to be provided with the necessary information setting out the context of the question. National State aid experts can be helpful in formulating questions to DG Competition.

3. ETC PROGRAMME APPROACHES TO STATE AID

3.1 What are best practices of assessing State aid and applying State aid measures in ETC programmes?

What works for one programme does not necessarily work for another and universally applicable best practices currently do not seem to exist. Every approach has advantages and disadvantages and there is never 100% certainty. There will always be the risk that a programme funds activities and later controls by Audit Authorities or Commission Auditors find that these activities fall within the scope of State aid. Measures to reduce this risk include:

- Making yourself familiar with State aid rules and guidelines to be able to take informed decisions. In addition to rules on *de minimis* (See Point 11), the General Block Exemption Regulation (GBER - see Point 17) and Services of General Economic Interest (SGEI – see Point 21), the following can be helpful: DG Competition is currently preparing a notice aimed at providing practical guidance for identifying state aid (*DRAFT Commission Notice on the notion of State aid pursuant to Article 107(1) TFEU*)[7]. For programmes funding infrastructure, the *Analytical Grids*[8] of DG Competition can help determine whether public financing of infrastructure involves State aid. In addition, for programmes funding research and development, the *Framework for State aid for research and development and innovation*[9] provides additional useful information.
- Making use of the enhanced national arrangements for the effective application of State aid rules which have to be ensured in the context of ex-ante conditionalities for European Structural and Investment Funds (see also Point 2.2).
- Establishing a clear methodology and sticking to the methodology, especially when discussed and agreed upon with the Audit Authority.

[6]ECN-ET will be available for some time (mid/end 2015) and afterwards EU COM plans to publish an FAQ on State aid with the most important questions and answers.

[7]The draft notice was open for consultation with Member States until March 2014 and can be downloaded at: http://ec.europa.eu/competition/consultations/2014_state_aid_notion/index_en.html.

[8] Analytical Grids; Ref. Ares(2012)934142 - 01/08/2012

[9] Communication from the Commission — Framework for State aid for research and development and innovation, OJ C 198 of 27.06.2014, p. 1

- Striving for a common understanding with the Audit Authority. Many Audit Authorities are not State aid experts but are under pressure to ensure that State aid rules are applied. Every Audit Authority needs to feel confident that the programme has a sound strategy to deal with State aid. In the past there were cases of Audit Authorities (much like some Managing Authorities) over-interpreting State aid rules in an effort to be on the safe side. A common understanding of the approach to State aid can help address this issue.
- Matching programme priorities and specific objectives to Articles of the GBER that are most relevant to each of them. For example a specific objective '*Technology transfer to SMEs through university-enterprise cooperation'* could be matched with Article 20 of the GBER '*Aid for cooperation costs incurred by SMEs participating in ETC'* and Article 25 of the GBER '*Aid for research and development projects'*.
- Having general as well as targeted calls with a clear State aid strategy. The narrower a call in terms of target group and/or economic sector the easier it is to decide ex-ante which approach to use for the expected types of project activities and partners (*de minimis*, GBER, SGEI, eliminating advantage, etc.).
- Clarifying choices about the State aid tools (e.g. *de minimis* and Article 20 of the GBER) for each call and explaining them to applicants.
- Attaching self-declarations to be submitted by the applicants (such as for *de minimis* or the status of an applicant as an SME in the meaning of the GBER) (see also Points 3.2, 13 and 20.6) to the calls.
- Being ready to defend the decision made, referencing existing State aid regulation, guidelines and programme documents.
- Focusing on HOW to finance viable projects (even if they could involve State aid) rather than IF they should be financed at all shifts the attention to available instruments such as *de minimis* and the General Block Exemption Regulation (GBER).
- Some programmes pay external experts to assess project applications in relation to potential State aid. Experiences with external experts range from very effective inputs to rather questionable advice. Experts can also be expensive, so it may be a good idea to limit the number of applications assessed by them (e.g. giving them only those applications that meet certain minimum quality requirements and stand a realistic chance to be approved by the programme). Also, external experts might not agree on the approach among themselves. Kick-off or briefing meetings with external experts can be helpful in harmonising the approach. However, even making use of external experts does not eliminate the need for programmes to acquire familiarity with State aid rules (see first bullet point).
- Programmes must keep the Monitoring Committee informed about how much State aid has been granted by the programme. For example, a country-specific letter to the MC could be prepared after each call to inform MC members which undertaking was granted how much *de minimis* or aid under the GBER.
- Keeping in mind proportionality. While ETC programmes obviously need to make an effort to abide by the rules, severe cases of illegitimate State aid of several million euros are not likely to be found in ETC.

Some programmes apply conditions in order to ensure that projects are free of State aid. However, trying to avoid State aid completely can be difficult and is not a feasible option for many ETC programmes (see also Point 5). Also, from the point of view of certainty, conditions might not be sufficient to ensure that projects are State aid free and conditions will have to be monitored during project implementation.

The *DRAFT guidance on management verifications*[10] recommends the use of checklists for State aid assessments. In ETC such a checklist would need to cover a wide range of economic sectors and typical situations in cooperation projects, including practical examples.

3.2 Does an ETC programme have to undertake its own State aid assessments or could this obligation also be transferred to applicants?

Some programmes are looking into options to use State aid self-declarations, questionnaires or checklists, which are filled-in and signed by project applicants. Through these documents applicants can, for example, be asked whether or not they plan to carry out activities or services for which a market exists (e.g. could your project activities be taken over by private operators with the view of making profit?). Applicants can also be asked whether they would like to apply for *de minimis* (see Point 11) or they would like to see their project activities handled under specific Articles of the General Block Exemption Regulation (see Point 17) or anything else deemed relevant to clarify potential State aid issues.

This approach can be effective in obtaining more information but should be handled carefully when applied. Self-assessments made by applicants do not free the MA from its responsibility of ensuring compliance with State aid rules. For instance, applicants' self-declarations require plausibility checks on the side of the MA. It can be rather risky to rely on beneficiaries' self-declarations without an assessment (e.g. a plausibility check) by the MA or under the responsibility of the MA. For example, *de minimis* self-declarations – according to State aid rules – are sufficient evidence in the context of State aid (see Point 13). Nevertheless MAs should apply professional judgement to these declarations, for example in case there is evidence that the beneficiary belongs to a larger group of companies (see also Point 13.6).

Also it is useful to keep in mind that applicants may not be able to answer questions that require familiarity with the State aid concept and way of thinking. There is a risk that self-declarations are not sufficiently reliable and add high administrative burden for applicants.

3.3 Can activities for one partner be split into State aid relevant and non-State aid relevant so that only State aid relevant activities would have to be followed up (e.g. via de minimis)?

In order to split activities into those that are outside the scope of State aid and those that are not, programmes need to assess project activities. It is possible to split activities and decide that some activities are State aid relevant while others are not. Once State aid relevant activities have been identified, they can be covered, for example, under *de minimis* or the GBER.

Decisions to split project activities must be based on thorough state aid assessments of all activities of the project partners. Splitting project activities into State aid relevant and non-State aid relevant can also have implications on the Application form and the Project reports used by a programme as activities will have to be described separately, possibly also leading to different co-financing rates for different project activities (e.g. when applying the GBER).

3.4 Is it possible to apply de minimis to all partners and activities that could potentially be relevant to State aid even without any assessment whether or not the activities do actually constitute State aid?

It is also possible to apply *de minimis* to all project partners potentially relevant to State aid without detailed assessment of activities and many programmes have done so in the past

[10] DRAFT Guidance for Member States and Programme Authorities Management verifications to be carried out by Member States on operations co-financed by the Structural Funds, the Cohesion Fund and the EMFF for the 2014- 2020 programming period.

However, this approach has serious downsides as applicants could quickly reach the *de minimis* threshold. Also applicants could be granted *de minimis* for activities that are not State aid and lose eligibility for funding under *de minimis* from other funding sources (as the *de minimis* threshold has already been met).

3.5 Our programme wants to co-finance the research infrastructure. The research institute will primarily focus on non-economic activities but it cannot be excluded that some of the activities will be economic in the future. Does co-financing this infrastructure constitute State aid?

