

State aid compliance check-list

1. What is State aid?

According to the provision of Article 107(1) of the TFEU “**Save as otherwise provided in the Treaties, any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the internal market**”.

State aid is defined as an **advantage** in any form whatsoever conferred on a **selective basis to undertakings/sectors** by national, regional or local public authorities (including structural funds). Therefore, subsidies granted to individuals or general measures open to all enterprises are not covered by this prohibition and do not constitute State aid (examples include general taxation measures).

To be State aid, a measure needs to have these features:

- there has been an **intervention by the State or through State resources** which can take a variety of forms (e.g. grants, interest and tax reliefs, guarantees, government holdings of all or part of a company, or providing goods and services on preferential terms, etc.);
- the intervention gives an **advantage on a selective basis**, for example to specific companies or industry sectors, or to companies located in specific regions
- **competition has been or may be distorted**;
- the intervention is likely to **affect trade between Member States**.

Before the State aid tests can be applied it is necessary to determine whether the following two aspects are present:

1.	Is the beneficiary an 'undertaking'? An undertaking is defined as any entity, regardless of its legal status, which is engaged in economic (commercial/competitive) activity and where there is a market in comparable goods or services.
2.	Is an undertaking engaged in economic activity? This is defined as offering goods and/or services on a given market and which could, at least in principle, be carried out by another operator.

2. Background information and applicable legal basis:

Further information on EU legislation in the field of State Aid can be obtained from:

http://ec.europa.eu/competition/state_aid/overview/index_en.html

http://ec.europa.eu/comm/competition/state_aid/legislation/legislation.html

New INTERACT Publication on State Aid

http://admin.interact-eu.net/downloads/9263/Questions_Answers_ETC_and_State_Aid_April_2015.pdf

National rules on procedure - Romania

<http://www.ajutordestat.ro/> section State aid legislation

National rules on procedure -Serbia

Law on State Aid Control, RS Official Gazette 51/09 (Zakon o kontroli državne pomoći, „Službeni glasnik RS“ broj 51/09)

Regulation on Rules for Granting the State Aid, RS Official Gazette 119/14 (Uredba o pravilima za dodelu državne pomoći („Službeni glasnik RS“ broj 13/2010; 100/2011, 91/2012, 37/2013, 97/13 and 119/2014)

Regulation on the Rules and Procedures for State Aid Notification, RS Official Gazette 13/10 (Uredba o načinu i postupku prijavljivanja državne pomoći („Službeni glasnik RS“ broj 13/10))

Here is the link for the Ministry of Finance web site with all the above documents:

<http://www.mfin.gov.rs/pages/issue.php?id=7272>

3. Relation of State aid rules with the Interreg - IPA CBC Romania - Serbia

According to Commission Implementing Regulation (EU) No 447/2014 of 2 May 2014 on the specific rules for implementing Regulation (EU) No 231/2014 of the European Parliament and of the Council establishing an Instrument for Pre-accession assistance (IPA II) and 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 and, therefore, **State aid compliance must be pursued.**

4. Assessment of the State aid presence in each project

A grant awarded within the Interreg - IPA CBC Romania - Serbia might lead to State aid for the Beneficiary of the project, to its partners that are involved in the project based on the Partnership Agreement. There are even situations in which the project can result in State aid to the end users/target group.

Therefore, a State aid assessment for each individual project is necessary in order to determine if the criteria defining State aid are met.

It is important to bear in mind that **if one of the criteria is not met, the grant in question does not constitute State aid.**

The criteria, detailed in the Check-list below, are:

- 1. Is the project funded by State resources? The answer to this question is always “Yes” (see point 2 above).
- 2. Does the project awards an economic advantage to an undertaking?
- 3. Is the grant awarded selective? The answer is always “Yes”, as grants awarded following a call for proposals are always selective.
- 4. Does the project threaten to distort competition?
- 5. Does the project threaten to affect trade between Member States?

The state aid assessment is mandatory for all projects partners, target groups and activities.

5. State aid check-list. When filling this please see section I.8 of the Applicant Guide for more detailed explanations.

A. Check list

Criteria	Description	Question	Answer (Yes/No)	Comments
1. State resources	Automatically fulfilled	-	Yes	
2. Economic advantage to an undertaking	<p>The first step is to identify whether the beneficiary represents an undertaking.</p> <p>- According to the State aid rules, an undertaking is any entity, irrespective of the type of legal organisation, which performs economic activities.</p>	<p>1. Is the beneficiary or its' partners an 'undertaking'?</p> <p>This question resumes to ascertaining if the</p>		

