State aid policy

Interreg Meuse-Rhine (NL-BE-DE)

2021-2027

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Content

1. Introduction

According to Regulation (EU) 1059/2021, any aid granted under the Programme must comply with the applicable EU internal market rules and legislation on State aid as defined by Article 107 of the Treaty on the Functioning of the European Union (TFEU).

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

Within the framework of Interreg, the key considerations are whether an organisation is involved in economic activities within a project and whether it gains a selective competitive advantage over other similar operators due to the aid provided.

2. State aid assessment

Stemming from Article 107 TFEU, an assessment of whether an aid granted to a project constitutes State aid is based on 5 cumulative criteria. If all the answers to the five questions below are positive, there is a risk of state aid, and appropriate action must be taken.

The first 3 criteria are considered to be met when aid is granted under Interreg projects. The last 2 criteria must be carefully assessed on a case-by-case basis.

2.1. Is the aid provided directly or indirectly by the State or through public resources?

In Interreg programmes, the answer to this question is always positive. Interreg programmes are ruled by shared management (this is different for programmes ruled by direct management at the EU level).

2.2. Does the aid (potentially) affect trade between Member States?

In Interreg programmes, the answer is almost always positive (the aid is, in essence, cross-border and may affect cross-border trade). The only exception could be if the activities carried out under the project are purely local.

2.3. Is the aid selective, while excluding operators in a factual and legal similar situation?

In Interreg programmes, the answer is always positive (specific territory targeted, specific sectors eligible,…)

2.4. Should the applicant be considered as an undertaking under EU law, i.e. is it involved in economic activities in the project?

State aids cover **aids granted to undertakings**. Derived from the Hofner case law, this broad concept encompasses **any entity that engages in economic activity**, irrespective of its legal status or financing (private or public).

Economic activity is established as soon as there is remuneration for goods or services in a given market, meaning that a governmental organisation can also be considered as an undertaking under State aid law. Participating in an economic activity is sufficient to determine whether an entity is an undertaking.

Private and public bodies can, therefore, be classified as undertakings. If a public partner operates in their public capacity, this is not considered an economic activity. However, if a public entity engages in a separable economic activity, it is regarded as an undertaking in that context. It is therefore less the legal status that needs to be considered, but rather the project activities that need to be assessed at the partner level to determine the presence of State aid. As such, public organisations, NGOs, research institutions, or universities can all be subject to State aid rules.

Some questions are important when answering to this criteria:

- Does the partner develop/offer goods/services for which a market exists (even hypothetically)?
- Could the activity be carried out by a private entity in order to make profit? (even if this is not the intention of the partner)
- Will infrastructure be exploited commercially and/or will not be available for public use for free?

2.5. Does the aid confer a competitive advantage to the undertaking and then (potentially) distorting competition?

Public aid is deemed to distort or threaten competition if it strengthens the beneficiary's competitive position compared to competitors.

Competitive advantage refers to any economic benefit an undertaking would not typically gain under normal market conditions in the absence of State aid.

There is no economic advantage if the activities are merely a service at market price.

2.6. To sum up

Criteria 1, 2 and 3 will always be answered positively for Interreg projects, as the funds come from public resources, are selective in essence, and the effects are intended to go beyond a local impact only. In assessing possible cases of state aid, the assessment will therefore focus on whether the activities in the project constitute an economic activity (undertaking) that confers an economic advantage on the partner and, consequently, a potential distortion of competition resulting from the grant. If the answer to both questions is yes, a risk of state aid is present.

An exception applies if the operator is a research organisation or research infrastructure that qualifies for exemption from State aid rules as defined by the Framework for State aid for research, development, and innovation (2014/C198/01):

- The beneficiary entity dedicates less than 20% of its total annual infrastructure capacity to economic activities.
- The economic activity uses exactly the same inputs (such as materials, equipment, labour, and fixed capital) as the non-economic activities.

As such, the organisation cannot be classified as a business under the State aid regulations according to the Framework for State aid for research, development, and innovation (2014/C 198/01).

