

Factsheet 4: Guidance on State aid definition

1. Introduction

The principles governing so-called State aid are enshrined in the Treaty, mainly in Articles 107-109 of the Treaty on the Functioning of the European Union (TFEU). In essence, this provides for a general prohibition on the use of State aid, subject to certain exceptions, the interpretation of which are largely the preserve of the European Commission, subject to the jurisprudence of the European Courts.

A critical issue in matters of State aid compliance is that a concrete definition remains elusive: “the European Court has not yet provided a consistent and comprehensive interpretation of the conditions for State aid”.¹

The notion of what constitutes a State aid is fundamental to being able discipline it, but the Treaty presents domestic policymakers with a conundrum insofar as it contains no precise definition of what is subject to control. The growing complexity of public-private relations, together with the wider range of activities now open to competition means that this is a difficult task. Nevertheless, the definitional issue is crucial since it determines whether or not a given measure² requires to be notified to the Commission (or whether another route to compliance, such as the General Block Exemption regulation (GBER) or *de minimis* needs to be found). As a result, domestic policymakers must make some *a priori* assessment of whether a measure involves aid in order to decide what steps to take to ensure compliance.

In 2014 the Commission sought, for the first time, systematically to clarify the concept of State aid. This took the form of a notice which was published on 19 July 2016³. For the most part the document is a compilation of existing case law – since the ultimate arbiter is the European Court - but it also refers to the ‘decisional practice’ of the Commission. This is helpful in and of itself, but nevertheless leaves a margin of appreciation, and consequently uncertainty, for domestic authorities in the assessment process. The notice provides a useful overview of Commission thinking. Also relevant, the R&D&I State aid guidelines outline the Commission’s understanding of the notion of State aid in relation to situations typically arising in the field of research and development and innovation activities. This too is a helpful development, but again is without prejudice to the interpretation of the Court of Justice.⁴

¹ Bacon, K (2013) *European Union Law of State Aid*, Second edition, Oxford University Press, p20.

² The term ‘measure’ is used in a neutral sense to refer to an intervention that may or may not involve State aid.

³ Commission Notice on the notion of State aid as referred to in Article 107(1) of the Treaty on the Functioning of the European Union (2016/C 262/01) (OJEU C 262/1, 19 July 2016)

⁴ Framework for State aid for research and development and innovation, OJEU No C198/1 of 27 June 2014, see: <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=OJ:C:2014:198:FULL&from=EN>

2. Summary

Although State aid is in principle prohibited under EU law (Articles 107-108 TFEU), the Treaty does not precisely define what a State aid is. However, an assessment of whether a project is State aid relevant is needed before support is approved.

This assessment can usefully be broken down into two steps:

- First, is the recipient an undertaking - that is, is the activity to be supported economic in nature?
- Second, if the activity is economic, does the support involve State aid?

The second step is the State aid ‘test’: where the beneficiary *is* an undertaking for the purposes of the project – i.e. is engaged in an economic activity - the five elements of the State aid ‘test’ should be applied. These criteria are cumulative, so *all* must be met for the measure to constitute aid.

1. Is the measure imputable to the **State** and financed through **State resources**? Yes: this is always the case for ESIF programmes.
2. Does the measure confer an **advantage** on the undertaking? This is the most difficult criterion to determine and concerns whether there is a benefit that the undertaking would not gain under ‘normal market conditions’ or whether it is relieved of costs that it would normally have to meet. Where a transaction is carried out on market terms there is no advantage, and therefore no aid.
3. Is the measure **selective**? Yes: ETC programmes are by their nature selective.
4. Does the measure **distort** or **threaten to distort competition**? Almost certainly ‘yes’, if there is an advantage.
5. Does it have the potential to **affect trade between the Member States**? Almost certainly ‘yes’, since ETC programmes are not intended to have purely local effects.

As can be seen, the presence of State aid will largely turn on whether the entity is engaged in an *economic activity* and, if so, whether the measure provides an *advantage* in respect of that activity. Importantly, it is also necessary to consider the presence of aid at several levels. For example, funding to an organisation to provide training courses to firms may involve aid to the course provider, as well as to the firms undergoing training.

3. Undertakings and economic activity

3.1 Undertakings

In order to qualify as aid, the recipient of the advantage conferred must be an *undertaking*. The notion of *undertaking* is neutral as to ownership, legal status and financing. The term

undertaking is not defined in EU law, but it is established that it may be public or private, voluntary, charitable or not-for-profit, involve a group of organisations or a public-private partnership or a self-employed individual; the key is not the *status* of the organisation, but the activity in which it is engaged:

“the Court has consistently held that, in the context of competition law, the concept of an undertaking covers any entity engaged in an *economic activity*, regardless of the legal status of the entity or the way in which it is financed”.⁵ [emphasis added]

The classification of an entity as an undertaking depends entirely on the nature of its activities. In practice, this means that:

- Undertakings may be charities, clubs or associations, public bodies, universities, social enterprises etc. etc. as well as private firms
- It does not matter whether the entity aims to generate profits

An entity can be engaged in economic and non-economic activities; it is only an undertaking in relation to economic activities.

