

WG3.2: Concept of State Aid in EU projects – legal issues

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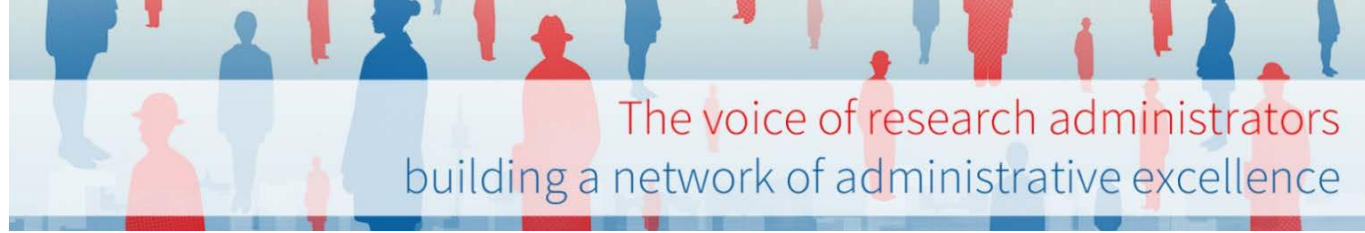
1. CONCEPT

.Art.107(1) TFEU: general prohibition

*“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, **insofar as it affects trade between Member States**, be **incompatible** with the internal market”*

.Art.107(2)-(3) TFEU:

derogations (aid compatible with Treaty)



Cumulative (!) conditions:

- advantage (grant, tax exemptions or reductions, state guarantees...)
- financial intervention by a state or through public resources
- favouring certain undertakings (selectivity)
- distort and threaten to distort competition



= NOT ALLOWED /

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INCOMPATIBLE WITH EU TREATY



=> In case these conditions are met, awarding the public funding to the project (or certain activities within the project) is – in principle – not compliant with EU state aid law and requires individual notification to the European Commission (Art.108(3) TFEU).

However, granting of the public funding can be **compliant** if:

✓Justification under GBER can be found

✓De-minimis applies

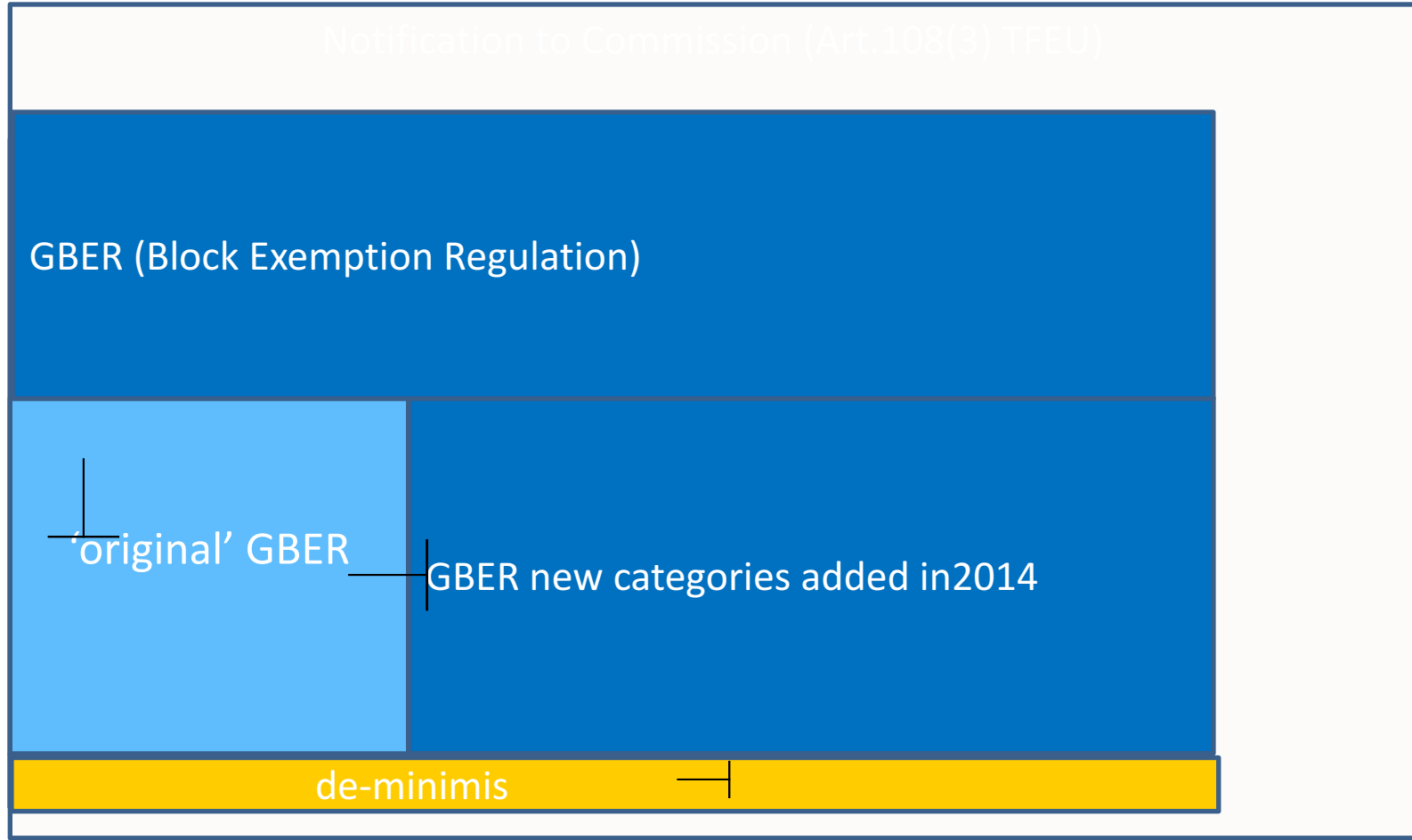
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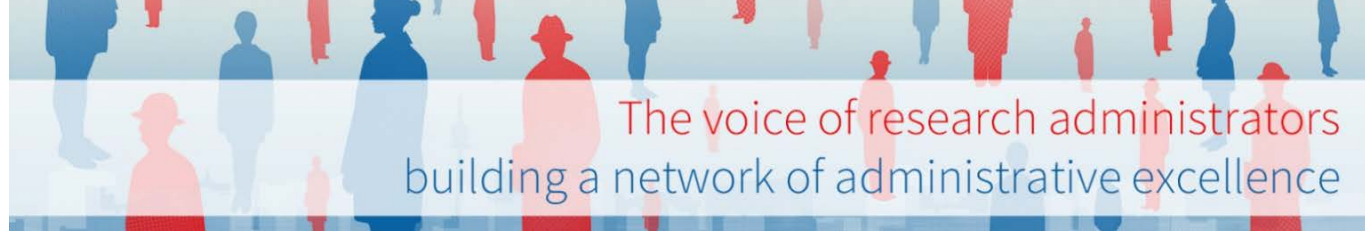