	<ul style="list-style-type: none"> - The concept of an undertaking encompasses every entity engaged in an economic activity, regardless of the legal status of the entity and the way in which it is financed. See for instance: judgement of the Court of 23 April 1991 in case C-41/90, Klaus Hofner and Fritz Elser vs Macrotron GmbH - The classification of an entity as an undertaking is always relative to a specific activity. An entity that carries out both economic and non-economic activities is to be regarded as an undertaking only with regard to the former. Furthermore, the application of the State aid rules as such does not depend on whether the entity is set up to generate profits, as also non-profit entities can offer goods and services on a market too. Also, the State authorities may themselves be considered as undertakings should they be involved in economic activities. <p>For example a public authority (central or local) that provides goods or services might be considered an undertaking. The same situation might occur in the case of an NGO providing training. If the services are granted for free and the beneficiaries of these services as undertakings, than it can be considered that it is also an indirect State aid for those beneficiaries.</p>	<p>beneficiary or its' partners are undertakings in the meaning of the State aid rules, as the grant awarded is always an economic advantage. Therefore, it is important to see if there is any commercial activity involved, as this is the main factor defining an undertaking.</p> <p>An undertaking is defined as any entity, regardless of its legal status, which is engaged in economic (commercial/competitive) activity and where there is a market in comparable goods or services.</p>		
	<p>Economic activity means the supply of goods or services on a given market and which could, at least in principle, be carried out by other actors.</p> <p>Another examples of economic activities are:</p> <ul style="list-style-type: none"> - health services that are not part of the national <i>health service</i> which are almost entirely based on the principle of solidarity - e.g. dentistry, patients transport services, etc. - funding to local authorities meant at providing renting 	<p>2. Is an undertaking engaged in economic activity? This is defined as offering goods and/or services on a given market and which could, at least in principle, be carried out by a private operator for remuneration in order to make profits.</p>		

	<p>at a lower price.</p> <ul style="list-style-type: none"> - the management of transport infrastructure. <p>Whenever the State acts in the exercise of its' public powers, respectively the activity in question is a task that forms part of the essential functions of the State or is connected with those functions by its nature, its aim and the rules to which it is subject, it is not to be considered an undertaking.</p> <p>Example of non-economic activities:</p> <ul style="list-style-type: none"> - compulsory education; - anti-pollution surveillance; - standardisation activities; - construction of railway infrastructure; - general promotion of tourism in a region. 	<p>3. Any products/services offered on a market?</p>		
	<p>The key issue is to consider whether, and under which conditions, the grant award/financial support favours certain undertakings by giving them an <u>economic advantage</u>.</p> <p>In line with the case law of the European Courts, the concept of economic advantage under the State aid rules includes any advantage “which the recipient undertaking would not have received under normal market conditions”.</p> <p>The Altmark judgement of the European Court of Justice concerning services of general economic interest also expressed the view that public procurement procedures allow for the selection of the tenderer capable of providing the given services “at the</p>	<p>4. Does the measure/ grant award /financial support confer 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 tender or by a Service of General Economic Interest (SGEI) provided the SGEI meets the <i>Altmark criteria</i>)?</p>		

	<p>least cost to the community”.</p>	<p>For example a service that is reimbursed at market price <u>is not conveying an advantage</u>.-</p> <p><u>All studies or other results of the non-investment research and development projects must be made available for free to all interested individual or legal persons, in a non-discriminatory way in order not to be considered an economic advantage.</u> On the other hand, according to the provisions of Regulation 651/2014 art 25, <i>alin. 6 b ii</i>) the intensity can be increased if the results are disseminated for free.</p>		
	<p>Usually, a direct grant represents by itself an economic advantage. However, there are situations in which such grants do not confer a direct advantage.</p> <p>The economic advantage may be avoided, for the projects that have as results research, IT tools/software and/or if training is involved, competing undertakings in the relevant market will be able to/can use the project output (e.g. ICT tool/software, training course) in the same way and under the same conditions as the lead partner, any of the project partners or the end users of the project. All undertakings in the market (will) have the same benefit and no undue advantage will be/is given for anybody. This is the case when the outputs are transferable to the whole market and when</p>	<p>5. Is there any indirect advantage awarded to one or more undertakings?</p>		

