

Coordination „EU State Aid Law “

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Art 107 TFEU (ex Article 87 TEC)
Notion of State Aid, Incompatibility and Derogations

Art. 107 (1) lays down the definition of State Aid

State aid: 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, in so far as it affects trade between MS. Incompatibility with the common market.

Art 107 (2) und (3) TFEU
Derogation to the incompatibility

Art 107 (3) TFEU

The following **may be** considered to **be compatible** with the **internal market**, especially:

Art 107 (3)(b) TFEU aid to promote the execution of an important project of common European interest;

Art 107 (3)(c) TFEU aid to facilitate the development of certain economic activities or of certain economic areas, where such aid does not adversely affect trading conditions to an extent contrary to the common interest.

Art 108 TFEU:

Art 108 (3) TFEU: The Commission shall be informed, in sufficient time to enable it to submit its comments, of any plans to grant or alter aid. The Member State concerned shall not put its proposed measures into effect until this procedure has resulted in a final decision.

ex-ante notification and standstill clause.

Art 108 (4) TFEU: The **Commission** may adopt **regulations** relating to the categories of State aid that the Council has, pursuant to Article 109 TFEU, determined may **be exempted from ex-ante notification** according to Art 108 (3) TFEU.

Art 109 TFEU:

The Council, on a proposal from the Commission and after consulting the European Parliament, may make any appropriate regulations for the application of Articles 107 and 108 and may in particular determine the conditions in which Article 108(3) shall apply and the categories of aid **exempted from this procedure.**

Enabling Regulation, Council Regulation (EC) No 1588/2015 of 13 July 2015
<http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32015R1588&from=EN>

Notion of „Undertaking“ – „Economic Activity“

State aid rules only apply where the beneficiary is an „undertaking“.

The Court has defined „undertakings“ as *„entities engaged in an economic activity, regardless of their legal status and the way they are financed“*

(see Judgment of the Court of Justice of 12. September 2000, Pavlov, Joint Cases C-180/98 to C-184/98, para 4).

The Court of Justice has held *“any activity consisting in **offering goods and services on a market is an economic activity**”*.

(see Judgment of the Court of Justice of 12. September 2000, Pavlov, Joint Cases C-180/98 to C-184/98, para 75).

Especially in the field of EDUCATION exists Judgement saying the main activities of kindergarten, schools, high schools and universities that are financed mainly by public funds are in general non-economic activities.

EDUCATION – Judgement of 27. 9. 1988 — Case 263/86, Humble Edel

Offering goods and services on a market are activities for remuneration

Para 17: The essential characteristic of remuneration thus lies in the fact that it constitutes consideration for the service in question, and is normally agreed upon between the provider and the recipient of the service.

Para 18: that characteristic is, however, absent in the case of (education) courses provided under the national education system. First of all, the State, in establishing and maintaining such a (educational) system, is not seeking to engage in gainful activity but is fulfilling its duties towards its own population in the social, cultural and educational fields. Secondly, the system in question is, as a general rule, (mainly) funded from the public purse and not by pupils or their parents.

Para 19: The nature of the activity is not affected by the fact that pupils or their parents must sometimes pay teaching or enrolment fees in order to make a certain contribution to the operating expenses of the system.

In Judgment of the Court of 7 December 1993 in Case C-109/92, Max Wirth, in para 15 the Court confirmed that the non-economic nature of public financed education is in principle not affected by the fact that the pupils or their parents sometimes have to pay a contribution to the operating expenses of the system.

These principles can cover public educational services, private and public primary and secondary schools and universities.

RESEARCH, DEVELOPMENT and INNOVATION:

Legal basis, especially for **Research Organisations:**

Commission Notice on the notion of State aid

[http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52016XC0719\(05\)&from=EN](http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52016XC0719(05)&from=EN)

Framework for Research, Development and Innovation (2014/ C 198/01).

<http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=OJ:C:2014:198:FULL&from=EN>

Commission Notice on the notion:

The public funding of certain activities of **universities and research organisations** fall outside the scope of State aid rules. This concerns the primary activities:

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

Framework for State aid for R&D&I:

(15) (ee) **Definitions: RESEARCH ORGANISATION** means an entity (such as universities or research institutes, technology transfer agencies, innovation intermediaries, research-oriented physical or virtual collaborative entities), irrespective of its legal status (organised under public or private law) or way 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. Where such entity also pursues economic activities, the financing, the costs and the revenues of those economic activities must be accounted for separately. Undertakings that can exert a decisive influence upon such an entity, for example in the quality of shareholders or members, may not enjoy a preferential access to the results generated by it.

Framework for State aid for R&D&I

(18) Where the same entity carries out **activities both economic and non-economic nature**, the **two kinds of activities and their costs, funding and revenues have to be clearly separated** so that **cross-subsidisation** of economic activity is effectively avoided.

