

## **INFRASTRUCTURE ANALYTICAL GRID N° 4<sup>1</sup> – RESEARCH DEVELOPMENT AND INNOVATION**

*Disclaimer: The contents seek to reflect the current rules and decisional practice and do not prejudge possible developments in the State aid enforcement practice and the application of public procurement rules. In any case DG COMP services are available to provide further guidance on the need for a formal notification. Such guidance may be given in the course of a pre-notification procedure.*

### **General principles**

1. This analytical grid concerns investment aid for the construction and upgrade of research infrastructures<sup>2</sup> and innovation clusters<sup>3</sup>.
2. According to established jurisprudence of the Union Courts, whenever an entity is engaged in an economic activity, regardless of its legal status and the way in which it is financed, it can be considered as an undertaking for the purposes of EU competition law. The construction or upgrade or extension of research infrastructure which is commercially exploited constitutes an economic activity. Therefore the entity carrying out such an activity, regardless of whether it is public or private, is considered as an undertaking for the purposes of EU State aid law and its funding may fall within the ambit of State aid rules.
3. Economic activities of research infrastructures that are primarily used to perform non-economic activities may result from efforts to achieve an efficient use of resources, such as in the case of research equipment with possible dual use (non-economic and economic).
4. The Commission distinguishes three types of public support involving research infrastructures:
  - Support for the construction or upgrade of the infrastructure (investment aid);
  - Support for the operation of the infrastructure; and
  - Support to the users of the infrastructure.
5. This grid however concerns mainly the support for construction or upgrade of research infrastructure.

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<sup>1</sup> This is a working document drafted by the services of the European Commission and it does not express an official position of the Commission on this issue, nor does it anticipate such a position. It is not intended to constitute a statement of the law and is without prejudice to the interpretation of the Treaty provisions on State aid by the Union Courts.

<sup>2</sup> As defined in Article 2(91) of Commission Regulation (EU) No 651/2014 declaring certain categories of aid compatible with the internal market in application of Articles 107 and 108 of the Treaty, OJ L 187, 26.6.2014, p. 1, ("GBER) and in point 15(ff) of the Framework for State aid for Research and Development and Innovation, OJ C 198, 27.06.2014, p. 1 ("RDI Framework").

<sup>3</sup> As defined in Article 2(92) of the GBER and point 15(s) of the RDI Framework.

## **Instances in which the existence of State aid is excluded**

### **No economic activity: research infrastructure used for non-economic activities (not applicable to innovation clusters)**

6. Public funding for the construction or upgrade of research infrastructure will not be considered as State aid if the infrastructure is used exclusively for non-economic activities as defined in point 19 of the RDI Framework. This is the case where the primary activity of the infrastructure is (i) education for more and better skilled human resources, such as public education organised within the national educational system, predominantly or entirely funded by the State and supervised by the State, (ii) independent R&D for more knowledge and better understanding (including collaborative R&D), i.e. where the activity is not influenced by economic interests of individual undertakings; (iii) the wide dissemination of R&D results on a non-exclusive and non-discriminatory basis, for example through teaching, open-access databases or open publications of open software. In particular, this may concern the construction of university buildings, lecture halls, libraries, laboratories and equipment used exclusively for teaching and for carrying out independent research<sup>4</sup>. Furthermore, knowledge transfer activities conducted by, or jointly with, or on behalf of other research infrastructure are generally non-economic, provided that all profits from those activities are reinvested in the infrastructure's primary, non-economic activities.
7. Research infrastructures may be used to perform both economic and non-economic activities. In such cases, only the funding of the costs linked to the economic activities falls under State aid rules. Thus the funding of costs related to the non-economic activities does not fall under State aid rules. However, it has to be ensured that the costs, funding and revenues of the two different types of activities are clearly separated, so that cross subsidisation of the economic activities is effectively avoided. A research infrastructure used for both economic and non-economic activities avoids the risk of cross-subsidisation of its economic activities by keeping separate accounts ("functional separation") in line with the principles governing the Transparency Directive<sup>5</sup>.

### **Research infrastructure performing ancillary economic activities linked to main non-economic activities (not applicable to innovation clusters)**

8. Research infrastructures that are primarily used for non-economic activities often also perform some economic activities in order to use their resources efficiently. As long as the economic activities remain ancillary to the non-economic activities, no State aid is deemed to be present. This is the case, for instance, if the infrastructure (e.g. equipment and laboratories) is occasionally rented out to industrial partners or if it is used in part to perform contract research on behalf of industry provided that economic activities resulting from the use of the research infrastructure remain purely ancillary in nature, which means that:

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<sup>4</sup> Provision of R&D services and R&D carried out on behalf of undertakings are not considered as independent R&D.

<sup>5</sup> Commission Directive 2006/111/EC of 16 November 2006 transparency of financial relations between Member States and public undertakings as well as on financial transparency within certain undertakings, OJ L 318, 17.11.2006, p. 17.