Since research infrastructure can be used for both economic and non-economic activities, simplification of this issue is provided by point 20 of the *Framework of State aid and research and development and innovation*. '*Where a research organisation or research infrastructure is used for both economic and non-economic activities, public funding falls under State aid rules only insofar as it covers costs linked to the economic activities. 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, that is to say corresponds to an activity which is directly related to and necessary for the operation of the research organisation or research infrastructure or intrinsically linked to its main non-economic use, and which is limited in scope. For the purposes of this framework, 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.'*

Point 21 of the *Framework of State aid and research and development and innovation* further clarifies that public funding clearly dedicated to economic activities of the research infrastructure is still considered State aid: '*Without prejudice to point 20, where research organisations or research infrastructures are used to perform economic activities, such as renting out equipment or laboratories to undertakings, supplying services to undertakings or performing contract research, public funding of those economic activities will generally be considered State.'*

A similar concept is also reflected in the DRAFT *Commission Notice on the notion of State aid*[11], which extends this concept to infrastructure in general (not limited to research infrastructure) albeit foreseeing a ceiling of 15% (not 20%) of the infrastructure's overall annual capacity dedicated to economic activities: According to Point 39 of the *DRAFT Commission Notice on the notion of State aid*[12]*,'If an infrastructure is used for both economic and non-economic activities, public funding will fall under the State aid rules only insofar as it covers the costs linked to the economic activities. When it is possible to separate the costs and revenues corresponding to the economic and non-economic activities, the State aid rules shall only apply with regard to the State support granted in excess of the amount covering the costs of the non-economic activities.'*

Point 40 of the *DRAFT Commission Notice on the notion of State aid explains the meaning of 'ancillary economic use'*: '*If, in cases of mixed use, the infrastructure is used almost exclusively for a non-economic activity, its funding may fall outside the State aid rules in its entirety, provided the economic use remains purely ancillary, i.e. an activity which is directly related to and necessary for the operation of the to its main non-economic use. In general, such ancillary activities consume the same inputs as the primary non-economic activities; e.g. material, equipment, labour, fixed capital. Ancillary economic activities must remain limited in scope, as regards the capacity of the infrastructure. Examples of such ancillary economic activities may include certain research organisations that occasionally rent out their equipment and laboratories to industrial partners.'*

[11] http://ec.europa.eu/competition/consultations/2014_state_aid_notion/index_en.html.
[12] http://ec.europa.eu/competition/consultations/2014_state_aid_notion/index_en.html.

The meaning of *ancillary* is defined in a foot note as follows: *In this respect, the economic use of the infrastructure may be considered ancillary when the capacity allocated each year to such activity does not exceed 15 % of the infrastructure's overall annual capacity.*

Further information on how to deal with research infrastructure co-financed by Structural Funds is provided in the *Infrastructure Analytical Grid No 6 – Research development and innovation*.

4. STATE AID TO THIRD PARTIES (INDIRECT AID)

4.1 Our programme approves project partnerships also based on their capacity in their field of action. Some projects provide training to third parties such as SMEs that are not part of the project partnership in the narrow sense. These third parties benefit from the services but does this constitute State aid to the third parties?

Any undertaking receiving an advantage through a cooperation project that it would not have received under normal market conditions can be the recipient of State aid. This applies to undertakings participating as project partners as well as – potentially - to third parties receiving benefits from the project such as trainings. One way of completely avoiding the possibility that State aid might be provided to third parties would be to charge market prices for the services conveyed to them. This is however not a realistic option for most ETC projects. Also, if selling services to third parties at market prices leads to net revenues for the project AND at the same time removes the presence of State aid at the level of third parties, net revenues would have to be treated according to the rules on generation of net revenue outlined in Articles 61 and 65(8) of Regulation (EU) 1303/2013 (see also Point 8).

4.2 How can our programme deal with potential State aid to third parties?

In case potential aid to third parties should be a major concern in the programme, it could be addressed by identifying potential cases and applying available State aid tools. In the past, some programmes asked third party beneficiaries of cooperation projects to sign *de minimis self-declarations* (see also Point 12.8). These declarations can either be prepared by the programme and made available to the project partner providing the services to third parties (e.g. training) or be available at a national level. It is the responsibility of the project partner to ensure that the declarations are signed and First Level Controllers can be asked to verify that the conditions have been met.

There does not seem to be a need for MA/JS to collect *de minimis* self-declarations as long as sound procedures are in place (FLC!) and it is clear where the declarations can be found and are archived. Clarifying this issue with the Audit Authority can be helpful also because there could be national procedures in place that require different approaches.

Solutions such as the one described above can require substantial administrative effort on the side of the project partners and FLC. Increasing workload for FLC can of course have negative effects on the overall quality of FLC work, thereby increasing the risk that other important issues such as public procurements (which are still the major source of errors in ETC) are overlooked.

5. AVOIDING STATE AID

5.1 Our programme does not want to grant any State aid. What kind of conditions should be stated (e.g. in the guidance to applicants) to ensure "not a state aid activity / activity not influencing a market"?

In the past many programmes have opted for eliminating State aid from project activities. It should be noted, however, that a programme which follows that approach, does not eliminate the need to undertake State aid assessments. Obviously project proposals need to be assessed in order to ensure that conditions were met and also to identify potentially remaining State aid relevant activities that need to be eliminated. Also the programme will later need to monitor whether or not conditions set at the project start are still fulfilled during project implementation.

Whether or not State aid is present is assessed based on the set of criteria outlined in the beginning of this document. If any of the criteria do NOT apply then no State aid is present. Some practical approaches are outlined below in Point 5.2.

5.2 What are good ways to avoid State aid?

There is no one size fits all approach that guarantees the absence of State aid in all projects. For programmes wishing to minimise the risk of granting illegitimate State aid, measures need to be applied that eliminate one or more elements that constitute State aid (e.g., economic advantages granted to a project partner). The following can be helpful:

- Public procurement: Procuring a service or purchasing of goods will eliminate the presence of State aid for the sub-contracted undertaking. For example, consider a consultancy planning to help other project partners (e.g. public institutions) develop innovative approaches. This is an activity that takes place on the market since there could be other undertakings offering the same services with the goal of making profits. The programme could decide that the consultancy cannot participate as project partner and, instead, innovation services must be procured by the project partnership. The consultancy winning the contract will not receive State aid. For more information on public procurement and State aid, please visit points 91 through 99 of the DRAFT *Commission Notice on the notion of State aid*.

- Benchmarking: Benchmarking is explained in the DRAFT *Commission Notice on the notion of aid*. This concept could still change in the final version of the Commission Notice and more detailed information could become available.

  Benchmarking can be used to demonstrate that project partners will not receive compensation above market price for its services. One way of excluding State aid is to establish by way of benchmarking that any payments are in line with market prices of certain goods or services.

  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.

  If a service provided by an ETC project partner is at market price (i.e. would be offered by a private company for prices equal or higher) there is no State aid granted to the ETC project partner. This can include, for example: Consultancy companies acting as project partners for the sole purpose of helping manage the ETC project or training companies acting as project partners for the purpose of providing training in innovation management. However, this concept is still unclear especially how it can be applied to ETC reality in practice.

  Note: In ETC project partners are reimbursed based on real costs. The maximum ERDF funding is 85% of the real costs. Referring to the real costs of an ETC project partner is not enough to exclude State aid. What is required is to establish that the payments are at market prices.

- Associated partners: Some programmes allow participation of organisations that do not receive public funds for their participation. Unlike regular project partners, these associated partners bear the full cost of participation and thus do not receive State aid.
- Wide dissemination of project outputs: DG Competition F*ramework for State aid in research and development and innovation*[13] explains in Point 28: '*Where collaboration projects are carried out jointly by undertakings and research organisations or research infrastructures, the Commission considers that no indirect state*[14] *aid is awarded to the participating undertakings through those entities due to favourable conditions of the collaboration if one of the following conditions is fulfilled:*

  (a) the participating undertakings bear the full cost of the project, or

  (b) the results of the collaboration which do not give rise to IPR may be widely disseminated and any IPR resulting from the activities of research organisations or research infrastructures are fully allocated to those entities, or

  (c) any IPR resulting from the project, as well as related access rights are allocated to the different collaboration partners in a manner which adequately reflects their work packages, contributions and respective interests, or

  (d) the research organisations or research infrastructures receive compensation equivalent to the market price for the IPR which result from their activities and are assigned to the participating undertakings, or to which participating undertakings are allocated access rights. The absolute amount of the value of any contribution, both financial and non-financial, of the participating undertakings to the costs of the research organisations or research infrastructures' activities that resulted in the IPR concerned, may be deducted from that compensation'.
- Open Source software: An undertaking that receives funds for the development of a software could potentially receive State aid. To reduce the risk of potential illegitimate State aid, open source IT developments can be helpful, especially if they are made widely available.
- More information on non-economic activities can also be found in Point 19 of the *Framework for State aid for research and development and innovation.*

6. STATE AID MANAGEMENT VERIFICATIONS

6.1 What are useful management verifications?

Section 4.3 of the DRAFT *guidance on management verifications*[15] provides some information on management verifications in relation to State aid and should be consulted prior to taking decisions on the types of verifications necessary, albeit keeping in mind that the Draft guidance is not a final version of the document and its applicability to ETC can be limited.

The Draft guidance states that *'It is essential to ensure a sound verification on State aid, based on specific checklists for each measure that will be used as an aide-memoire and an audit trail of the*

[13] Communication from the Commission — Framework for State aid for research and development and innovation, OJ C 198 of 27.06.2014, p. 1

[14] Please note that the term *indirect State aid* in State here refers to advantages derived from access to know-how, information or professional contacts, which an undertaking would not have under market conditions. In the context of ETC *indirect advantage* is also often used to mean advantages provided by a cooperation project to third parties such as SMEs receiving training through a cooperation project (see also Point **Error! Reference source not found.**). These are two very different meanings!

[15] DRAFT Guidance for Member States and Programme Authorities Management verifications to be carried out by Member States on operations co-financed by the Structural Funds, the Cohesion Fund and the EMFF for the 2014- 2020 programming period

checks carried out.' As pointed out in Point 3.1 of this document, also *Analytical Grids*[16] of DG Competition can help determine whether public financing of infrastructure involves State aid.

The types of verifications will vary depending, for example, on the State aid instrument (e.g. *de minimis*), whether or not the project was approved under certain conditions and, potentially, whether or not certain risks were detected.