3.2 Economic and non-economic activities

Economic activity is broadly defined as ‘any activity consisting in offering goods or services on a given market’.⁶ If a market “however limited” exists for the activity concerned then the activity is organised on market principles and it is to be considered economic.⁷ Even if a public authority decides to close a market to competition, an economic activity can exist where other operators would be willing and able to provide the service in the market concerned.⁸ On the other hand, the mere fact that private operators are already operating a service does not mean that, if the State carries out the same or a similar activity, this activity automatically has to be considered economic – this should be judged rather on the kind of activity concerned, considering also the context in which it takes place.⁹

The Commission has provided **examples of economic and non-economic activities**, based on past decisions and case law,¹⁰ but it has also made clear that: the distinction between

⁵ Joined cases C-180/98 to C-184/98 *Pavlov and others and Stichting Pensioensfond Medische Specialisten*, [2000] ECR-I-6451, para 74.

⁶ C-222/04 *Ministero dell’Economia e delle Finanze v Cassa di Risparmio di Firenze* [2006] ECR I-289, para 108.

⁷ State aid N 293/2008 – Hungary – aid for multifunctional community cultural centres, museums, public libraries: http://ec.europa.eu/competition/state_aid/cases/226186/226186_894107_35_1.pdf

⁸ European Commission (2014) Draft Commission Notice on the notion of State aid pursuant to Article 107(1) TFEU, para 14.

⁹ SA 25745 – Germany – National website for auctions in insolvency proceedings: http://ec.europa.eu/competition/state_aid/cases/247954/247954_1433360_92_2.pdf

¹⁰ See Commission notice on the notion of State aid (OJEU C 262/1 of 19 July 2016), Communication from the Commission on the application of the European Union State aid rules to compensation granted for the provision of services of general economic interest (OJEU C 8/4 of 11 January 2012) and Commission Staff Working

economic and non-economic services depends on political and economic specificities in a given Member State¹¹ and the organisation of that activity in the Member State concerned; and that the definition may change over time.¹² In consequence, it considers that:¹³

“it is not possible to draw up an exhaustive list of activities that a priori would never be economic. Such a list would not provide genuine legal certainty and would thus be of little use.”

The limited scope of those activities deemed ‘non-economic’ and the fact that a wide margin of appreciation still remains is illustrated below.

Examples of economic and non-economic activity

Economic	Non-economic
<ul style="list-style-type: none"> • Examples include: • employment procurement by public employment agencies • optional insurance schemes based on the capitalisation principle • emergency transport and patient transport services • management of transport infrastructure • provision of infrastructure ancillary to social housing 	<ul style="list-style-type: none"> • Activities related to State prerogative: • armed forces and police • maintenance and improvement of air navigation safety, air traffic control, maritime traffic control and safety • anti-pollution surveillance as regards protection of the environment in maritime areas • organisation, financing and enforcement of prison sentences • Certain purely social activities • management of compulsory social security • provision of childcare and public education • organisation of public hospitals

Source: Commission Staff Working Document (2013) op cit, pp31.

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 are also non-economic.¹⁴ This would extend to leisure facilities such as cycle paths, nature trails and

Document (2013) 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, SWD(2103) 53 final/2, Brussels, 29 April 2013.

¹¹ Para 15, Communication from the Commission on the Application of the European State aid rules to compensation granted for the provision of services of general economic interest, OJ C8/4 of 11 January 2012,

¹² Commission notice on the notion of State aid, point 13.

¹³ Commission notice on the notion of State aid, point 15.

¹⁴ European Commission (2014) Commission Notice on the notion of State aid pursuant to Article 107(1)TFEU, para 7.2.1.

associated signage, equipment and information and rest areas to be used without charge.¹⁵ Importantly, however, the future use of infrastructure (for an economic activity or not) determines whether the funding of its construction falls within the scope of State aid.¹⁶ Nevertheless, certain types of activities are excluded from this principle since they fall within the public remit and are not economic. In the case of ports, for example, investment in infrastructure which is exclusively reserved for functions in the public remit (customs and police related, security infrastructure) are non-economic activities. The distinction between the public remit and economic activities needs to be done on a case-by-case basis and is not a static concept; it also needs to be considered at the level of the owner, the operator and the user. It may change, for example, if an activity is privatised. In past decisions, the Commission has, in certain conditions, considered maritime access routes such as breakwaters, sea locks, navigable channels, sea walls and rails tracks outside the port to be non-commercially exploitable infrastructures, but other cases have indicated otherwise, ultimately leaving this question open.¹⁷

The status of an activity as economic or not also depends on the **terms** on which the goods or services are supplied – healthcare and pensions are obvious examples. Even if an entity provides services totally free-of-charge to users or customers and is financed entirely by the State, it can still be an undertaking – museums and libraries, for example, cannot be excluded from the scope of ‘undertaking’ on this basis. On the other hand, where such beneficiaries do not qualify as undertakings (because their activity is non-economic), then the financing involved is a transfer of funds within the State, which does not constitute State aid. It follows that the classification of an entity as an undertaking is always relative to a **specific activity** – an entity can be regarded as an undertaking for some of its activities and not for others. For example, a cultural centre offering theatre performances and music concerts is engaged in an economic activity, but when it offers extracurricular activities for primary school children it is not.¹⁸ Similarly, research organisations and infrastructures (including public universities and private research institutes) can carry out both economic and non-economic activities, but the