(19) non-economic character:

- education for more and better skilled human resources
- independent R&D , including collaborative R&D
- wide dissemination of research results on a non-exclusive and non-discriminatory basis , e.g. through teaching, open access databases, open publications or open software

Knowledge transfer activities, where all profits from those activities are reinvested in the primary activities of research organisations.

Framework for State aid for R&D&I

(20)

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

Where the research organisation or research infrastructure is used almost exclusively for a non-economic activity, its funding may fall outside State aid rules in its entirety, provided that the economic use remains purely ancillary, that is to say corresponds to an activity which is directly related to and necessary for the operation of the research organisation or research infrastructure or intrinsically linked to its main non-economic use, and which is limited in scope.

For the purposes of this framework, the Commission will consider this to be the case where the economic activities consume exactly the same inputs (such as material, equipment, labour and fixed capital) as the non-economic activities and the capacity allocated each year to such economic activities does not exceed 20 % of the relevant entity's overall annual capacity.

GBER, Commission Regulation No 651/2014 of 17. June 2014, Amendment 2017
http://ec.europa.eu/competition/state_aid/legislation/block.html

Article 26

Investment aid for research infrastructures that perform economic activities

- Art 26 (2) Where a research infrastructure pursues both economic and non-economic activities, the financing, costs and revenues of each type of activity shall be accounted for separately on the basis of consistently applied and objectively justifiable cost accounting principles.
- Art 26 (3) The price charged for the operation or use of the infrastructure shall correspond to a market price.

Art 26 GBER

- Art 26 (4) Access to the infrastructure shall be open to several users and be granted on a transparent and non-discriminatory basis. Undertakings which have financed at least 10 % of the investment costs of the infrastructure may be granted preferential access under more favourable conditions. In order to avoid overcompensation, such access shall be proportional to the undertaking's contribution to the investment costs and these conditions shall be made publicly available.
- Art 26 (5) The eligible costs shall be the investment costs.
- Art 26 (6) The aid intensity shall not exceed 50 % of the eligible costs.
- Art 26 (7) Where a research infrastructure receives public funding for both economic and non-economic activities, Member States 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.

Where the same entity carries out **activities both economic and non-economic nature**, the **two kinds of activities and their costs, funding and revenues have be clearly separated** so that **cross-subsidisation** of economic activity is effectively avoided.

A calculation of a certain percentage of the costs of the whole infrastructure used for economic activities and for non economic activities each year during the deprecation period.

Monitoring the capacity allocated each year to the economic activities based on the actual use does not exceed the percentage calculated at the start of the project during the amortization period.

Art 22 - Aid for start-ups

Start ups, small enterprises within the first 5 years from registration

Grants, including equity or quasi equity investment, interests rate and guarantee premium reductions up to EUR 0,4 million gross grant equivalent or EUR 0,6 million for undertakings established in assisted areas fulfilling the conditions of Article 107(3)(c) of the Treaty, or EUR 0,8 million for undertakings established in assisted areas fulfilling the conditions of Article 107(3)(a) of the Treaty.

For small and innovative enterprises the maximum amounts set out may be doubled.

Art 25

Aid for research and development projects

The aided part of the research and development project shall completely fall within one or more of the following categories:

- (a) fundamental research;
- (b) industrial research;
- (c) experimental development;
- (d) feasibility studies.

The eligible costs of research and development projects shall be related the projects costs allocated to a specific category.

Article 27

Aid for innovation clusters

- Access to the cluster's premises, facilities and activities shall be open to several users and be granted on a transparent and non-discriminatory basis. Undertakings which have financed at least 10 % of the investment costs of the innovation cluster may be granted preferential access under more favourable conditions. In order to avoid overcompensation, such access shall be proportional to the undertaking's contribution to the investment costs and these conditions shall be made publicly available.
- The fees charged for using the cluster's facilities and for participating in the cluster's activities shall correspond to the market price or reflect their costs.
- Investment aid may be granted for the construction or upgrade of innovation clusters. (max 50%).
- Investment aid may be granted for the construction or upgrade of innovation clusters. (50%)

Article 28

Innovation aid for SMEs

The eligible costs shall be the following:

- (a) costs for obtaining, validating and defending patents and other intangible assets;
- (b) costs for highly qualified personnel from a research and knowledge-dissemination organization or a large enterprise, working on research, development and innovation activities in a newly created function within the beneficiary and not replacing other personnel;
- (c) costs for innovation advisory and support services;

The aid intensity shall not exceed 50 % of the eligible costs.

Up to 100 % of the eligible costs provided that the total amount of aid for innovation advisory and support services does not exceed EUR 200 000 per undertaking within any three year period.