3. State aid exemptions

The principle is clear: oversubsidising distorts competition, and State aids must be prohibited under EU law. Any direct or indirect measure taken by State authorities and through State resources which grants competitive advantage to an undertaking distorts or threatens to distort competition on the internal market and affects trade between Member States.

Since State aids are incompatible with the internal market, they have to be notified and authorised directly at the European level before being granted (DG COMP - European Commission) unless they meet the exemption criteria provided for by Articles 106(2), 107(2) and 107(3) TFEU, are de minimis because they do not exceed a certain amount, or fall within the scope of the General Block Exemptions Regulation.[1]

There are, therefore, some exemptions to the general rule: if an aid is considered as a State aid following the State aid assessment, then this aid is prohibited due to its incompatibility with internal market rules.

If State aid cannot fall under a specific exemption, then it has to be notified to the DG COMP in the European Commission, responsible for assessing notified state aid. Public authorities must notify DG COMP when they plan to grant State aid that does not fall under any exemption. DG COMP reviews whether the aid distorts competition and whether it is justified under EU rules.

3.1. The General Block Exemption Regulation (GBER)

The GBER regulation allows public grants of certain types of state aid without prior approval from the European Commission. This simplifies the process for public authorities to support undertakings while ensuring fair competition in the EU's internal market.

[1] There are different kinds of exemptions as TFEU exemptions (State aid to the former East Germany) or exemptions following certain events (financial economic crisis aid, covid,…) or FBER and ABER but the Programme focuses in this document on GBER and de minimis which are more relevant.

The GBER is essentially a long list of different types of aid (exemptions) that serve a useful public function and are therefore exempt from notification, provided certain conditions are met.

The current GBER (Regulation (EU) 651/2014) was last extended and amended in 2023 and is set to expire on 31 December 2026.[2] However, the European Commission often reviews and extends state aid rules before they expire, sometimes with modifications to align with new economic and policy priorities. There is a strong possibility that GBER will be further updated or extended beyond 2026.

3.1.1. Article 20 GBER

A major exemption specifically relates directly to activities carried out in the framework of Interreg projects. Article 20 of the GBER is part of the second section of the GBER and concerns SMEs as amended by EU Regulations 2021/1237 and 2023/1315 and states:

"*Aid for costs incurred by undertakings participating in European Territorial Cooperation projects covered by Regulation (EU) No 1299/2013 or Regulation (EU) 2021/1059 shall be **compatible with the internal market** within the meaning of Article 107(3) of the Treaty and **shall be exempted from the notification** requirement of Article 108(3) of the Treaty, provided the conditions laid down in this Article and in Chapter I are fulfilled*".

Those conditions are the following:
- Following Chapter 1 of the GBER Regulation, the **notification threshold for aid is €2.2 million per undertaking per project** (article 4(1)(f));
- The covered costs shall be linked to the cooperation project and be eligible (according to cost categories: staff costs, O&A, travel and accommodation, external expertise and services, equipment, infrastructure and works);
- The aid intensity shall not exceed the maximum co-financing rate provided for in the Regulation. According to Article **13 of the ETC Regulation, the co-financing rate at the level of each Interreg programme shall not be higher than 80 %**.

Thus, a project partner whose activities under a project are State aid relevant can nonetheless fall under the GBER scheme of Article 20, allowing its aid granted to be compatible with the internal market rules provided that its budget remains under the notification threshold of € 2.2 million and the intensity is not higher than 80%. It means that public resource funds cannot exceed 80% and that 20% must come from the partner's own resources (the intensity is therefore different than the cofinancing and covers all kinds of public resources).

Simplified cost options are compatible with GBER application.

This is a major change compared with the original 2014 version of the GBER that limited the exemption to SMEs and to a 50% intensity. It now applies to any undertaking (and not only SMEs) with a maximum of 80% intensity.