¹⁵ See, for example, SA 35909 – Czech Republic – Infrastructure for tourism: http://ec.europa.eu/competition/state_aid/cases/247108/247108_1471756_131_2.pdf and SA 34891 - Poland – State support to Związek Gmin Fortecznych Twierdzy Przemysł: http://ec.europa.eu/competition/state_aid/cases/244866/244866_1398073_222_3.pdf

¹⁶ C-288/11 P, *Freistaat Sachsen and others v European Commission (Leipzig Halle)* http://curia.europa.eu/juris/document/document_print.jsf?doclang=EN&text=&pageIndex=0&part=1&mode=lst&docid=131967&occ=first&dir=&cid=17784 (accessed March 2014).

¹⁷ See European Commission (2012) Infrastructure Analytical Grids, ref Ares (2012)934142-01/08/2012 – these appear not to have been formally published by the Commission, but are widely available online, including here: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/15278/State_Aids_Guidance.pdf

¹⁸ State aid no N 293/2008 – Hungary – Aid for multifunctional community cultural centres, museums, public libraries: http://ec.europa.eu/competition/state_aid/cases/226186/226186_894107_35_1.pdf

costs and revenues must be separated for the non-economic activities to fall outside the scope of State aid.¹⁹

In practice, the distinction between economic and non-economic activities is not always straightforward. In particular, it is important to bear in mind that the **objective** of the measure (e.g. cultural, environmental or other public interest, as opposed to overtly commercial) is not relevant to whether the activity is economic or not. A recent case involving the transfer of woodland areas to non-governmental organisations (NGOs) gives some flavour of the reach of State aid – see Box 1. In this case, the Commission had found the measure to be compatible aid, but the point at issue before the Court was whether the measure involved aid at all. This was contested by the German authorities, supported by France, Finland and the Netherlands – which considered that the measure did not involve aid because the activity was not economic. This ruling shows that even where the objectives are clearly in the public interest (in this case environmental) and there is no intention to generate a profit, the activity may still be economic.²⁰

¹⁹ Framework for State aid for research and development and innovation, para 18.

²⁰ Note, however, that the measure was found by the Commission to involve *compatible* aid.

Box 1: Example of economic activity - German nature conservation areas²¹

This case arose from the Federal German government's decision to divest itself of areas of woodland, transferring ownership to various nature conservation bodies and assigning them responsibility for maintenance. The transfer was notified to the Commission, but the German authorities argued that the measure did not involve aid. The Commission disagreed, but found the measure compatible with the Treaty; the Commission decision that the measure did involve aid was appealed to the General Court, which upheld the Commission decision.

Germany's main line of argument was that the NGOs were not *undertakings* – national legislation and the contract setting out the terms of the transfer regulated what could be done on the land and, although the NGOs could raise revenue from, for example, the sale of fishing or hunting permits, any surplus income had to be reinvested in the land or returned to the Federal Government.

The General Court did not share this view. It observed that even an organisation with exclusively social objectives may also carry out economic activities. The terms of the transfer contract enabled them to raise revenues from leisure activities, sale of timber, hunting and fishing permits and those sales could be carried out on commercial terms in the same way as private providers of the same. The Court also did not agree that the need to protect plant life from animals meant that the sale of hunting permits was intrinsically linked to its environmental objectives. It was also not relevant that the NGOs were not seeking a profit as such since they were competing on the market (for timber and hunting and fishing permits etc.) with organisations that were operating on a commercial basis.

The Greek case outlined in Box 2 also shows how extensive the notion of economic activity can be. This is a somewhat surprising decision insofar as the Commission could arguably have concluded that the activities of the museum were not capable of being commercial since the revenues would not cover the operating costs over a 15-year period in an area of activity from which the private sector was excluded by law.

²¹ Commission decision in State aid NN 8/2009 – Germany Nature conservation areas:
http://ec.europa.eu/competition/state_aid/cases/229660/229660_973605_24_1.pdf; Case T-347/09 Federal Republic of Germany v European Commission: <http://curia.europa.eu/juris/liste.jsf?language=en&num=T-347/09>

Box 2: Example of *economic activity* – archaeological museum²²

In *Messara Archaeological Museum*, the Greek authorities considered that the construction of a new archaeological museum in Crete was non-economic because:

- a) the safeguarding and exhibition of to the public of unique Greek archaeological monuments is provided exclusively by the State according to the constitution and no private bodies are allowed to offer such services;
- b) the main aim of the project was to protect antiquities and conservation and not to promote tourism or any other inherently commercial activity; and
- c) the museum is not expected to result in profits – indeed the profitable exploitation of archaeological monuments is illegal under Greek law and any revenue would be channelled back into purely cultural purposes without benefiting any commercial activity.