Note: the term *management verifications* refer to checks that are undertaken by MA/JS or FLC after the project has already been approved. In practical terms, management verifications on State aid should complement the checks carried out during the selection process of the operation.[17]

For ETC programmes, especially useful management verifications **by FLC** can include:

- Verification that all relevant documents are available at the partner premises (e.g. *de minimis* self-declarations)
- Verification that a company is not linked to another company (see also Point 16 - FREQUENT ERRORS IN APPLYING DE MINIMIS). A plausibility check is done during the selection process but subsequent verifications by FLC can take a closer look, if wanted by the programme.
- Verification that State aid – related conditions set-out in the subsidy contract or other Programme documents are met (e.g. publication of project outputs, open source IT tools, etc.) (see also Point 5.2).
- -if applicable- verification that *de minimis* self-declarations of third parties (e.g. SMEs receiving training through a cooperation project) have been collected by the project partner providing the training (see also Point 4).Verification that costs of economic and non-economic activities are clearly separated.

6.2 Who should do state aid management verifications? MA/JS or FLC?

The term management verification refers to both MA/JS and FLC. Each programme can decide how to best distribute the task of verifying State aid compliance. Things to consider include:

- Many controllers do not have the expertise to undertake State aid verifications. They should be guided on what to do exactly and how much of this. General questions such as 'Does the project partner comply with State aid rules?' are not always useful.
- Controllers can only verify based on their professional expertise as controllers. Programmes can decide where FLC can provide real added value. Do not overburden FLC with questions they can most likely not answer.
- In case of existing State aid conditions in the subsidy contracts or other Programme documents, FLC could check whether such conditions are accomplished.
- The occurrence of new facts in the project life leading to new State aid relevance (e.g. substitution of planned activities through new ones) should be assessed by the MA/JS following the same procedure used for the assessment of applications.

[16] Analytical Grids; Ref. Ares(2012)934142 - 01/08/2012

[17] Checks carried out during the selection include verification whether the operation includes State aid, and –if applicable- checks related to *de mini*mis (e.g. availability of the *de minimis* self-declaration) or the GBER.

6.3 Does the HIT FLC checklist contain any specific criteria/questions to be checked with regard to State aid?

The HIT FLC checklist contains a general verification, asking the controller to confirm that - based on his/her professional judgement as a controller (not as a State aid expert!) - *There is no evidence that the project activities do not comply with Community rules on State aid*.

State aid-related verifications differ from programme to programme as they depend on the approach to State aid chosen by the programme (see also Point 6.1- What are useful management verifications?). Programmes can add verifications to the HIT FLC checklist as needed.

6.4 Do we have to do these verifications for each project partner and each progress report?

Point 3.7 of the *DRAFT guidance on management verifications* clarifies that verifications can be sampled (Point 3.7: intensity of verifications). Sampling can be a good way to direct available resources towards those cases which pose the highest risk of non-compliance.

Sampling implies that there must be a risk assessment (e.g. on the side of the JS and/or FLC) to identify risky projects and partners and undertake verifications accordingly. For example, controllers could be asked to verify *de minimis* thresholds if there is suspicion that the project partner has received undeclared public support during the past three years.

Any sampling based on risks such as these, should be accompanied with randomly selected verifications: Among the self-declarations, a few are randomly chosen and verified in addition to the ones selected based on identified risks.

Please note again that the term management verifications refer to checks that are undertaken by MA/JS or FLC after the project has already been approved. Any ex-ante checks prior to project approval might follow a different approach.

7. ERRORS AND IRREGULARITIES RELATED TO INFRINGEMENTS ON STATE AID RULES

7.1 Can infringements on State aid rules lead to financial errors?

If there are errors, there can be consequences under State aid rules and under the Cohesion Policy rules. So infringement on State aid rules can lead to financial errors and irregularities.

Project partners of course remain liable in the case of irregularities. An undertaking that received illegitimate State aid has to be asked to pay back the illegitimate amount received.

In any case, contacting the Audit Authority and discussing this issue with them would be very useful.

8. STATE AID AND GENERATION OF NET REVENUE

8.1 Art. 65(8) CPR (Eligibility; generation of net revenue during implementation) foresees that reduction of net revenue generated during implementation shall not apply to operations subject to State aid rules. Does this mean that we do not need to take net revenues into account if we provide de minimis?

The generation of net revenue does not seem to be an issue for project activities that fall under State aid and are covered by e.g. *de minimis* or the GBER.

For example, if all activities of project partner X are covered under *de minimis*, net revenue generated by this project partner during implementation does not have to be taken into account (i.e. does not have to be deducted from the expenditure of this partner). The same would be the case if all activities of project partner X are covered under the GBER.

In case project activities are split into those activities relevant to State aid (and covered under e.g. *de minimis or the GBER*) and those not relevant to State aid, net revenue generated through activities covered under *de minimis* do not have to be taken into account. Net revenue generated through

activities NOT covered under *de minimis* (or the GBER) would still have to be deducted from the expenditure.

9. STATE AID AND NON-MEMBER STATES

9.1 Do State aid rules apply if non- EU Member States participate in an ETC programme?

State aid rules apply to Member States (at whatever administrative level and in whatever legal form). For countries of the European Economic Area (EEA - Norway, Iceland, Liechtenstein and Switzerland), the same substantive rules apply (see Article 61 of the EEA Agreement[18]) although some exemption regulations do not apply to EEA countries. For example, the block exemption for the fishery and aquaculture sector and the *de minimis* for fishery and aquaculture are not available for EEA countries as these are not subject to the fishery policy of the EU. However, the GBER and the regular *de minimis* regulation are applicable.

To countries neither belonging to the EU nor the EEA, State aid rules of the TFEU or the EEA Agreement do not apply, unless such countries have agreed on an application. This may be the case for instance in the context of preparation for accession to the Union (Instrument for pre-accession - IPA countries[19]). For determining the rules that apply it is necessary to check for each country since the relevant rules can differ. Some IPA CBC programmes (i.e. cross-border programmes between Member States and IPA countries) applied *de minimis* also to non-Member States in the past.

For the European Neighbourhood Instrument (ENI)[20], Article 12.3 of the ENI CBC Implementing Rules states that *Aid granted under the programme shall comply with the applicable Union rules on State aid within the meaning of Article 107 of the Treaty on the Functioning of the European Union*. This applies to EU Member States only. ENI partner countries are not required to apply State aid rules unless decided otherwise by the ENI programme.

It is important to note that even if countries are involved to which State aid rules do not apply, State aid rules remain applicable to the others (EU Member States, EEA countries and those countries who accepted the application in other agreements).

10. DATE OF GRANTING THE AID AND ARCHIVING

10.1 When is the date of granting de minimis or aid under the GBER?

According to Article 3(4) of the *de minimis* regulation, *de minimis aid shall be deemed granted at the moment the legal right to receive the aid is conferred on the undertaking under the applicable national legal regime irrespective of the date of payment of the de minimis aid to the undertaking*.

Similarly, the General Block Exemption regulation (GBER) states in Article 2 (28): *'date of granting of the aid' means the date when the legal right to receive the aid is conferred on the beneficiary under the applicable national legal regime.*

In the context of ETC programmes this means the date of signing the subsidy contract is the date the aid was granted.

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[18] Agreement on the European Economic Area (OJ No L 1, 3.1.1994, p. 3; and EFTA States' official gazettes); Updated 14.10.2014.

[19] IPA beneficiary countries are divided into two categories: 1) EU candidate countries (Croatia, Turkey and the former Yugoslav Republic of Macedonia) and 2) Potential candidate countries in the Western Balkans (Albania, Bosnia-Herzegovina, Montenegro, Serbia, and Kosovo under UN Security Council Resolution 1244/99).

[20] The 16 ENI Partner Countries are:
ENI South: Algeria, Egypt, Israel, Jordan, Lebanon, Libya, Morocco, Palestine, Syria, Tunisia
ENI East: Armenia, Azerbaijan, Belarus, Georgia, Moldova, Ukraine

10.2 ARCHIVING OF DOCUMENTS

10.3 How long do programmes need to archive State aid relevant documents?

According to Article 6(4) of the *de minimis* Regulation,

Member States shall record and compile all the information regarding the application of this Regulation. Such records shall contain all information necessary to demonstrate that the conditions of this Regulation have been complied with. Records regarding individual de minimis aid shall be maintained for 10 fiscal years from the date on which the aid was granted.

See also question 10.1. for information on the date when *de minimis* is granted.

According to Article 12 of the GBER, *…in order to enable the Commission to monitor the aid exempted from notification by this Regulation, Member States, or alternatively, in the case of aid granted to European Territorial Cooperation projects, the Member State in which the Managing Authority is located, shall maintain detailed records with the information and supporting documentation necessary to establish that all the conditions laid down in this Regulation are fulfilled. Such records shall be kept for 10 years from the date on which the ad hoc aid was granted or the last aid was granted under the scheme*.

For most ETC programmes this means that documents have to be kept 10 years after the date when aid was granted to the last ETC project working under the GBER or under *de minimis*.

See also question 10.1. for information on the date when aid under the GBER is granted.

