

A background image featuring a complex network of black lines and nodes on a light gray background, resembling a web or a molecular structure. A large red rectangle is overlaid on the left side of the image, containing the title and author information. A dark blue rectangle is located on the right side of the image.

# Investing in R&D: State aid issues

Daumantas Gudelis

# Legal bases

- ✓ Article 107 (1) of the TFEU
- ✓ Commission Notice on the notion of State aid as referred to in Article 107 (1) of the TFEU OJ C 262/1, 19.7.2016
- ✓ Research & Development & Innovation Framework (OJ C 198, 27.06.2014)
- ✓ Case law of the Court of Justice and decisions of the European Commission

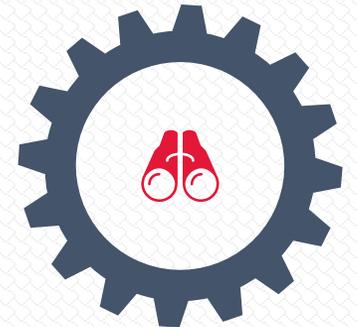
# State aid Regulations for 2014-2020 period excluding notification

- ✓ De minimis Regulation No 1407/2013 (OJ L 352, 24.12.2013)
- ✓ SGEI de minimis Regulation No 360/2012 (OJ L 114, 26.4.2012)
- ✓ General Block Exemption Regulation No 651/2014 (17.06.2014) (OJ L 187, 26.06.2014)
- ✓ Commission SGEI Decision No 2012/21/EU (OJ L7, 11.01.2012)

# What is state aid?

Article 107(1) of the Treaty

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 favoring 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



5 criteria hidden in this article

## 5 Criteria

Criteria are cumulative, if only one criterion is not met, state aid rules do not Apply

- 1) Aid granted to **undertakings**
- 2) From **state origin** (public funds - MS or State resources)
- 3) Aid **confers advantage** that distorts or risk to distort competition
- 4) Aid is **selective**
- 5) Aid affects trade between Member States

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# CRITERION 1 : Aid is given to undertakings

Definition in Article 1 of Annexe 1 of GBER N°651/2014

**“any entity engaged in economic activity”**

Regardless of legal status & way it is financed and

Regardless of whether entity intends to make profit

Regardless of whether it offers the services free of charge to its users or customers

**Definition of the economic activity by the Court of Justice:**

**“Any activity consisting in the provision of goods or services on a given market.”**

**As a result : almost all activities shall be considered as economic except for those defined by Court of Justice**

# Examples of non economic activities

- ✓ education for more and better skilled human resources;
- ✓ the conduct of independent research and development for more knowledge and better understanding, including collaborative research and development;
- ✓ the dissemination of research results.
- ✓ Knowledge transfer

# Examples of non economic activities

education (non economic activities):

- ✓ Public education organised within the national educational system funded and supervised by the State may be considered as a non-economic activity
- ✓ The non-economic nature of public education is in principle not affected by the fact that pupils or their parents sometimes have to pay tuition or enrolment fees.
- ✓ Financial contributions covers a fraction of the true costs of the service - not considered as remuneration.

## Examples of non economic activities

the conduct of independent R&D for more knowledge and better understanding

The aim of research – knowledge and better understanding

(R&D carried out on behalf of undertakings are not considered as independent)

# Examples of non economic activities

the dissemination of research results

- ✓ wide dissemination of research results on a non-exclusive and non-discriminatory basis:
- ✓ through teaching
- ✓ open-access databases
- ✓ open publications or open software.

## Examples of non economic activities

knowledge transfer activities, where they are conducted either by the research organization or research infrastructure, or on behalf of other such entities, and where all profits from those activities are reinvested in the primary activities of the research organization or research infrastructure.

## CRITERION 2 : from state origin

2 cumulative conditions :

1°) aid is from state resources :

2°) aid is imputable to the state:

✓ Aid granted by a Member State or through State resources:

Central government, ministries or departments

Regional governments, local authorities or councils

Public undertakings or agencies of the State

Funds or associations controlled by the State

✓ Does the State has discretion to control the actions of its bodies?