The Commission was of the view that the existence of an economic activity could not be ruled out since the museum would provide a service against remuneration. The exclusion of third parties from providing a certain service did not rule out the existence of an economic activity, nor did the absence of profit. However, the Commission concluded that, largely owing to the remote location, the project would not have an effect on intra-EU trade.

It was common ground that the provision of canteen services and construction works *were* economic activities, however, in both cases the contractors either had been or would be appointed on the basis of open, transparent, non-discriminatory and unconditional tender procedures organised in line with EU Directive 2004/18/EC; there was no *advantage* accorded to the construction firm and as the museum had no effect on intra-EU trade, then nor could the canteen.

The ‘landmark’ *Leipzig-Halle* (see Box 3) case of infrastructure funding and State aid has had considerable implications for domestic authorities, resulting in uncertainty in what could be funded by public bodies without raising State aid issues and leading the Commission to develop the so-called ‘infrastructure analytical grid’.²³

²² Commission Decision SA.36581 (2013/NN) – *Greece – Construction of Archaeological Museum Messara, Crete*, 6 November 2013.

²³ European Commission (2012) Infrastructure Analytical Grids, ref Ares (2012)934142-01/08/2012

Box 3: Public funding of infrastructure as an *economic activity* – Leipzig-Halle²⁴

Historically, public funding of general infrastructure was either considered to be within the ‘public remit’ or if non-discriminatory access was granted to all potential users, was not considered to involve State aid.²⁵ The Commission’s interpretation of ‘economic activities’ changed following the General Court’s ruling in *Aéroports de Paris*.²⁶ In this case the Court held that:

“The provision of airport facilities to airlines and the various service providers by a public corporation, in return for a fee at a rate freely fixed by the latter, and the management of those facilities are *economic activities*, and although those activities are carried out on publicly-owned property, they do not for that reason form part of the exercise of a task conferred by public law.” [emphasis added]

The *Aéroports de Paris* case was not concerned with State aid, but the ruling nevertheless effectively invalidated the principle that infrastructure projects could not be controlled by the State aid rules. The European Court of Justice ruling in *Leipzig-Halle* extended this logic and linked the construction of infrastructure to its later exploitation: if the subsequent use of the infrastructure constitutes an economic activity, then the funding of the construction may entail State aid. Importantly, the Commission has made clear its view that:²⁷

“it cannot be denied anymore that the financing of *any type of infrastructure* (excluding infrastructure related to security, safety, etc.) that is later commercially exploited is State aid relevant.” [emphasis in original].

This implies that only infrastructure that is not commercially exploited and is built in the interest of the general public is excluded from the applications of the State aid rules. Examples include public roads (other than toll roads / roads operated by a concessionaire) or public parks and playgrounds. In addition, case law has confirmed that infrastructure related to national security, safety, air traffic control, meteorological services all fall within the public remit. Notwithstanding these exclusions, the *Leipzig-Halle* decision meant there were few types of infrastructure funding that fell clearly outside the scope of the State aid rules, a fact which was the source of considerable uncertainty and concern to many public authorities.

The *land development* decision (see Box 4) is helpful in clarifying the contours of economic activities and the scope of the ‘public remit’. In this case the German authorities re-notified a

²⁴ C-288/11 P, *Freistaat Sachsen and others v European Commission (Leipzig Halle)*

http://curia.europa.eu/juris/document/document_print.jsf?doclang=EN&text=&pageIndex=0&part=1&mode=lst&docid=131967&occ=first&dir=&cid=17784

²⁵ DG Competition (2011) Note to DG Regio (unpublished), see: http://www.esfondi.lv/upload/00-vadlinijas/Note_on_State_aid_for_infrastructure_projects.pdf.

²⁶ Case T-128/98 *Aéroports de Paris v European Commission*: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:61998TJ0128:EN:HTML>, confirmed on appeal in C-82/01 P: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62001CJ0082:EN:HTML>

²⁷ DG Competition (2011) *op cit*.

measure in 2013 which had been notified in 2002 and which the Commission had then concluded did not involve aid. The German authorities re-notified the measure for legal certainty in the light of the *Leipzig-Halle* decision, which had created considerable uncertainty regarding the presence of State aid in the public funding of infrastructure. Note, however, that the decision refers explicitly to land and associated utilities and infrastructure such as roads, but does not refer to the construction of buildings or other structures.

Box 4: Example of *non-economic* activity – land development by local authorities²⁸

In *GRW land development* the German authorities notified for legal certainty a regional development scheme for the development and revitalisation of land for the subsequent construction of industrial and commercial infrastructure. The purpose of the scheme is to make the land ready to build on, including decontamination in line with the ‘polluter pays’ principle and ensure connections to utilities and transport networks. Eligible costs are, in particular: groundwork for making land ready to build; construction costs for street, street lighting, anti-noise barriers and landscaping; connection costs for water, electricity, gas and sewage; environmental protection and decontamination, subject to the polluter-pays principle; removal of existing buildings (eg old factories, military installations). The measure does not concern funding the construction of buildings or other structure, nor the management or administration of land or buildings, but only making the terrain ready to build on.