APPLICATION OF DE MINIMIS IN ETC

11. WHAT IS DE MINIMIS?

11.1 Where can I find relevant rules on de minimis?

State aid rules are set in the EU Treaty and any state funding that meets the criteria of Article 107(1) TFEU constitutes State aid. However, measures not exceeding the *de minimis* threshold are not considered to be State aid in order to simplify the provision of small amounts of aid.

The *de minimis* principle has been outlined in successive Commission Regulations, the latest of which was adopted in December 2013.[21] The *de minimis* Regulation sets the *de minimis* ceiling at EUR 200.000 per undertaking and Member State granted over any period of three fiscal years. Aid meeting these criteria can be considered to fall outside Article 107(1).

For freight transport the *de minimis* ceiling is EUR 100.000.

A separate *de minimis* Regulation with a lower threshold (EUR 30.000) and national caps on spending applies to the fisheries and aquaculture sector.[22]

A separate *de minimis* Regulation with a threshold of EUR 15.000 exists for the agricultural sector.[23]

For Services of General Economic Interest (SGEI), a separate *de minimis* Regulation exists as well of up to EUR 500.000 for SGEI that do not clearly meet the four Altmark criteria (see also Point 22.3). [24]

11.2 What information needs to be collected and provided by the programme with regards to de minimis?

Article 6 of the *de minimis* Regulation on *monitoring* clarifies that *de minimis self-declarations* (see Point 13) must be collected from the recipients of *de minimis*: '*Before granting the aid, the Member State shall obtain a declaration from the undertaking concerned, in written or electronic form, about any other de minimis aid received to which this Regulation or other de minimis regulations apply during the previous two fiscal years and the current fiscal year.'*

In ETC, *de minimis* self-declarations are signed by the project partners and then collected by the MA/JS.

Article 6 of the *de minimis* Regulation also clarifies that recipients of *de minimis* must be informed about the *de minimis* amount granted to them: '*Where a Member State intends to grant de minimis aid in accordance with this Regulation to an undertaking, it shall inform that undertaking in writing of the prospective amount of the aid expressed as a gross grant equivalent and of its de minimis character, making express reference to this Regulation and citing its title and publication reference in the Official Journal of the European Union.*

In ETC this can involve a letter in which the MA/JS informs the project partners that they will receive support that will be granted as *de minimis* and under the rules outlined in the Regulation.

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[21] Regulation (EU) 1407/2013 of 18 December 2013 on the application of Articles 107 and 108 of the Treaty on the Functioning of the European Union to *de minimis* aid.

[22] Regulation (EU) No 717/2014 of 27 June 2014 on the application of Articles 107 and 108 of the Treaty on the Functioning of the European Union to *de minimis* aid in the fishery and aquaculture sector

[23] Regulation (EU) No 1408/2013 of 18 December 2013 on the application of Articles 107 and 108 of the Treaty on the Functioning of the European Union to *de minimis* aid in the agriculture sector.

[24] Regulation (EU) No 360/2012 of 25 April 2012 on the application of Articles 107 and 108 of the Treaty on the Functioning of the European Union to *de minimis* aid granted to undertakings providing services of general economic interest (OJ L 114, 26.4.2012, p. 8).

On this basis the MA/JS then informs Monitoring Committee (MC) members (e.g. through a letter) summarising support under *de minimis* provided in the respective Member States.

Note: It is strongly recommended that Programmes take enough time to explain these issues to their MC and that they seek agreement right in advance.

All ETC programmes must know how much *de minimis* was provided by the programme.

11.3 What happens if a project partner receives additional public funding as a contribution to match ERDF? Does this add up to the de minimis?

The concept of *de minimis* refers to all public contributions received by a project partner. In case a beneficiary receives public funds to match the ERDF (e.g. from a national ministry), then these public funds must be taken into consideration as well.

The Programme should make the project partners aware of the fact that the national public funds are to be considered as well. When talking about public contributions also the question might arise if entities that are part of the public sector and are almost fully publicly funded have per se a national public funding. In the context of State aid, the financial contribution is free of any public support if it is derived from the own resources.

12. COUNTRY PROVIDING DE MINIMIS IN ETC

12.1 De minimis applies per Member State. What does this mean?

In the *de minimis* Regulation of 2013 it was clarified that the *de minimis* threshold counts per Member State. This means that ETC project partners could receive *de minimis* support from different Member States. In the past, some have assumed that *de minimis* has to be seen per Member State but this was not explicit in the Regulation. It is impossible for a Member State to check what is done in another Member State. For this practical reason the rule is that *de minimis* applies per Member State.

12.2 What is the advantage for ETC?

An ETC project partner that already reached the *de minimis* threshold in its country of origin can still join an ETC project under *de minimis* as long as it is a different Member State that provides the *de minimis* support. The main question is to which Member State the ETC programme allocates the *de minimis* support and how the programme reasons that choice (See also Point 12.4).

12.3 In our ETC programme we have two Member States. Can we say that half of the de minimis is granted by one Member States and the other half by the other Member States?

If you establish a clear reasoning, this proportional approach can be possible. For example, you can establish that EUR 200.000 counts for two Member States (EUR 100.000 each).

QUESTION to ECN-ET: Project activities of economic nature carried out by the DE undertaking amount to EUR 100,000 total cost, for which it receives an aid of EUR 60.000. Due to the cooperation nature of the project, the aid is granted to the DE undertaking by the three Member States involved in the project according to the share of the total project budget allocated to each Member State (33 % each). Accordingly, the DE undertaking would receive EUR 20.000 de minimis aid from DE, EUR 20.000 de minimis aid from DK and EUR 20.000 de minimis aid from PL. Is the proposed approach acceptable?

ANSWER by DG COMP: YES

12.4 Is it possible to add several de minimis for one project partner and one project: EUR 200.000 from Country A (location of undertaking) plus EUR 200.000 from Country B (location of the Managing Authority) plus EUR 200.000 from Country C (location of the Lead Partner) = EUR 600.000?

Potentially there could be a project partner in an ETC project that receives three times 200.000 EUR (i.e. EUR 600.000) under *de minimis* from three different countries. Programmes would need to ensure that the *de minimis* thresholds in neither of these countries are exceeded. They would also have to provide reasoning for this approach.

QUESTION to ECN-ET: Project activities of economic nature carried out by the DE undertaking amount to EUR 250.000 total cost, for which it receives an aid of EUR 210.000. Due to the cooperation nature of the project, the aid is granted to the DE undertaking by the three Member States involved in the project according to the share of the total project budget allocated to each Member State (33 % each). Accordingly, the DE undertaking would receive EUR 70.000 de minimis aid from DE, EUR 70.000 de minimis aid from DK and EUR 70.000 de minimis aid from PL. Is the proposed approach acceptable?

ANSWER by DG COMP: Yes. Given that MS can normally only check cumulation for de minimis purposes in their own territory and in order to keep the administrative work manageable, the Regulation refers to total amount of de minimis aid "granted per Member State", meaning that it is not obliged to verify or take account of possible de minimis aid granted in other MS. Nevertheless, MS must verify that the total amount of de minimis aid "per undertaking" does not exceed EUR 200.000. All entities having one of the relationships listed in Article 2(2) of the de minimis Regulation are considered as a single undertaking.

QUESTION to ECN-ET : Project activities of economic nature carried out by the DE undertaking amount to EUR 100.,000 total cost, for which it receives an aid of EUR 60.000.In DE the undertaking has already reached the de minimis threshold. Due to the cooperation nature of the project, the aid can only be granted to the DE undertaking by the two other Member States involved in the project according to the share of the total project budget allocated to each Member State (33 % each). Accordingly, the DE undertaking would receive EUR 20.000 de minimis aid from DK and EUR 20.000 de minimis aid from PL.

Is the proposed approach acceptable?

ANSWER by DG COMP: YES. See above.

12.5 How do we deal with the Lead Partner principle? Where do I count the de minimis in this case?

If a programme wants to attribute *de minimis* always to the country of the Lead Partner, this can also be a programme rule. There is no obligation, however, to do so. In case programmes select this option, reasoning has to be provided.

12.6 Does an ETC programme need to justify which Member States was chosen as the one providing de minimis?

There is no standard solution and in principle any Member State participating in an ETC programme can be the one providing the *de minimis* support. The ETC programme will need to be able to show that the selection of the Member State was reasonable. For example, the Member State where the Managing Authority is located, the Member State where the undertaking is located or the Member State of the Lead partner could be obvious choices.

Note: It is very important to also clarify with the Member States in the Programme as the decision for one of the methods can have national implications, e.g. in case a Programme plans to use the country where the project partner is located it might not be possible that the MA sends the award letter as then Member States might have problems to enter the funds into their national registers, etc.

12.7 Does an ETC programme need to establish programme rules for the country providing de minimis under the programme (e.g. it is always the country where the MA is located?)?

Programmes can decide to establish programme rules, but a rationale is needed for selecting the country of the undertaking, the country of the MA or the country of the LP or a mix of these options.

The rationale should not be that the ETC programme wants to have the maximum out of the *de minims*.

It can be better to decide on a project per project basis as this allows for more flexibility for the programme. Which Member State provides *de minimis* can also be decided for each project and project partner individually provided that there is a rationale. However, also this approach should be discussed with the MC in detail to reach an agreement.