- Level of companies' integration in the public administration & nature of activities

- Legal status of companies (i.e. subject to public law or ordinary company law)

- Intensity of public supervision over the management of companies

## CRITERION 3 : distortion of competition

“which distorts or threatens to distort competition by favouring...”

- ✓ **Economic advantage** given by public measure, directly or indirectly
- ✓ **Subsidies always give an advantage to the undertaking**
- ✓ the recipient of the aid gets a better position in the market
- ✓ Advantage is any relief from normal costs that are inherent in the economic activity of the beneficiary undertaking
- ✓ Advantage at different levels (e.g. owner, operator and user of infrastructure)
- ✓ **Even when the company is alone in its market**
- ✓ in the event that other companies could enter the market "one day"

## CRITERION 4 : Selectivity

“by favouring certain undertakings or certain productions ”

Aid favours certain regions, sectors, undertakings, products

**In practice almost all aid are selective**

- ✓ all subsidies are selective
- ✓ ERDF grants are selective because limited to the region

Only **general measures** are not selective and do not involve state aid:

**criteria for general measures**

- ✓ aid applicable to all companies
- ✓ established by law
- ✓ without limitation of size, zoning, or sector of activity
- ✓ without discretionary instruction

## CRITERION 5 : Effect on trade between MS

Cases where there is no effect on trade

the analysis must be done on a **case-by-case basis**

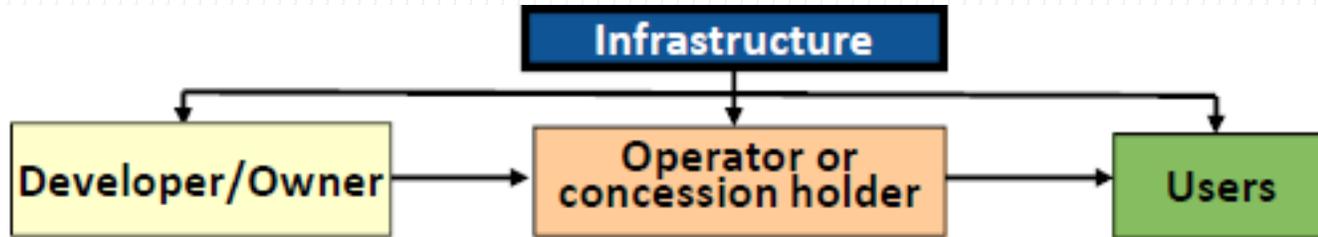
« the beneficiary supplied goods or services to a limited area within a Member State and is unlikely to attract customers from other Member States, and it is not foreseen that the measure would have more than a marginal effect on the conditions of cross- border investments or establishment »

**3 cumulative CRITERIA** for purely local impact measures

- 1) The activity is intended for a local clients (or marginally European)
- 2) The activity is not aimed at attracting European customers or European investors (or marginal)
- 3) The beneficiary is not in competition with cross-border operators (with European dimension)

# Principles

- Infrastructures financing shall respect state aid rules if the 5 state aid criteria are met.
- Analysis must be done at 3 levels :



If it's a case of state aid it can be compatible on following options:

- 1) Apply an aid scheme exempted on GBER basis
- 2) Apply "de minimis" regulation
- 3) Apply SGEI exemption decision
- 4) Notification to EC