The direct recipients of funds are generally local authorities or associations thereof, but can be not-for-profit bodies and joint-ventures with commercial enterprises where the majority share is held by local authorities or not-for-profit bodies. The direct recipients of the funds – the bodies implementing the projects – are normally the owners of the land. The implementation of the projects can be entrusted to developers through an open, transparent and non-discriminatory tender process; the developers may not use the land themselves. The Commission considered the potential for aid at three main levels, but the point at issue here concerns 1(a), below.

- 1) Bodies implementing the projects:
 - a) *Land development by local authorities*: here the Commission concluded that the development and revitalisation of public land by local authorities *is not an economic activity*, but ‘part of their public tasks, namely the provision and supervision of land in line with local urban and spatial development plans.’ The resources involved were therefore an intrastate transfer and did not involve State aid.
 - b) *Land development by other entities*: in this instance no intrastate transfer is involved, but the obligation to refund any possible profits from the subsequent sale of land excludes the possibility of an *advantage*.

²⁸ Commission Decision SA.36346 (2013/N) Germany – GRW land development scheme for industrial and commercial use.

- c) *Land development where the body responsible for implementation is not the owner of the land:* the owner has to pass on all the benefits from the development, including any increase in value of the land, which excludes the possibility of an advantage to the land owner, who is therefore not an aid beneficiary.
- 2) *Developers:* are engaged in an economic activity, but would always be selected through an open, transparent and non-discriminatory public procurement procedure, and therefore not gain an *advantage*.
- 3) *Purchasers of the land:* the land must be sold in accordance with the Commission's Communication on land sales,²⁹ thus providing sufficient safeguards that the land is sold at a market price and the purchaser does not gain an advantage.

Non-economic activities of research organisations include their 'primary' activities, namely: public education; independent R&D for more knowledge and better understanding, including collaborative R&D (but excluding contract research); and wide dissemination of research results on a non-discriminatory basis, for example through open access databases, publications and software. Knowledge transfer activities of research organisations and infrastructures where all profits are reinvested in their primary activities are also regarded as non-economic.³⁰

The 2014 Framework on State aid for research and development and innovation³¹ provides some guidance on the presence or absence of aid in certain R&D&I situations.³² This may prove helpful in the case of ETC projects involving publicly-funded research institutes involved in industry-oriented research and knowledge transfer, enabling the possibility of aid to such organisations to be excluded altogether in some instances.³³ The discussion here is primarily focussed on whether research organisations are engaged in economic activities – and therefore the circumstances in which they may be characterised as undertakings; an important, but distinct, question is whether private undertakings that collaborate with such organisations obtain an advantage from that association. This question is addressed later.

In broad terms, the R&D&I Framework indicates that public funding of the core teaching, research and knowledge exchange activities of university and other research organisations do not involve State aid because the activities are non-economic. This also applies to technology transfer type activities such as licensing and spin-off research created by the research organisation where these are conducted internally and the profits reinvested.

²⁹ Commission Communication on State aid elements in sales of land and buildings by public authorities, OJEC No C209/3 of 10 July 1997, see: [http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:31997Y0710\(01\)&from=EN](http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:31997Y0710(01)&from=EN)

³⁰ Framework for State aid for research and development and innovation, para 19(a).

³¹ Framework for State aid for research and development and innovation, OJEU No C198/1 of 27 June 2014, see: <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=OJ:C:2014:198:FULL&from=EN>

³² R&D&I Framework, paras 16-34.

³³ It should also be borne in mind that even where State aid is involved in supporting R&D&I activities, a range of interventions is covered by the GBER.

Box 5: Non-economic activities of research and knowledge dissemination organisations and research infrastructures³⁴

- Primary activities of research organisations and research infrastructures, in particular:
 - Education for more and better skilled human resources – essentially education organised within the national educational system, predominantly funded by the State and supervised by the State. *However, workforce training is not a non-economic primary activity of research organisations.*
 - Independent R&D for more knowledge and better understanding, including collaborative R&D where the research organisation or infrastructure engages in effective collaboration. *However, contract research and provision of research services are not considered forms of collaboration; provision of R&D services and R&D carried out on behalf of undertakings are not considered as independent R&D.*
 - Wide dissemination of research results on a non-exclusive and non-discriminatory basis, for example through teaching, open-access databases, open publication or open software.
- Knowledge transfer activities, where they are conducted either by the research organisation or research infrastructure (including their departments or subsidiaries) or jointly with or on behalf of other such entities and where all profits from those activities are reinvested in the primary activities of the research organisation or research infrastructure. The non-economic nature of those activities is *not* prejudiced by contracting the provisions of corresponding services to third parties by way of open tenders.

Close attention needs to be paid to the precise terms, some, but not all of which are defined in the R&D&I Framework – see Box 6.