12.8 What can we do if we are unsure if our approach to de minimis complies with the rules?

The *de minimis* Regulation was not drafted specifically for ETC therefore there are some areas that are not spelled out. This can be a risk but also a source of opportunity. There is flexibility but you should be able to explain your use of *de minimis*. If you are unsure and you want to be more certain that the case complies with the regulation, you can also contact DG Competition.

13. DE MINIMIS SELF DECLARATIONS

13.1 How to ensure that an undertaking is not exceeding the de minimis threshold?

The application of *de minimis* includes the obligation to ensure that the *de minimis* threshold is not exceeded at the moment of granting the aid. In most cases, *de minimis self-declarations* are used. Some countries have established central *de minimis* registers (see Point 14.2).

13.2 What is the de minimis self-declaration?

This is explained in Article 6(1) of the *de minimis* Regulation. It involves a declaration signed by the applicant indicating any *de minimis* received during the previous three fiscal years (this being the current *fiscal year* and the previous two *fiscal years*).

IN ETC *de minimis self-declarations should also include* the Member State which provided the *de minimis* and a sentence confirming that the *de minimis* threshold will not be exceeded.

13.3 Who should draft the de minimis self-declaration, the ETC Managing Authority or the Member State granting the de minimis?

The Regulation refers to the Member State. But for ETC, you have to decide what is appropriate. There is flexibility for Member States. In ETC the Managing Authority can draft the self-declaration. The self-declarations signed by the project partners are then collected by MA/JS. As it is the case for all self-declarations, the MA/JS has to apply professional judgement. On the basis of collected self-declarations, MA/JS then informs the MC members (e.g. through a letter) by summarising support under *de minimis* provided in the respective Member States.

13.4 Is there a model of a de minimis self-declaration, which I can use?

We at INTERACT prepared a template for an ETC *de minimis self-declaration,* which was reviewed by DG Competition. Programmes are free to use this template or adjust as needed. Programmes can also use their own self-declarations.

13.5 Is the INTERACT template of the de minimis self-declaration 100% waterproof?

The draft template was sent to DG Competition and adjusted according to the comments received. DG Competition found the template sufficient and also pointed out that other templates could be suitable as well. There is no official template for a self-declaration published by DG Competition. As mentioned

above, the template should be discussed with the MC as there might be national requirements not covered by the template.

13.6 Who should check if the de minimis self-declaration is correctly filled-in by the project partner?

During the assessment of the project application, programmes should ensure that the *de minimis self-declaration* is completely filled-in, nothing has been deleted and that it is properly signed by the authorised person. Also apply professional judgement: If you have certain evidence that the declaration is not correct, then this has to be addressed. For example, if the declaration is only for the project partner and you know that the project partner belongs to a larger group of companies, this has to be corrected (see also question 16.1). Detailed investigations of all self-declarations are not required according to State aid rules.

13.7 Are there any verifications necessary later during project implementation?

See Point 6.

14. CENTRAL DE MINIMIS REGISTERS

14.1 What is a central de minimis register?

During the discussion on the new *de minimis* Regulation, there was a proposal to establish central registers for *de minimis* in all Member States. Later it was decided that the self-declaration system should stay due to administrative burden and resistance from the Member States.

14.2 Is there a list of countries that have a central register available?

Currently the following countries have *de minimis* registers:

- Cyprus (since 2009), Czech Republic (since 2010), Estonia (since 2009), Greece (since March 2013), Lithuania (since 2005), Poland (since 2013), Portugal (since 2002), Slovenia (since 2002).
- The Slovak Republic is in in the process of introducing a central register.
- Bulgaria and Hungary have an indicative central register, which works together with a system of declarations.

If a country has a central register, self-declarations are not strictly necessary. However, with regards to ETC, the self-declarations should be always be used, also in Member States that have a register.

14.3 What data are required for countries with central registers?

In case an ETC programme includes a Member State with a central *de minimis* register, it is best to contact the national State aid authority to ensure that data are collected and provided in the suitable type and format.

In order to inform national authorities, the MA/JS can for example send a letter to MC members who then inform the national authorities in their countries.

14.4 Is there an obligation to use the national registries if available or could the Programme choose to only use self-declaration?

Article 6(1) of the *de minimis* regulations outlines the possibility to use *de minimis* self-declaration: *…Before granting the aid, the Member State shall obtain a declaration from the undertaking concerned, in written or electronic form, about any other de minimis aid received to which this Regulation or other de minimis regulations apply during the previous two fiscal years and the current fiscal year.*

According to Article 6(2) of the *de minimis* regulation*, where a Member State has set up a central register of de minimis aid containing complete information on all de minimis aid granted by any*

authority within that Member State, paragraph 1 shall cease to apply from the moment the register covers a period of three fiscal years.

This means that after three years of existence of a national register, it is obligatory to use the national register.

15. LIMITATONS OF DE MINIMIS

15.1 Are there any specific limitations for de minimis?

Article 1 of the *de minimis* Regulation outlines the scope of *de minimis*. The *de minimis* Regulation applies to all economic sectors but there are certain sectorial limitations that concern grants to undertakings active in the fisheries and aquaculture sector, in the primary production of agricultural products or the processing and marketing of agricultural products. Aid to export-related activities and aid contingent upon the use of domestic over imported good is also not covered by the *de minimis* Regulation.

In addition, *non-transparent forms of aid* are not covered (e.g. capital injections). This is not really relevant to ETC, as ETC does no invest in companies (does not become a shareholder).

15.2 What are examples of export-related activities that are excluded from the de minimis regulation?

An assessment needs to be made on the basis of Article 1(1)(d) of the de minimis regulation 1407/2013 on whether the supported activity constitutes an export-related activity towards third countries or Member States, namely aid directly linked to the quantities exported, to the establishment and operation of a distribution network or to other current expenditure linked to an export activity.

Examples of export related activities that may not be granted are mentioned in recital 9 of the *de minims* regulation 1407/2013. Based on this, it is clarified that the *de minimis* regulation does not apply to the establishment and operation of a distribution network in other Member States or in third countries.

As examples of support which does not constitute export aid, it is further stated in recital 9 that aid towards the costs of participating in trade fairs, or of studies or consultancy services needed for the launch of a new or existing product on a new market in another Member State or a third country does not normally constitute export aid.

16. FREQUENT ERRORS IN APPLYING DE MINIMIS

16.1 What are the most frequent errors in applying de minimis?

The most frequent source of errors is that the de minimis threshold counts per undertaking. In case a project partner is part of a group, the entire group is considered one undertaking and the de minimis threshold applies to the entire group. It is therefore not sufficient to look at the project partner as it must be determined whether or not the project partner is part of a group.

16.2 How can I find out if a project partner is part of a group?

Article 2(2) of the *de minimis* Regulation defines groups. The burden to proof that an ETC project partner and all other entities belonging to the same group as the project partner have not reached the *de minimis* threshold lies with the project partner. The *de minimis* self-declaration should make clear that *de minimis* refers to the entire group. Project partners have to declare to the programme that *de minimis* is not exceeded and they have to do so for the whole national or multi-national group.

Linked undertakings are almost always equal to companies that consolidate. In the context of financial accounting, the term *consolidate* refers to the preparation of one financial statement (annual report) for all subsidiaries reporting under the umbrella of a parent company.

As regards multi-national groups, some more clarification is provided by DG COMP through questions answered in the ECN-ET network (the network Member States currently can use to ask questions to DG COMP).

QUESTION to ECN-ET: But what about the situation when company A is registered in one MS, the mother company B is registered in another MS and owns another daughter company registered in the first MS (company C)?

ANSWER by DG COMP: For reasons of practicability and administrative burden, the de minimis Regulation requires Member States only to check enterprises and de minimis amounts within their territory. It would therefore not be required (nor be possible in many cases) to determine the links between A and C, since they can only be established through a foreign enterprise.

QUESTION to ECN-ET: or a more complicated situation when company A is registered in one MS (e.g. Estonia), its mother company is registered in another MS (e.g. Finland) and is in its turn owned by company C also registered in another MS (Finland) and this company C has a daughter company D registered in the first MS (Estonia).

ANSWER by DG COMP: As mentioned above, it would not be required (nor be possible in many cases) to determine the links between A and D, since they can only be established through a foreign enterprise. To conclude, the de minimis aid received by D will not count towards the de minimis aid to be received by A in Estonia.

16.3 Some partners, e.g. universities, are involved in many programmes and projects with their different departments. How to define such partner as "single undertaking" and the applicable threshold of de minimis?

There is just one *de minimis* aid for the entire university.

16.4 Some groups of universities work under one label. Is this considered one undertaking?

Normally cooperation links will not trigger the notion of a single undertaking. However, for a joint venture it may well be. It goes back to the criteria listed in Article 2(2) of the *de minimis* Regulation and the majority of controlling rights are an important factor. Also, if you look at the general accounts you can see what organisations the beneficiary consolidates with.

GENERAL BLOCK EXEMPTION REGULATION (GBER)

17. WHAT IS THE GBER?

As a general rule, EU Member States are not allowed to implement measures that qualify as State aid until those measures have been approved by the Commission. Member States are subject to a *standstill obligation*, under which aid granted prior to the Commission's approval is illegal.