➢ It therefore means a maximum of
  - EUR 2,2 million ERDF and other public funds;
  - EUR 0,55 million non-public own funds

[2] See Commission Regulation (EU) 2023/1315 of 23 June 2023 amending Regulation (EU) No 651/2014. The GBER has also been amended by Commission Regulation (EU) 2021/1237. For the updated legal framework, see: https://competition-policy.ec.europa.eu/state-aid/legislation/regulations_en

- So a maximum of EUR 2,75 million total costs per partner

It must be noted that other consequences arise when falling under GBER scheme:

- If a partner applies under the GBER scheme, this must be clearly indicated. All information pertaining to the GBER scheme and the project partners involved is forwarded to the European Commission and is made accessible. All partners receiving aid under the GBER must retain all documents for at least 10 years after the date of the final aid payment to the project.
- Recoverable VAT is not eligible for partners funded under GBER. In such cases, only non-recoverable VAT under national VAT legislation is eligible.[3]
- This exemption cannot apply to any undertaking in difficulty (as defined in Commission Regulation (EU) 651/2014, Article 2(18) declaring certain categories of aid compatible with the internal market). To that end, a partner self-declaration of legal status and undertaking not in difficulty should be provided by project partners while submitting the final project.
- The aid must be transparent (article 5 GBER), meaning that GBER only applies to aid for which it is possible to precisely calculate the gross grant equivalent of the aid ex-ante, without any need to undertake a risk assessment.
- Aid granted under GBER needs to have an incentive effect. If the project would have been carried out regardless of the aid, then the aid lacks an incentive effect and is not justified under GBER. To comply with GBER, aid must be applied for before work on the project starts. However, aid for undertakings participating in Interreg projects is deemed to have an incentive effect if the relevant conditions in Article 20 or Article 20a GBER are fulfilled.[4]
- A new State aid cannot be granted to an undertaking if it has not yet repaid previous unlawful aid that was declared incompatible with the internal market by the European Commission (Deggendorf case C-355/95).

The GBER foresees many other kinds of exemptions, but the Programme encourages the use of Article 20, which specifically addresses ETC projects and provides a broad exemption.

3.1.2. Article 20a GBER and its application for indirect State aid

Article 20a GBER targets the limited amounts of aid to undertakings for participation in Interreg projects. It establishes a notification threshold for aid of 22.000€ per undertaking and per project.

Contrary to Article 20, which limits its application for eligible and identifiable costs within the framework of a project, Article 20a targets the non-identifiable eligible costs (for instance, loans, guarantees, training, services, and consultancy services provided free of charge by the partner to some undertakings).

[3] VAT charged on eligible costs or expenses that is refundable under the applicable national tax law shall not be taken into account when calculating aid intensity and eligible costs. This means consequently that if a partner under the GBER scheme can recover VAT from a national or other source, this cost cannot be claimed to the programme. See Regulation EU 2023/1315 amending the GBER Regulation.

[4] In accordance with Eesti Pagar case-law, there is no incentive effect where the beneficiary enters into an unconditional and legally binding commitment (purchase, leasing etc.) before the submission of the application to the relevant authority and the company's contractual commitment are the conclusive proof of the beginning of a project.

Article 20a covers, above all indirect beneficiaries, undertakings outside the formal partnership, even if the article does not exclude potential non-identifiable eligible costs of project partners.

Indeed, in some cases, undertakings indirectly benefit from State aid under Interreg projects and should be considered recipients even if they are not officially listed as project partners. Through the activities carried out by the project, these undertakings receive a selective and competitive advantage over other companies.

Such cases arise, for instance:

- when the aid is invested in infrastructures which will benefit to undertakings;
- when research organisations engage in economic activities, such as renting laboratories or conducting contractual research,
- or when the direct beneficiary acts as a mere vehicle for aid, transferring the entire advantage to other beneficiaries while retaining no benefit for itself.

For this reason, recipients of indirect aid may have to be included under a state aid scheme.

As all aid granted under GBER, aid granted under 20a GBER must be transparent (it must be possible to calculate precisely the gross grant equivalent of the aid ex-ante).
The fact that the MA/JS does not know the exact amount of the indirect aid at the moment of the approval of the project is not an issue. The interpretation of ex-ante must be understood as the moment the specific aid is granted.
If the threshold is exceeded, the partner responsible should propose an alternative assessment for the concerned support, typically under Article 20.

For indirect State aid granted under Article 20a GBER, there is no need to inform in SANI2. Also, the detailed records with supporting documentation kept for 10 years for the partner do not apply.