Where a research organisation or research infrastructure is used for **both economic and non-economic activities**, public funding falls under the State aid rules only insofar as it covers costs linked to the economic activities.³⁵

In general, where research organisations or infrastructures are involved in **economic activities** such as renting out equipment or laboratories, supplying services to undertakings or performing contract research, public funding of those economic activities will generally be considered State aid.³⁶

³⁴ R&D&I Framework, para 19.

³⁵ R&D&I Framework, para 20.

³⁶ R&D&I Framework, para 21.

Box 6: Selected definitions of terms under the R&D&I Framework³⁷

Research and knowledge dissemination organisation means:³⁸

- Entities such as universities, research institutes, technology transfer agencies, innovation intermediaries, research-oriented physical or virtual collaborative entities
- Irrespective of legal status (public or private law) or means of financing
- Whose primary goal is to independently conduct fundamental research, industrial research or experimental development or to widely disseminate the results of such activities by way of teaching, publication or knowledge transfer

Research infrastructure means:³⁹

- Facilities, resources and related services that are used by the scientific community to conduct research in their respective fields and includes scientific equipment or sets of instruments, knowledge-based resources such as collections, archives or structured scientific information; infrastructures may be single-sited or distributed.

Effective collaboration means:⁴⁰

- collaboration between at least two independent parties
- to exchange knowledge or technology or to achieve a common objective based on a division of labour where the parties jointly define the scope of the project, contribute to its implementation and share its risks and results; one or several parties may bear the full costs of the project and thus relieve the other parties of their financial risks.

Knowledge transfer means:⁴¹

- any process which aims to acquire, collect and share explicit and tacit knowledge, including skills and competence in both economic and non-economic activities such as research collaborations, consultancy, licensing, spin-off creation, publication and mobility of researchers and other personnel.
- knowledge on the use of standards and regulations embedding them in real life operating environments and methods for organisational innovation, and management of knowledge related to identifying, acquiring, protecting defending and exploiting intangible assets.

An important issue in some case is the need to **identify all the potential beneficiaries** of the measure. Each group of beneficiaries is potentially a different level of aid. For example, proposed funding to an organisation to provide training courses to firms may involve aid at two levels – at the level of the training organisation and at the level of the firms receiving the

³⁷ This is a summary of the main terms referred to in this section: for precise wordings and the full list of terms which are defined, reference should be made to the R&D&I Framework, para 15.

³⁸ R&D&I Framework, paras 15(ee).

³⁹ R&D&I Framework, paras 15(ff).

⁴⁰ R&D&I Framework, paras 15(h).

⁴¹ R&D&I Framework, paras 15(v).

training. Some specific situation arises in the case of R&D&I which is discussed separately below.

In the *GRW land development scheme* the Commission considered as potential beneficiaries (i) the direct recipients of funds for implementing projects, (ii) the developers and (iii) the final purchasers of land,⁴² though it ultimately found there to be no aid at any level on the basis of the absence of an advantage for the latter two groups. It considered that developers are engaged in an economic activity, but as they would always be selected through an open, transparent and non-discriminatory public procurement procedure, they would not gain an *advantage*. Purchasers of the land might also be engaged in an economic activity, but as the land must be sold in accordance with the Commission's Communication on land sales,⁴³ this provides sufficient safeguards that the land is sold at a market price and the purchaser does not gain an advantage.

Similarly, in *Messara Archaeological Museum*,⁴⁴ the Commission considered: (i) the owner of the museum; (ii) the operator of the museum; (iii) the operator of the canteen in the museum; and (iv) the contractor for the construction works. In this case, the owner and operator of the museum was the State, while private firms were responsible for canteen services and construction works. It was common ground that the provision of canteen services and construction works *were* economic activities, however, in both cases the contractors either had been or would be appointed on the basis of open, transparent, non-discriminatory and unconditional tender procedures organised in line with EU Directive 2004/18/EC; there was no *advantage* accorded to the construction firm and as the museum had no effect on intra-EU trade, then nor could the canteen have such an effect.

Finally, a *research organisation or infrastructure* itself will not be considered the beneficiary of State aid if it merely acts as a conduit for passing on to final beneficiaries all the public funding and any advantage acquired through such funding.⁴⁵ In such cases, the final beneficiaries (e.g. firms purchasing laboratory services at subsidised prices) *will* be recipients of aid.⁴⁶ As such, appropriate steps will need to be taken to ensure that aid at this level is compatible.

⁴² Commission Decision SA.36346 (2013/N) Germany – GRW land development scheme for industrial and commercial use.

⁴³ Commission Communication on State aid elements in sales of land and buildings by public authorities, OJEC No C209/3 of 10 July 1997, see: [http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:31997Y0710\(01\)&from=EN](http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:31997Y0710(01)&from=EN)

⁴⁴ Commission Decision SA.36581 (2013/NN) – Greece – Construction of Archaeological Museum Messara, Crete, 6 November 2013.

⁴⁵ R&D&I Framework, para 22.

⁴⁶ R&D&I Framework, para 23.

4. Presence of aid

For each undertaking or class of undertaking (e.g. a group of SMEs which are potential beneficiaries on the same terms), the five elements of the State aid test should be applied. These are cumulative – all must be met for the measure to constitute State aid.