The GBER establishes an important exception from this approval requirement. If a measure that qualifies as State aid falls within the scope of the GBER, does not exceed the notification thresholds established by the GBER and fulfils all the GBER's substantive criteria, no approval is required by the Commission and the measure is exempted from the notification requirement. For all other aid, Member States need to wait for the Commission's approval before they implement the measure.

17.1 Where can I find relevant rules?

Council Regulation No 733/2013 of 22 July 2013, enables the Commission to adopt so-called Block Exemption Regulations for State aid. With these regulations, the Commission can declare specific categories of State aid compatible with the Treaty if they fulfil certain conditions, thus exempting them from the requirement of prior notification and Commission approval. Categories of State aid compatible with the Treat are outlined in the General Block Exemption Regulation.[25]

17.2 The GBER contains two provisions specifically for ETC: Article 14(15) – regional investment aid in ETC and Article 20 (Aid for cooperation costs incurred by SMEs participating in ETC projects). Does our programme always have to use these Articles or can other Articles of the GBER be used as well?

Which Article a programme chooses depends on the main objective of the support. Article 20 is the main Article specifically drafted for ETC programmes.

There is also Article 14(15) on initial investments linked to European territorial cooperation projects. At this point the implications of this Article are not fully understood and programmes applying this Article should seek further guidance.

There are many Articles in the GBER that could potentially be used by ETC programmes as well, including Article 25 (Aid for research and development projects), Section 7 (Aid for environmental protection) and many others (see also Point 20.4).

17.3 What do we have to keep in mind when applying the GBER?

The number of block exempted measures contained in the GBER has increased significantly over the years. The Commission has added new exemptions for certain categories of aid (e.g. SMEs in ETC) and increased aid intensities as well as notification thresholds over the years. The GBER now contains 43 exemptions of which 27 are new compared to the previous version of the GBER.

Articles 1 through 12 and Articles 57 and 58 of the GBER contain **general provisions**, which must be taken into account in addition to the **specific provisions** on aid categories (Articles 13 through 56).

[25] Regulation (EU) No 651/2014 of 17 June 2014 declaring certain categories of aid compatible with the internal market in application of Articles 107 and 108 of the Treaty

General provisions include:

- The scope of the GBER (Article 1): Certain types of aid excluded in Article 1, such as Aid for export related activity, Aid to the fishery and aquaculture sector, Aid in the primary agricultural production sector[26], Aid to facilitate the closure of uncompetitive coal mines or Aid to undertakings in difficulty
- Definitions (Article 2), including a definition of *(63) organisational cooperation*, (64) *advisory services linked to cooperation* and (65) *support services linked to cooperation* relevant to Article 20.
- Notification thresholds (Article 4): The GBER does not cover aid above the notification thresholds set out in Article 4. Measures exceeding these thresholds must be notified. The notification threshold for aid under Article 20 is EUR 2 million per undertaking, per project (see Article 4(f)).
- Incentive effect (Article 6): There is an obligation for the beneficiary to make a demand for support before starting the project ('*Aid shall be considered to have an incentive effect if the beneficiary has submitted a written application for the aid to the Member State concerned before work on the project or activity starts*'). For ETC this can mean, for example, that State aid relevant activities should only start after the application for funding (e.g. first step application in a two-step application procedure).
- Publication and information (Article 9): To use the GBER, the granting body must publish a scheme on the internet and complete an online form which goes to the Commission (see Point 19.1).
- Articles 11 (Reporting) and 12 (Monitoring): See also Point 19 of this document.
- The definition of SME can be found in Annex I of the GBER.

An ETC programme applying the GBER should be familiar with general provisions of the GBER as well as the specific provisions of the aid category applied.

17.4 What other Block Exemption Regulations exist that could be relevant to ETC?

ETC programmes dealing with undertakings active in the production, processing and marketing of fishery and aquaculture products should refer to the relevant Block Exemption Regulation (*FIBER)*[27], which provides that under certain conditions specific categories of aid are considered compatible with the Treaty on the Functioning of the European Union and do not need to be notified to the Commission.

There is also an Agricultural Block Exemption Regulation (*ABER*)[28] that allows the granting of certain categories of State aid to the agricultural and forestry sectors and in rural areas without prior notification to the Commission.

More information on State aid tools for fisheries, aquaculture, agriculture and forestry is provided in Point 23.

17.5 Should aid intensity be referred to the entire eligible costs of the project budget or the budgets of individual beneficiaries?

This is answered by ECN-ET as follows: The aid intensities are established at the level of individual beneficiaries. Please note that in case of participants of the project which are not engaged in economic

[26] Please note that some GBER articles are available for these sectors (e.g. all articles under R&D&I).

[27] '*FIBER*': Regulation (EU) No 1388/2014 of 16 December 2014 declaring certain categories of aid to undertakings active in the production, processing and marketing of fishery and aquaculture products compatible with the internal market in application of Articles 107 and 108 of the Treaty on the Functioning of the European Union

[28] '*ABER*': Regulation (EU) No 702/2014 of 25 June 2014 declaring certain categories of aid in the agricultural and forestry sectors and in rural areas compatible with the internal market in application of Articles 107 and 108 of the Treaty on the Functioning of the European Union

activity, their funding is not considered state aid and therefore the maximum aid intensity requirement does not apply to them.

18. COMBINING DE MINIMIS AND THE GBER IN ETC PROGRAMMES

18.1 What are advantages of using de minimis or the General Block Exemption Regulation (GBER)?

Programmes are free to choose whether they apply *de minimis*, the GBER or both. One advantage of *de minimis* is that programmes can apply their standard co-financing rate (e.g. 85%) also to activities that involve State aid. One disadvantage is the *de minimis* ceiling of EUR 200.000, which is not always sufficient to fund project activities.

The GBER on the other hand allows rather high ceilings but maximum co-financing rates are low compared to typical ETC co-financing rates. For example SMEs cooperating in ETC under GBER Article 20 (*Aid for cooperation costs incurred by SMEs participating in European Territorial Cooperation projects*), can receive up to EUR 2 million per project and undertaking but the maximum co-financing rate (*aid intensity*) is only 50%.[29]

There are many options to deal with this situation. Programmes can, for example, apply *de minimis* to those project partners that receive up to EUR 200.000 public support and apply the GBER to the remaining project partners. The GBER can also be a good solution for project partners that have already reached the de minimis threshold through previous public funds received. [30] Programmes can also decide to apply the GBER to specific types of project partners (e.g. all SMEs) and *de minimis* to all the others. Another example could be programmes deciding to apply the GBER (e.g. for SMEs in ETC) in strategic calls (e.g. cooperation of SMEs to develop products or services for the market) but otherwise apply *de minimis* only.

In any case project activities that do not involve State aid do not fall under either *de minimis* or the GBER.

18.2 Is it possible to apply the GBER to one project partner and de minimis to another project partner in the same project?

Yes, this is possible. One project partner could be covered by Article 20 of the GBER, another by another GBER Article and a third by *de minimis*.

18.3 Is it possible to cover some partner activities under the GBER and others under de minimis?

According to Article 5(2) of the *de minimis* Regulation: *De minimis aid shall not be cumulated with State aid in relation to the same eligible costs or with State aid for the same risk finance measure, if such cumulation would exceed the highest relevant aid intensity or aid amount fixed in the specific circumstances of each case by a block exemption regulation or a decision adopted by the Commission. De minimis aid which is not granted for or attributable to specific eligible costs may be cumulated with other State aid granted under a block exemption regulation or a decision adopted by the Commission.*

For ETC programmes a feasible solution is to never provide both *de minimis* and aid under the GBER to the same project partner in the same project. A decision should be made for each project partner whether to cover the support under either *de minimis* or the GBER.

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[29] In this context it should be noted that the maximum aid intensity refers to the sum of all public contributions. In case a beneficiary receives additional public funds to match the ERDF, then these public funds must be taken into consideration as well. (see also Point 11.3). Programmes can make national funds aware of this situation and the programme rules for State aid. It is the responsibility of the national funds to ensure their compliance with State aid rules.

[30] See point 18.3 for limitations on combining de minimis and the GBER.

19. GBER PUBLICITY AND MONITORING REQUIREMENTS FOR ETC

19.1 What are the responsibilities of Member States and Managing Authority in fulfilling GBER publicity, monitoring and reporting requirements?

GBER publicity, monitoring and reporting are outlined in Article 9, 11 and 12 of the GBER Regulation. In this Regulation it has been clarified that for ETC these requirements can be taken over by the Member State where the Managing Authority is located. This means that in the case of ETC, publicity, monitoring and reporting requirements can be taken over by ONE Member State for all Member States involved in the cooperation programme and there is no need to repeat the same procedure on all Member States.

Applying the GBER requires that ETC programmes register their intention to use certain Articles of the GBER to DG Competition, via the Member State where the MA is located) (or – alternatively - via all concerned Member States). It is important to note that registering the intention to use the GBER does not oblige programmes to actually use it.

Applying the GBER also requires keeping track of the application of the GBER to individual beneficiaries, as Member States must submit annual reports on the use of the GBER to DG Competition.