# Infrastructures

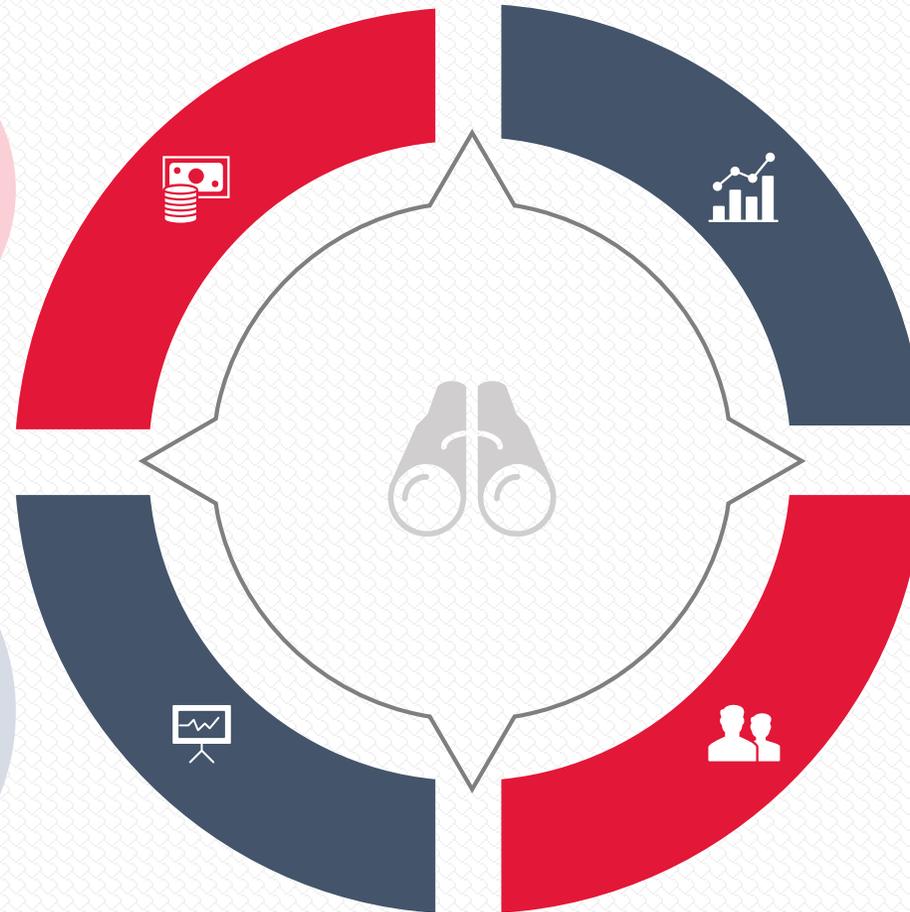
Economic/non economic

## Non economic

Infrastructure without commercial exploitation Public, open and free access

## Economic

Infrastructure with commercial exploitation with limited access



Infrastructure with economic and non economic activity:

- ✓ If annual capacity allocated to economic activity < 20% of overall annual capacity
- ✓ **economic activity is considered ancillary, public funding is not a subject to state aid rules**

Infrastructure with economic and non economic activity:

- ✓ If annual capacity allocated to economic activity > 20 % of overall annual capacity
- ✓ **public funding to economic activity must comply with state aid rules**

# GBER article 26: Research infrastructures

To be used only if:

- ✓ Economic activity of the infrastructure > 20% of the research infrastructure's overall annual capacity,
- ✓ And to finance investment linked to the economic activity of the infrastructure (Construction or upgrading of infrastructure)

Account separation for infrastructure that pursues both economic and non-economic activities

Self-monitoring of the economic and non-economic activities carried out during the whole depreciation period of the relevant assets

- ✓ Aid intensity: 50% in tangible and intangible assets
- ✓ No need to calculate operating profit of the investment to reduce aid amount
- ✓ Open access
  - Preferential access for companies that have financed at least 10% of the infrastructure
  - Exclusive use is not allowed
- ✓ Price charged for the operation or use of the infrastructure shall correspond to a market price

## The Principle: ancillary activities

Where Research infrastructure is used almost exclusively for a noneconomic activity, its funding may fall outside state aid rules

[...] provided that the economic use remains ancillary. [...]

[t]he 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 noneconomic activities and the capacity allocated each year to such economic activities does not exceed 20% of the relevant entity's overall annual capacity.