State aid tests	
Is the measure imputable to the State and financed through State resources ?	YES. Once Structural Funds come under the control of the Member States, they are regarded as State resources.
Does the measure confer an advantage on the undertaking?	<i>Needs to be considered on a case-by-case basis and for each potential beneficiary</i>
Is measure selective ?	YES. ETC programmes only apply to certain regions.
Does the measure distort or threaten to distort competition ?	Almost certainly YES if there is an advantage.
Does it have the potential to affect trade between the Member States ?	Almost certainly YES since ETC projects by their nature are not intended to have only local effects.

In practice, four of the five tests will almost certainly be met:

- It is established that Structural Funds are regarded as **imputable to the State** and financed through **State resources** once there is Member State discretion as to how to allocate them.
- ETC programmes are, by their nature, **selective** since they apply in only certain regions and are not generally available.
- The circumstances in which there has been found to be no **potential distortion of competition** Member States have been rare in the decisional practice of the Commission and European Court case law and in analysing the presence of aid, it is not recommended to rely on this criterion alone not being fulfilled. In particular, if there is an advantage to an undertaking, there will almost certainly be a potential distortion of competition.
- Similarly, the bar is set low regarding the **effect on trade between Member States**. Only in few cases have such effects not been found and these circumstances can be considered even less likely in the context of ETC programmes.

To the extent that beneficiaries are found to be undertakings (i.e. engaged in an economic activity, as described above), the presence of aid will largely turn on whether the measure confers an **advantage** or a benefit that the undertaking would not otherwise have received.

4.1 Does the measure confer an advantage on the undertaking?

For each undertaking, or group of undertakings, identified the State aid self-declaration should indicate whether the measure confers an **advantage**. There are a number of dimensions to consider:

- **General:** Any economic benefit that an undertaking would not gain under ‘normal market conditions’ is an advantage.
- **Effect:** The objective of the policy is not relevant – what counts is whether the financial situation of an undertaking is improved as a result of the intervention.
- **Form:** the type of intervention is also irrelevant – it can include being relieved of charges that would normally be borne – such as charges for business training - as well as actual cash receipts.
- **Indirect:** the advantage may accrue to undertakings other than those to which resources are actually transferred.
- **Market economy operator:** Economic transactions carried out by public bodies do *not* confer an advantage if carried out in line with normal market conditions.

Much of the case law and decisional practice of the Commission concerning the issue of advantage has been concerned with public capital injections into large, sometimes ailing and/or state-owned enterprises. To determine whether such an investment involves State aid, the key issue has been an assessment of whether a private investor operating in normal market conditions would have made the same investment – the *market economy investor principle*. This line of case law is not directly relevant in the context of ETC programmes (although the underlying principle still applies).

An advantage is present when an undertaking is relieved of the costs which it would normally have to bear. For example, business consultancy, training or access to laboratory facilities provided free-of-charge through a public body would constitute an advantage. However, it may be possible to *eliminate the aid* elements of a measure by mechanisms such as competitive tendering. For example, instead of funding a selected organisation to provide subsidised training to SMEs – involving aid to both the training provider and the SMEs - the training provider could be selected on the basis of an open tender so that it simply acts as a conduit for aid to SMEs and is not itself aided.

More complex situations arise where there is some form of exchange or services provided. In the case of the **provision of goods and services by an undertaking** within the context of a project, there is a need to assess whether the transaction is on market terms – typically through an open public procurement process. For example, in *Messara archaeological museum* (see Box 2), although the owner and operator of the museum (a public entity) were

potentially the recipients of aid there was no advantage to the constructor of the museum since the works were to be subject to an open, transparent and non-discriminatory tender such that building costs would be at market prices. Similarly, in *GRW land development* (see Box 4) the possibility of aid to developers was eliminated through an open tender process to appoint contractors.

Where partners are providing downstream support to end users, the R&D&I framework provides some ideas to eliminate such aid. Several scenarios may be envisaged:

- the provision of services by a public body to an undertaking;
- collaboration between independent organisations, for example in the context of research, development and innovation.

Where **services are provided by a public body to an undertaking** in the context of a project, there must be an assessment of whether these are provided on market terms. In the context of research and development projects, for example, where a research organisation or a research infrastructure is used to perform contract research or provide a research service to an undertaking, there will usually be no State aid passed from the research organisation/infrastructure to the undertaking if there is adequate remuneration, particularly where one of the following conditions is fulfilled:⁴⁷

- the research organisation provides the service **at a market price**. Where a specific service is being provided or the organisation is carrying out contract research for the first time on behalf of a given undertaking, on a trial basis and during a clearly limited period of time, the Commission will normally consider the price charged as a market price where that research service or contract is unique and it can be shown that there is no market for it
- where there is no market price but the research service or contract is provided at a price which:
 - reflects the full costs of the service and generally includes a margin established by reference to those commonly applied by undertakings active in the sector concerned
 - is the result of arm's length negotiations where the research organisation negotiates in order to obtain the maximum economic benefit at the moment when the contract is concluded and covers at least its marginal costs

Where the ownership of or access rights to IPR remain with the research organisation/infrastructure, their market value may be deducted from the price charged.