When granting aid under the GBER, ETC programmes should bear in mind some key aspects in this process and take the following steps:

- Review the Operational Programme and other programme documents (e.g., programme manuals, fact sheets) to ensure compliance with general requirements of the GBER and specific requirements of the GBER Articles that should be used. For Article 20 this includes also the definition of an SME (see Annex I of the GBER) the ceiling of 2 million EUR per undertaking, per project and maximum permissible aid intensities.
- According to Article 9(1)(a) and Article 11(a) of the GBER: Complete a *summary information* form about each aid measure in the standardised format laid down in Annex II of the GBER. Annex II – Part 1 contains general information and Annex II Part 2 concerns the selected categories of aid. This summary information has not yet been written with ETC in mind and adjustments are necessary. Part 1 requires a web-link to the full text of the aid measure that in the case of ETC programmes can be a link to the Operational Programme or other programme documents. The Member State, which submits the information form, can be the Managing Authority on behalf of all other Member States participating in the programme.
- According to the State aid implementing Regulation[31], the completed *summary information* form should be published on a State aid website (e.g. of the Member State where the MA is located) AND transmitted to the European Commission via the European Commission's electronic notification system (*SANI*), in consultation with the national State aid unit (of the country where the Managing Authority of the programme is located). The *summary information* form must be sent to the European Commission via *SANI* within 20 working days from the day on which the aid was granted. This means that it is not necessary to register the use of the GBER during programming, as it can be done later on.
- According to Article 9(1)(c)of the GBER, for each individual award exceeding EUR 500.000, the standardised form included in Annex III of the GBER has to be published on the State aid website of a Member State (e.g. the Member State where the MA is located):
    - Name of the beneficiary
    - Beneficiary's identifier
    - Type of enterprise (SME/large) at the time of granting
    - Region in which the beneficiary is located, at NUTS level II

[31] Regulation (EU) No 794/2004 of 21 April 2004 implementing Council Regulation (EC) No 659/1999 laying down detailed rules for the application of Article 93 of the EC Treaty

- Sector of activity at NACE group level
- Aid element, expressed as full amount in national currency
- Aid instrument (e.g. Grant)
- Date of granting
- Objective of the aid
- Granting authority
- For schemes under Articles 16 and 21, name of the entrusted entity, and the names of the selected financial intermediaries
- Reference of the aid measure.

- ETC programmes using the GBER must also put procedures in place to keep track of the aid granted under the GBER, as this information is required for annual reporting to the European Commission (Article 11(b) of the GBER). The information is used to monitor the application of the GBER. It also allows the European Commission and other interested parties to verify that all conditions laid out in the GBER have been fulfilled. The annual report is outlined in the State aid Implementing Regulation[32] and amendments. According to Annex III of the implementing Regulation, information to be contained in the annual report to be provided to the European Commission comprises:

  1. Title of aid scheme, Commission aid number and reference of the Commission decision

  2. Expenditure
     - 2.1. amounts committed,
     - 2.2. actual payments,
     - 2.3. number of assisted projects and/or enterprises;
     - 2.5. regional breakdown of amounts under point 2.1.

  3. Other information and remarks.

- According to Article 12 of the GBER the Member State in which the Managing Authority is located, shall maintain detailed records with the information and supporting documentation necessary to establish that all the conditions laid down in this Regulation are fulfilled. Such records shall be kept for 10 years from the date on which the ad hoc aid was granted or the last aid was granted under the scheme.

- Programmes should consult with the national State aid unit to ensure that all required data are collected.

20. ARTICLE 20 (AID FOR COOPERATION COSTS INCURRED BY SMEs PARTICIPATING IN ETC)

20.1 Is Article 20 applicable to all eligible costs of SMEs in ETC projects?

Article 20 was drafted specifically for ETC. It covers all ETC cost categories and all project activities provided they are related to cooperation.

The GBER in Point (63) defines *organisational cooperation* as follows: *'organisational cooperation' means the development of joint business strategies or management structures, the provision of common services or services to facilitate cooperation, coordinated activities such as research or marketing, the support of networks and clusters, the improvement of accessibility and communication, the use of joint instruments to encourage entrepreneurship and trade with SMEs*

ETC programmes applying Article 20 to cooperation projects should make sure that the projects meet this definition.

[32] Regulation (EU) No 794/2004 of 21 April 2004 implementing Council Regulation (EC) No 659/1999 laying down detailed rules for the application of Article 93 of the EC Treaty.

The GBER also provides additional definition which must be taken into account:

- Under point (64) it is stated that '*advisory services linked to cooperation' means consulting, assistance and training for the exchange of knowledge and experiences and for improvement of cooperation;*
- Under Point (65): *'support services linked to cooperation' means the provision of office space, websites, data banks, libraries, market research, handbooks, working and model documents;*

20.2 Has Article 20 been harmonised with ETC rules?

Article 20 has been harmonised with ETC rules In terms of eligible costs and budget lines. Article 20 makes reference to all ETC budget lines, namely staff costs, office and administration, travel and accommodation, external expertise and services and equipment albeit using different wording.

Article 20 has NOT been harmonised with typical ETC co-financing rates. Typical ETC co-financing rates (up to 85%) are higher than the permissible aid ceiling under Article 20 (50%).

20.3 Investments are eligible according to Article 20. What type of investment falls under this article?

Article 20 also makes reference to investment costs because at the time of drafting the GBER, *investment* was still a separate budget line in ETC. Now investment is no longer a separate budget line but of course investments are still eligible in ETC, as they are under GBER Article 20. Clarification was provided by DG COMP via ECN-ET:

QUESTION to ECN-ET: Article 20 - We would like to clarify what is meant under the investment expenditure directly related to the project. Could it be investment costs in tangible and intangible assets (like in case of regional aid) in case SMEs from different Member States co-operate in e.g. infrastructure project (small ports)?

ANSWER by DG COMP: Based on the comments received in the public consultation on the GBER, an effort was made to harmonise the wording of Article 20(2) with ETC rules and ETC cost categories as mentioned in the ETC regulation (Regulation (EU) No 1299/2013 of the European Parliament and of the Council of 17 December 2013 on specific provisions for the support from the European Regional Development Fund to the European territorial cooperation goal). The investment expenditure directly related to the project can be indeed interpreted as meaning investment costs in tangible and intangible assets that are undertaken by the project-partners and are directly related to the ETC project.

Another question answered by ECN-ET further clarifies the scope of investments eligible under Article 20:

QUESTION to ECN-ET: Are eligible only additional costs associated with implementation of the investment (e.g. the costs of purchase of computer equipment used to service the project or the costs associated with the premises) which in itself (investment costs) is funded as e.g. regional aid?

ANSWER by DG COMP: According to Article 20(2) of the GBER costs incurred by SMEs – as listed under Article 20(2) - in relation to European Territorial Cooperation projects are eligible for aid. There is no requirement for any other type of aid (ex. regional aid) to cover any other part of the investment costs of the project.

20.4 We would like to use Article 20 of the GBER. Can we use this Article also in cases where other Articles of the GBER could fit as well (e.g. research development and innovation)?

There is no hierarchy between Article 20 and other GBER provisions. The intention of Article 20 was to facilitate aid to SMEs. Similar to, for example, investment aid to SMEs (Article 17 of the GBER), aid to SMEs participating in ETC is not related to an economic sector. It is a horizontal Article which specifically addresses aid for organisational cooperation of SMEs in the framework of ETC.

To the extent that several GBER provisions could be fulfilled by one and the same project partner, prorammes should make the choice on which GBER provision to use on the basis of the main objective of the support. It can be argued that the main objective of ETC projects is always organisational cooperation and Article 20 always applies provided the conditions of Article 20 are met. For some ETC projects other objectives might be even more important than cooperation (e.g., research and development) and - in these cases other Articles of the GBER (e.g. Article 25 -aid for research and development) can also apply.

20.5 Are SMEs that benefit from a project but that are not strictly 'project partners' (i.e. beneficiaries in the meaning of Article 13 of the ETC Regulation) covered by Article 20 of the GBER? For example, there could be a cooperation project of three regions from two different countries. Project partners are three regional development agencies. In the framework of the project they develop together training in innovation for SMEs. They also offer this training (i.e. the possibility to participate) to SMEs from the three regions. Could any SMEs training or business advice that is offered by projects be fully covered under "Art 20 SME cooperation"?

The wording of Article 20 GBER refers to SMEs 'participating' in ETC projects. It is not required that the SMEs qualify as project partners/'beneficiaries' in the meaning of Article 13 of the ETC Regulation.

Therefore, Article 20 can be applied to cover the training of SMEs in the context of an ETC project even if the SMEs are not participating in the project partnership. However, it is very difficult to apply this approach in practice as – in order to meet conditions of Article 20 - it must be shown that SMEs receiving training or other benefits contribute 50% of the costs.

20.6 How do we ensure that the project partners meet the criteria for SME? Can it be based on a self-declaration? What needs to be in this self-declaration?

This can be based on self-declaration. This self-declaration should refer to Annex 1 of the GBER and should be subject to plausibility checks by the MA/JS (see also Point 3.2). There is a template for such a declaration in Commission communication 2003/C 118/03: Model declaration on the information relating to the qualification of an enterprise as an SME.

SERVICES OF GENERAL ECONOMIC INTEREST (SGEI)

21. WHAT IS AN SGEI?

A Services of general economic interest (SGEI) is a utility (infrastructure) or service that a Member State considers essential such as public bus services, water supply, waste water treatment, public libraries, public housing, health care, postal services, public broadcasting, fire services, environmental protection, electricity supply, gas supply, and even consultancy services (e.g. energy consultancy).