The MA shall nonetheless ensure that all supporting documents are kept at the appropriate level for 5 years from 31 December of the year in which the last payment by the managing authority to the partner is made (Article 82.1 CPR)

3.2. De Minimis Regulation

The *De Minimis* Regulation allows the grant of State aid to undertakings without needing prior approval from the European Commission. The idea is that such small-scale aid is too minor to distort competition or affect trade within the EU.

If there is a risk of state aid, compliance with internal market rules can therefore be achieved through the *De Minimis* rule. The De Minimis Regulation was revised under the Commission Regulation (EU) 2023/2831 of 13 December 2023, which governs the application of Articles 107 and 108 of the Treaty on the Functioning of the European Union in relation to *De Minimis* aid.

This regulation allows for State aid of minimal financial significance, provided it stays within a defined threshold over a rolling three-year period and certain administrative requirements are met. Specifically, the amounts of *De Minimis* aid granted per Member State to a single undertaking over the past 3 years cannot exceed € 300,000.
It means that any entity can declare that maximum amount in each EU Member State.
Within the Interreg Meuse-Rhine Programme, the *De Minimis* aids can be declared in the different countries of the programme territory.

Until the end of 2025, a self-declaration (available on the programme website) has to be completed.
In the self-declaration, aid can only be declared in the countries in which a partner is located or from which it receives cofinancing.

As of 2026, the *De Minimis* aids will have to be registered at the national or EU level.
The Interreg Meuse-Rhine programme will only take into account the amount of *De Minimis* aids which are officially registered in each Member State.

The project partners must be aware of the extra burden it constitutes.

The Programme advises prioritising the GBER scheme under Article 20.

4. State aid management by the Programme

A State aids self-assessment is an integral part of the step 2 application form (in the Programme monitoring system (Jems) and must be completed by each project partner.

The applicants have to answer the two questions, which have to be assessed on a case-by-case basis (see section 2).

The applicants are therefore asked to declare if they have to be considered as an undertaking (an entity involved in economic activities through the project) and if they receive a competitive advantage as a result of this aid. They must address:

- whether their organisation is involved in economic activities within the project :
  - → Will the project applicant implement activities and/or offer goods/services for which a market exists?
- whether it gains a selective competitive advantage over other similar operators as a result of the aid provided through the project:
  - → Does the project applicant plan to carry out the economic activities on its own i.e. without selecting an external service provider via public procurement?
  - → Will the project applicant, any other operator not listed as a project partner, or the target audience gain any benefits from the project’s economic activities that would not occur in the normal course of business (i.e. benefits only made possible through the aid granted through the project)?

This self-declaration is analysed by the MA/JS after project submission in parallel with the project assessment.

If the MA/JS identifies a risk of State aid that differs from the self-check assessment of the project partner, the MA/JS informs the project partner.

If the project partner and/or the MA/JS identify a risk of State aid, the MA/JS carries out a State aid assessment.

The programme partner may conduct its analysis and share its position with the MA/JS. If so, a shared and definitive position is established before the Steering Committee. If the programme partner does not share its position before the Steering Committee, the MA/JS analysis prevails.

If a risk of State aid is confirmed after the assessment(s), appropriate measures will be implemented to ensure that the aid is compatible with internal market rules.

Note that any correction for incorrectly applied state aid is 100% of the project partner's budget.

According to Articles 9 and 11(1) of the GBER Regulation, the Programme Managing Authority maintains actual information of State aids granted under GBER scheme:
- The GBER scheme is published on the website;
- GBER Annex II is actualised and sent to the European Commission and shared via SANI 2 (State Aid Notification Interactive);
- The SARI2 (State Aid Reporting Interactive) information, which is the database on all aid granted under GBER, is updated (the legal department of the Province);
- Report in the Transparency Award Module. The TAM is a website maintained by European Commission where are registered individual aid granted following GBER Annex III.

Records of documentation regarding State aid must be available for 10 fiscal years from the date when aid was granted (de minimis) and available for 10 years from the date on which the ad hoc aid was granted or the last aid was granted under the scheme (GBER).