⁴⁷ R&D&I Framework, para 25.

Where **collaboration projects** are carried out jointly by undertakings and research organisations/infrastructures, no indirect State aid is awarded to participating undertakings if one of the following conditions is fulfilled:⁴⁸

- the participating undertakings bear the full cost of the project; or
- the results of the collaboration which do not give rise to any IPR may be widely disseminated and any IPR resulting from the activities of the research organisation / infrastructure are fully allocated to those entities; or
- 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
- the research organisations / 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 the participating undertakings are allocated access rights.⁴⁹

4.2 Does the measure have the potential to distort competition?

The requirement that a measure must distort or threaten to distort competition in order to be caught by Article 107(1) is not a seriously limiting factor in the definition of a State aid. Indeed, it could be argued that, if the measure fulfils the selectivity criterion, then it is also likely to have the capacity to improve the competitive position of a given undertaking, and therefore to distort competition. In short, there is a virtual presumption of an impact on competition; while the Court has held that an impact on competition cannot simply be *assumed* by the Commission without any consideration of the likely effects of a measure,⁵⁰ the level of proof required is low; the Commission is:

“not required to carry out an economic analysis of the actual situation on the relevant market, of the market share of the undertakings in receipt of the aid, of the position of competing undertakings and of trade flows of the services in question between Member States.”⁵¹

As a result, domestic policymakers would be ill-advised to conclude that a measure did not constitute State aid simply on the basis that it did not, or did not have the potential to, distort competition.

⁴⁸ R&D&I Framework, para 28.

⁴⁹ The R&D&I Framework sets out a series of conditions which must be met for the compensation received to be considered a market price – see R&D&I Framework, para 29.

⁵⁰ T-34/02 *Le Levant and others v Commission* [2006] ECR II-267.

⁵¹ T-55/99 *Confederación Española de Transporte de Mercancías (CETM) v European Commission* [2000] ECR II-3207, para 102.

4.3 Does the measure affect trade between the Member States?

The impact of a measure on trade between Member States is closely linked to its capacity to distort competition – a measure which affects trade will certainly be viewed as distorting competition, although the converse is not necessarily true. As a result, only measures that support activities in which the trade is purely local are likely to fall outside the definition of State aid – such as a single business engaged in local services (e.g. hairdressing) or household trades (e.g. painting and decorating).

In practice, most goods and services are traded between Member States, and this criterion applies whether or not the recipient itself is actually involved in intra-EU trade. Moreover, the Commission and Court have been reluctant clearly to define the circumstances in which trade is *not* affected. In consequence, such examples are relatively few and far between. They include a German swimming pool used by local residents,⁵² a small museum in Alsace,⁵³ an archaeological museum in Crete⁵⁴ and the restoration of Brighton Pier (in the United Kingdom).⁵⁵ By contrast, the Court *did* find an impact on trade in respect of tax credits paid to Austrian dentists on the basis that “it is not inconceivable that... ..medical practitioners specialising in dentistry... ..might be in competition with their colleagues established in another EU Member State.”⁵⁶ In short, the very small number of cases in which there has been a finding of ‘no effect’ on trade, coupled with the absence of any quantitative test – there is no threshold below which trade can be said not to be affected - means that an effect on trade can usually be presumed. In the case of ETC projects, this is especially likely to be so given that the essence of such measures is *encourage* cross-border collaboration with the intention that effects should *not* be purely local.

5. Concluding points

This factsheet has provided an overview of the key considerations for determining whether State aid is present in support for ETC projects. An important issue here is that there is no ETC-specific decisional practice of the Commission on which to draw.

In many situations, particularly those where all the partners are public sector organisations, the cooperation involved is likely to involve non-economic activities and fall outside the State aid rules. In others, especially, but not only, those involving private partners, cooperation could lead to outputs that are capable of commercial exploitation. In other words there is a

⁵² Commission Decision N 258/00 - *Germany: Freizeitbad Dorsten*, 12 January 2001.

⁵³ Commission Decision NN136/A/02 - *France: Mesures concernant l'Ecomusée d'Alsace*, 21 January 2003.

⁵⁴ Commission Decision SA.36581 (2013/NN) – *Greece – Construction of Archaeological Museum Messara, Crete*, 6 November 2013.

⁵⁵ Commission Decision N560/01 and NN17/02 - *United Kingdom: Brighton west Pier*, 9 April 2002.

⁵⁶ C-172/03 *Wolfgang Heiser v Finanzamt Innsbruck*, [2005] ECR-I 1627, para 35.

spectrum of cooperation activity, one end of which is state aid relevant, while the other falls within the public remit. Whether State aid is present in any given case can only be decided on an individual basis.

6. Other relevant documents

- Factsheet 1: State aid in Interreg Baltic Sea Region
- Factsheet 2: De minimis support
- Factsheet 3: The General Block Exemption Regulation