The concept of SGEI appears in Articles 14 and 106(2) TFEU and in Protocol No 26 to the TFEU, but it is not defined in the TFEU or in secondary legislation. The Commission has clarified in its *Quality Framework for Services of General Interest* that SGEIs are economic activities which deliver outcomes in the overall public good that would not be supplied (or would be supplied under different conditions in terms of objective quality, safety, affordability, equal treatment or universal access) by the market without public intervention.

SGEI are often profit-making but co-financing SGEI does not constitute State aid, if the SGEI meets the 4 so called Altmark Criteria.

Currently, only an SGEI that meets all four of the so-called *Altmark Criteria*[33] falls outside the scope of State aid. The Altmark criteria are*:*

1) The recipient undertaking is actually required to discharge public service obligations and those obligations have been clearly defined;

2) The parameters on the basis of which the compensation is calculated have been established beforehand in an objective and transparent manner;

3) The compensation does not exceed what is necessary to cover all or part of the costs incurred in discharging the public service obligations, taking into account the relevant receipts and a reasonable profit for discharging those obligations;

4) Where the undertaking which is to discharge public service obligations is not chosen in a public procurement procedure, the level of compensation needed has been determined on the basis of an analysis of the costs which a typical undertaking, well run and adequately provided with the relevant means so as to be able to meet the necessary public service requirements, would have incurred in discharging those obligations, taking into account the relevant receipts and a reasonable profit for discharging the obligations.

Since it is often not possible to determine whether or not an SGEI meets all 4 Altmark criteria (especially the 4th criteria is hard to establish), there is an SGEI *de minimis* of up to EUR 500.000 for SGEI that do not clearly meet the four Altmark criteria (see also Point 22.3).

Very good information on SGEI can be found in the C*ommission Staff working document: Guide to the application of the European Union rules on state aid, public procurement and the internal market to services of general economic interest, and in particular to social services of general interest.*[34]

[33] The Altmark case concerned the conditions for the award of a regional transport license in Germany. In this case the Court ruled that if the undertaking concerned provided a universal service in exchange for its financing there is no state aid because there is no economic advantage.
[34] http://ec.europa.eu/competition/state_aid/overview/new_guide_eu_rules_procurement_en.pdf

22. ETC PROGRAMMES CO-FINANCING SGEI

22.1 Why are SGEI relevant to ETC?

SGEI play an important role in the EU and in many Member States they are an important aspect of the welfare State. Many typical ETC project partners can be SGEI and identifying SGEI can be an important aspect of a programme strategy to rule out State aid.

22.2 Is there a list of SGEI that we can use?

SGEI may be designated at any level of government, including national, regional and local governments. For example, a concession to provide local bus services may involve a SGEI designated at municipal level. One consequence of this *de-central* designation of SGEI is that a service that is considered to be an SGEI in one Member State need not be so in the next! For this reason it would be very difficult to establish lists of SGEI for all Member States. Since SGEI can be designated at any level of government, there are not necessarily lists of all SGEI on the national level of Member States. Thus the assessment of SGEI presence has to be done individually for each case.

Another difficulty arises because a service that is considered to be an SGEI at one point in time may no longer be so at a later stage. For example, the telecom sector was originally the province of statutory national monopolies in Europe (an SGEI). Today the market is liberalised in all of Europe and a framework for competition exists that gives third parties access to the market. Telecom companies are no longer statutory monopolies and subsidising them is State aid.

It can be noted that even in this liberalised framework of the telecom sector there still exist SGEI today in particular in the area of broadband services (where otherwise there would be no investment at all or insufficient quality).

22.3 Why is there a de minimis for SGEI?

Currently, only an SGEI that meets all four *Altmark* criteria falls outside the scope of State aid (see also Point 21). The concept of SGEI is evolving over time and there are often uncertainties in meeting the Altmark criteria. While criteria one through three are often clear, the fourth Altmark criteria can be difficult to meet.

The SGEI *de minimis* addresses this uncertainty: As long as the criteria for the SGEI *de minimis* are met, public funding of SGEI does not constitute State aid even if there are uncertainties in the designation of the SGEI.

The *de minimis* threshold for SGEI is EUR 500 000 granted over any period of three fiscal years.[35]

22.4 Our programme plans to co-finance SGEI. How can we make sure that a project partner is an SGEI?

In the case of SGEI, a public service obligation is imposed on the provider by way of entrustment and on the basis of general interest. This means that there must be an act of entrustment for every SGEI. Point 47 of the C*ommission Staff working document*[36] explains the types of acts of entrustment that can be considered adequate.

Examples of entrustment acts are: Concession contract and public service contract, Ministerial programme contracts, Ministerial instructions, laws and acts, yearly or multiannual performance contracts, and Legislative decrees and any kind of regulatory decisions, as well as municipal decisions or acts.

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[35] Regulation (EU) No 360/2012 of 25 April 2012 on the application of Articles 107 and 108 of the Treaty on the Functioning of the European Union to *de minimis* aid granted to undertakings providing services of general economic interest.

[36] http://ec.europa.eu/competition/state_aid/overview/new_guide_eu_rules_procurement_en.pdf

It is up to the Member States themselves to designate SGEI and they are therefore different from country to country. Since designation of SGEI is delegated to the Member States, in case of doubt programmes can seek advice from the Monitoring Committee to ensure that the project partner is actually designated as an SGEI in the Member State.

As outlined above, it is possible that and SGEI designated by a Member State does in fact not meet all criteria or uncertainty exist that whether or not it does (see Point 22.1 - Altmark criteria). There is always the theoretical possibility that the European Commission or the European Court do not agree with the opinion of Member States. Since it is impossible for ETC programmes to determine whether or not an SGEI designated by a Member State meets the criteria, applying the SGEI *de minimis* can be considered a measure to minimise risk for the programme.

ETC PROGRAMMES DEALING WITH FISHERIES, AQUACULTURE, AGRICULTURE OR FORESTRY

23. WHAT STATE AID INSTRUMENTS EXIST FOR FISHERIES AND AQUACULTURE?

There are three sector specific state aid instruments for fisheries and aquaculture:

- The fisheries and aquaculture *de minimis* Regulation[37] provides that small amounts of aid are, under certain conditions, not considered as affecting trade between Member States. This regulation allows limited amounts of aid to be given for the production, processing and marketing of fisheries products. According to Article 3(2) of this Regulation, the total amount of *de minimis* aid granted per Member State to a single undertaking in the fishery and aquaculture sector shall not exceed EUR 30 000 over any period of three fiscal years. This regulation is not applicable in a number of cases. For example, it cannot be used for purchasing or building fishing vessels (see Article 1 of Regulation (EU) No 717/2014). Moreover, the *de minimis* regulation requires additional administrative tasks due to the observance of the national cap. Therefore, for ETC programmes, it can be very difficult to apply this type of *de minimis* due to difficulties verifying the national caps for all countries in due time.
- The Block Exemption Regulation applicable to the fishery and aquaculture sector (*FIBER*)[38] provides that under certain conditions specific categories of aid are considered compatible with the Treaty on the Functioning of the European Union and do not need to be notified to the Commission.
- Guidelines for the examination of State aid to fisheries and aquaculture.[39]

24. WHAT STATE AID INSTRUMENTS EXIST FOR AGRICULTURE AND FORESTRY?

There are three sector specific state aid instruments for agriculture and forestry:

- The agriculture *de minimis* Regulation[40] applies to aid granted to undertakings active in the primary production of agricultural products. According to Article 3(2) of this Regulation, the total amount of *de minimis* aid granted per Member State to a single undertaking shall not exceed EUR 15 000 over any period of 3 fiscal years. Please refer to Regulation (EU) No 717/2014 for more information.
- The Agricultural Block Exemption Regulation (*ABER*) allows the granting of certain categories of State aid to the agricultural and forestry sectors and in rural areas without prior notification to the Commission.[41]
- European Union Guidelines for State aid in the agricultural and forestry sectors and in rural areas.[42]

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[37] Regulation (EU) No 717/2014 of 27 June 2014 on the application of Articles 107 and 108 of the Treaty on the Functioning of the European Union to *de minimis* aid in the fishery and aquaculture sector

[38] *'FIBER'*: Regulation (EU) No 1388/2014 of 16 December 2014 declaring certain categories of aid to undertakings active in the production, processing and marketing of fishery and aquaculture products compatible with the internal market in application of Articles 107 and 108 of the Treaty on the Functioning of the European Union

[39] Guidelines for the examination of State aid to fisheries and aquaculture ((2008/C 84/06). At the time of writing this document, new guidelines were about to be adopted.

[40] Regulation (EU) No 1408/2013 of 18 December 2013 on the application of Articles 107 and 108 of the Treaty on the Functioning of the European Union to *de minimis* aid in the agriculture sector

[41] *'ABER'*: Regulation (EU) No 702/2014 of 25 June 2014 declaring certain categories of aid in the agricultural and forestry sectors and in rural areas compatible with the internal market in application of Articles 107 and 108 of the Treaty on the Functioning of the European Union

[42] European Union Guidelines for State aid in the agricultural and forestry sectors and in rural areas 2014 to 2020 (2014/C 204/01)