# Monitoring

Where a RI receives public funding for both economic and non-economic activities, MS shall put in place a monitoring and claw-back mechanism in order to ensure that the applicable aid intensity is not exceeded as a result of an increase in the share of economic activities compared to the situation envisaged at the time of awarding the aid [GBER, Article 26(7)]

- ✓ Annual recovery refers to the annual tranche
- ✓ Recovery to take place with interest
- ✓ Monitoring period to take account the depreciation
- ✓ Pragmatic approach

# Operation of RI

## Methodology

- Establishing capacity of infrastructure
- Separation of economic/ non economic activities
- Separate accounting
- Monitoring share of economic activity
- Marked price assesment
- Use of infrastructure in line with measure objectives
- Monitoring period

# GBER article 25

European Commission

## Aid for R&D&I projects (art 25)



**'fundamental research'** means experimental or theoretical work undertaken primarily to acquire new knowledge of the underlying foundations of phenomena and observable facts, without any direct commercial application or use in view;

**'industrial research'** means the planned research or critical investigation aimed at the acquisition of new knowledge and skills for developing new products, processes or services or for bringing about a significant improvement in existing products, processes or services. It comprises the creation of components parts of complex systems, and may include the construction of prototypes in a laboratory environment or in an environment with simulated interfaces to existing systems as well as of pilot lines, when necessary for the industrial research and notably for generic technology validation;

**'experimental development'** means acquiring, combining, shaping and using existing scientific, technological, business and other relevant knowledge and skills with the aim of developing new or improved products, processes or services. This may also include, for example, activities aiming at the conceptual definition, planning and documentation of new products, processes or services;

# Questions and Answers via eWiki

1) Please clarify when should licensing activities be considered economic and when should they be considered non-economic?

**Reply:** Licensing activities are considered to be of non-economic nature when performed by a research organisation or structure and when all income is reinvested in their primary activities. These conditions, spelled out in point 32, as well as point 19 b) of the RDI Framework are cumulative.

# Questions and Answers via eWiki

Question: According to the par. 19(a) and par. 21 of R&D&I Framework, independent R&D are generally considered non-economic activity, while contract research is considered economic activity. Should independent (carried out without any contract) R&D still be considered non-economic activity and fall under par. 19(a), if the result of such independent R&D is a patent (which can later be either used for licensing or can be sold on the market)?

**Reply:** Where the result of independent R&D is a patent (which can later be either used for licensing or can be sold on the market), such independent R&D can still be considered non-economic, if the all income is reinvested by the research organisation or research infrastructure in its primary activities (see point 19 b of the RDI Framework).

# Questions and Answers via eWiki

Question: What are the differences between knowledge transfer activities (which generate profit and can still be considered non-economic under par. 19(b) of the R&D&I Framework) and sale of R&D results on the market (economic activity)?

Reply: Knowledge transfer activities can only be considered non-economic when the two cumulative conditions spelled out in Point 19 b) of the RDI Framework (activities performed by a research organisation and all revenues generated reinvested in primary activities). If one of the two conditions is not met, therefore knowledge transfer activities are economic activities.

The sale of R&D results can be made via licensing (hence knowledge transfer activities) or via contract research (see point 25 of the RDI Framework).

# Questions and Answers via eWiki

Question: Please clarify if the following would qualify as “reinvestment in the primary activities of the research organisations concerned”:

(a) investment in R&D activities: salaries of the research personnel; operating expenses (i. e. costs of materials); investment in human resources (e. g. training costs of the research personnel);

(b) investment in education activities provided by research organisations (e. g., attracting qualified lecturers (i. e. salaries of the lecturers)).

**Reply: Yes**

# Case analysis

	University	Chemistry lab
<b>Economic</b>	20	60
<b>Non-economic</b>	80	40
<b>Maximum financing</b>	100	70 (30+40)
<b>Intensity of financing</b>	100%	50%
<b>Assessment</b>	No aid	Aid

What is the relevant entity at the level of which the threshold of 20% should be assessed?

# Operation of infrastructure



**Moment of granting aid:**  
10 mln. EUR of aid for non economic activity

In reality use of infrastructure



Non-economic activity 70 %



Economic activity 30 %

**Aid/State aid recalculation:**

$(10 \text{ mln. EUR} \times 0,7) + 10 \text{ mln. EUR} \times 0,3 \times 0,5 (\text{max. State aid 651/2014 art. 26}) = 8,5 \text{ mln. EUR} - \text{interest } 1,5 \text{ mln. EUR}$

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**THANK YOU**