- i. they are directly related to and necessary for the operation of a research infrastructure or are intrinsically linked to its main non-economic use<sup>6</sup>. In general, ancillary economic activities consume exactly the same inputs as the primary non-economic activities, e.g. material, equipment, labour and fixed capital<sup>7</sup>;
- ii. they remain limited in scope, i.e. the capacity of the research infrastructure allocated each year for economic activity should not exceed 20% of the overall annual capacity.

**No potential effect on trade between Member States: de minimis**

9. Support granted under the *de minimis* Regulation is not regarded as State aid, if no more than EUR 200 000 is granted to a single undertaking over a period of three years and the other conditions are also respected<sup>8</sup>.

**No economic advantage: investment in compliance with the Market Economy Operator Principle (MEOP)**

10. As far as the economic activities are concerned, if it is proven that the State acted under the same terms and conditions as a commercial investor when providing the necessary funding, then State aid is not involved. This should be demonstrated by: (i) significant *pari passu* co-investments of commercial operators, i.e. on the same terms and conditions as the public authorities; and/or (ii) the presence (*ex ante*) of a sound business plan (preferably validated by external experts) demonstrating that the investment provides an adequate rate of return for the investors – which is in line with the normal market rate of return that would be expected by commercial operators on comparable projects, taking into account all the relevant circumstances. Note however that the existence of accompanying or prior State aid measures concerning the same project might invalidate the conclusion that a similar measure would also have been undertaken by a market economy investor.
11. The financing of research infrastructures and innovation clusters often requires substantial capital investments that in some cases can only be recovered in the very long term and would therefore not be undertaken on the basis of purely economic considerations. Thus, in such cases Member States would have to provide a convincing explanation why the criteria for the application of the MEOP are complied with.

**Instances in which there is no need to notify for State aid clearance, but other requirements could apply**

12. Possible State aid may be considered compatible with the internal market and can be granted without notification in the following instances:

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<sup>6</sup> See point 20 of the RDI Framework and recital 49 of the GBER.

<sup>7</sup> Thus, equipment and facilities used exclusively for economic activities must be excluded from the eligible expenditure.

<sup>9</sup> See footnote 2.

### **General Block Exemption Regulation (GBER)<sup>9</sup>**

13. The measure may be exempted from notification if it is granted in conformity with the conditions of the GBER. In particular, **Article 26 of the GBER** allowing investment aid for research infrastructures up to EUR 20 million of aid per infrastructure, can apply. Furthermore, aid must be limited to 50 % of the eligible costs and must comply with all the conditions of Article 26 of the GBER.
14. **Article 27 of the GBER** allowing aid for innovation clusters up to EUR 7.5 million of aid per cluster representing maximum of 50 % of the eligible cost, can also apply. For investment aid, an increase in aid intensities of 5 and 15 percentage points can be granted in assisted areas fulfilling the conditions of subparagraphs (a) and (c) of Article 107(3) TFEU respectively.
15. **Article 14 of the GBER** allowing regional investment aid can also apply, provided that the investment takes place in an assisted area, that aid intensities established in the regional aid map are not exceeded and that all the conditions set by Article 14 are complied with. In particular the access to research infrastructures must be transparent and non-discriminatory.
16. Note that in all cases the provisions of Chapter 1 of the GBER must also be complied with.

### **Instances in which notification for State aid clearance is necessary**

17. If the measure constitutes State aid and does not meet the conditions allowing exemption from notification, a notification to the Commission for State aid clearance is required.

### **Framework for Research Development and Innovation (RDI Framework)<sup>10</sup>**

18. The compatibility of notifiable State aid for the construction or upgrade of research infrastructures and innovation clusters is normally assessed on the basis of the RDI Framework.

### **Regional Aid Guidelines (RAG)<sup>11</sup>**

19. Research infrastructure projects may also be supported in assisted areas on the basis of the Regional Aid Guidelines (RAG), if not falling under the specific provisions for regional aid under the GBER. In that case, aid to research infrastructure may qualify as aid for an initial investment within the meaning of the RAG and it will be assessed on the basis of the compatibility conditions set out in the RAG.

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<sup>9</sup> See footnote 2.

<sup>10</sup> See footnote 2.

<sup>11</sup> Guidelines on regional State aid for 2014-2020, OJ C 209, 23.07.2013, p. 1.

*References:*

- Commission 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, OJ L 187, 26.6.2014, p. 1.
- Commission Decision 2012/21/EU of 20 December 2011 on the application of Article 106(2) of the Treaty on the Functioning of the European Union to State aid in the form of public service compensation granted to certain undertakings entrusted with the operation of services of general economic interest, OJ L 7, 11.01.2012, p. 3.
- Commission Directive 2006/111/EC of 16 November 2006 transparency of financial relations between Member States and public undertakings as well as on financial transparency within certain undertakings, OJ L 318, 17.11.2006, p. 17.
- Framework for State aid for Research and Development and Innovation, OJ C 198, 27.06.2014, p. 1.