	<p>they are open-source, i.e. the source (e.g. source code, curricula) and certain other rights (e.g. content) normally reserved for copyright holders are provided under a public license.</p> <p>It might also be the case for public services. The service has to be defined through an entrustment act (a normative act (Law, Ordinance, Emergency Ordinance, Government Decision, Local Council Decision)) through which the state entrusts an undertakings with the obligation to perform the defined SGEI. The entrustment act has to include</p> <ul style="list-style-type: none">a) the content and duration of the public service obligations;(b) the undertaking and, where applicable, the territory concerned;(c) the nature of any exclusive or special rights assigned to the undertaking by the authority in question;(d) the parameters for calculating, controlling and reviewing the compensation; and(e) the arrangements for avoiding and recovering any overcompensation. If the service is not provided on a free basis by the authority itself, the Altmark criteria have to be taken into account:<ul style="list-style-type: none">– ... First, the recipient undertaking must actually have public service obligations to discharge, and the obligations must be clearly defined. ...– ... Second, the parameters on the basis of which the compensation is calculated must be established in advance in an objective and transparent manner, to avoid it conferring an economic advantage which may			
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	<p>favour the recipient undertaking over competing undertakings. ... Payment by a Member State of compensation for the loss incurred by an undertaking without the parameters of such compensation having been established beforehand, where it turns out after the event that the operation of certain services in connection with the discharge of public service obligations was not economically viable, therefore constitutes a financial measure which falls within the concept of State aid within the meaning of Article (107(1) of the Treaty).</p> <p>– ... Third, the compensation cannot exceed what is necessary to cover all or part of the costs incurred in the discharge of public service obligations, taking into account the relevant receipts and a reasonable profit</p> <p>... Fourth, where the undertaking which is to discharge public service obligations, in a specific case, is not chosen pursuant to a public procurement procedure which would allow for the selection of the tenderer capable of providing those services at the least cost to the community, the level of compensation needed must be determined on the basis of an analysis of the costs which a typical undertaking, well run and adequately provided with means of transport 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’ Even if the operator does not have profit it receives funds for its operating costs and an advantage is granted. This also applies if the operator does not pay a fee for concession that is proportionately with the value of the infrastructure and the concession period.</p>			
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	<p>An advantage can be conferred on undertakings other than those to which State resources are directly transferred (indirect advantage). An indirect advantage is present if the measure is designed in such a way so as to channel its secondary effects towards identifiable undertakings or groups of undertakings. This is the case, for example, if the direct aid is, de facto or de jure, made conditional on the purchase of goods or services produced by certain undertakings only. Also, the indirect advantage might occur, for example, in the following cases”:</p> <ul style="list-style-type: none">-business incubators established with State support if part of the aid is transferred by the recipient undertaking to the incubated companies (by means of lower level of rent as compared to the market conditions, of services as accounting or law consultancy provided at lower fees than those available on the market.-building of infrastructure for the sole or main use of an undertaking.-Such indirect advantages should be distinguished from mere secondary economic effects that are inherent in almost all State aid measures (e.g. through an increase of output). For this purpose, the foreseeable effects of the measure should be examined from an ex ante point of view.	<p>6. Are there indirect advantages awarded to other undertakings?</p>		
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<p>3. Selectivity</p>	<ol style="list-style-type: none"> 1. As the grants within the CBC framework are awarded only to certain entities, the selective nature is always present. 2. An analysis of the selective nature is relevant only when there is an indirect advantage. Beside the examples above, for example, in the cases involving research, if the results of the research are made available to a limited number of undertakings there might be a selective economic advantage granted to those undertakings. In order to avoid the selectivity issues in such a case ensuring a sufficient promotion of the results, by means of publication in speciality magazines and/or on the project's web page. Furthermore, as the provision of Regulation 651/2014, must be observed, in the sense that at research development and innovation State aid, ensuring a sufficient promotion is a criteria to receive a higher intensity, but the measures are still considered State aid. 	<p>Selectivity criteria is always met in the case of the direct beneficiary. Almost certainly 'yes' in ETC.</p> <p>7.If there are indirect beneficiaries, is there a selective nature or all the potential undertakings can benefit?</p>		
<p>4. Distortion of competition</p>	<ol style="list-style-type: none"> 1. A measure granted by the State is considered to distort or threaten to distort competition when it is liable to improve the competitive position of the recipient compared to other undertakings with which it competes. 2. For the case of the CBC, should all the other above conditions be fulfilled, this criteria is automatically met, with the exemption of the situation in which the recipient is holding a legal monopoly. 3. For example, the railway infrastructure 	<p>8. Is there a competitive market for the product/service in question?</p> <p>Always presumed 'yes', if there is an advantage</p>		

	<p>represents a legal monopoly in Romania. Always presumed 'yes', if there is an advantage</p>			
5.Effect on trade between Member States	<p>1. This criterion is considered automatically fulfilled in most of the cases, and it does not require a detailed definition of the market.</p> <p>2. The effect on competition might be only potential. For example, a State aid might inhibit a company from another Member State from opening a branch.</p> <p>In order to assert that this criterion is not fulfilled, the project in question must have a mere local impact. For this, the following characteristics have to be fulfilled</p> <p>(a) the aid does not lead to demand or investments being attracted to the region concerned and does not create obstacles to the establishment of undertakings from other Member States;</p> <p>(b) the goods or services produced by the beneficiary are purely local or have a geographically limited attraction zone;</p> <p>(c) there is at most a marginal effect on the markets and on consumers in neighbouring Member States;</p> <p>Some examples are:</p> <ul style="list-style-type: none"> - swimming pools and other leisure facilities intended predominantly for a local catchment area; - museums or other cultural infrastructure unlikely to attract visitors from other Member States; 	<p>9. Is there a European market for the product/service in question, or does it have a mere local nature?</p> <p>Always presumed 'yes', if there is an advantage</p>		

	<ul style="list-style-type: none"> - hospitals and other health care facilities aimed at a local population; - news media and/or cultural products which, for linguistic and geographical reasons, have a locally restricted audience - a conference centre, where the location and the potential effect of the aid on prices is unlikely to divert users from other centres in other Member States; 			
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B. Conclusion

As a result of the assessment we conclude that:

- For the project no activities that are subject to State aid rules were identified.
- For the project the following activities that do not comply with State aid rules were identified:

Description of the activity	Partner(s) involved	Country	Clarification/revision recommended , if applicable

C. Decision

The project assessed is considered **ACCEPTED /REJECTED** for the state aid compliance stage.