The voice of research administrators
building a network of administrative excellence

Aid amount





2. LEGAL CONTEXT

.Prohibition: Article 107(1) TFEU (Treaty of the Functioning of the European Union)

.GBER: 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

3. RELEVANT FOR UNIVERSITIES?



*“any aid granted
...by favouring
certain
undertakings shall*

H2020 funding:



·Framework Programme has been notified and validated (programm as a whole) by the European Commission



·public funding granted to each H2020 project is deemed compliant

·**legal certainty**

4. ASSESSMENT

I/ DOES THE FUNDING QUALIFY AS STATE AID?

Question 1: is aid granted by a government or through state resources?

.In case of ERDF: answer is always YES

Question 2: is the aid granted to 'an undertaking'?

Question 3: is there an advantage?

In case of Interreg (ERDF): answer is most likely YES since a subsidy is granted

Question 4: is the grant or aid selective?

Aid having a regional or local effect can be selective, even if all undertakings in the given region can benefit from such aid

In case of Interreg (ERDF): answer is most likely

...closer look at question 2:

ECONOMIC vs. NON-ECONOMIC

Point 19 a) of the Commission Communication: the European Commission considers that the following activities are generally

(a) primary activities of research organisations and research infrastructures, in particular:

- education for more and better skilled human resources. In line with case-law⁽¹⁾ and decisional practice of the Commission⁽²⁾, and as explained in the Notice on the notion of State aid and the SGEI Communication⁽³⁾, public education organised within the national educational system, predominantly or entirely funded by the State and supervised by the State is considered as a non-economic activity⁽⁴⁾;
- independent R&D for more knowledge and better understanding, including collaborative R&D where the research organisation or research infrastructure engages in effective collaboration⁽⁵⁾;
- wide dissemination of research results on a non-exclusive and non-discriminatory basis, for example through teaching, open-access databases, open publications or open software.



Education

— education for more and better skilled human resources. In line with case-law⁽¹⁾ and decisional practice of the Commission⁽²⁾, and as explained in the Notice on the notion of State aid and the SGEI Communication⁽³⁾, public education organised within the national educational system, predominantly or entirely funded by the State and supervised by the State is considered as a non-economic activity⁽⁴⁾;

! Attention: workshops, sector advice for SME's:

- ✓ avoid in "indirect" state aid: no company-specific advice
- ✓ offering workshops, advice...at market price

Independant R&D

- independent R&D for more knowledge and better understanding, including collaborative R&D where the research organisation or research infrastructure engages in effective collaboration (?);

! Attention: effective collaboration as part of which the research organisation should be fully independant to carry out the research:

Wide dissemination of research results

— wide dissemination of research results on a non-exclusive and non-discriminatory basis, for example through teaching, open-access databases, open publications or open software.

- ✓ in most Interreg projects, broad dissemination of project results is required / covered under specific workpackage)
- ✓ Important for researchers: consider valorisation plans for (anticipated) project results: broad dissemination <> exclusive deals, spin-off trajectory,...

Point 19 b) of the Commission Communication: the European Commission considers that the following activities are generally of a non-economic character:

Knowledge transfer activities of which profits are reinvested in primary activities

(b) 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 provision of corresponding services to third parties by way of open tenders.

Point 21 of the Commission Communication: the European Commission considers that the following activities are generally of an **economic** nature:

- .Renting equipment or laboratories
- .Supplying services to undertaking

.(21. Without prejudice to point 20, where research organisations or research infrastructures are used to perform economic activities, such as renting out equipment or laboratories to undertakings, supplying services to undertakings or performing contract research, public funding of those economic activities will generally be considered State aid.



!! Blurred line between limits of point 19b) and point 21:

-> Definition

'knowledge transfer' means any process which has the aim of acquiring, collecting and sharing 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 involved in those activities. Besides scientific and technological knowledge, it includes other kinds of knowledge such as knowledge on the use of standards and regulations embedding them and on conditions of real life operating environments and methods for organisational innovation, as well as management of knowledge related to identifying, acquiring, protecting, defending and exploiting intangible assets;

e.g. 'consultancy' (pt.19.b: non-economic
'supplying services to undertakings' (pt.2
economic)



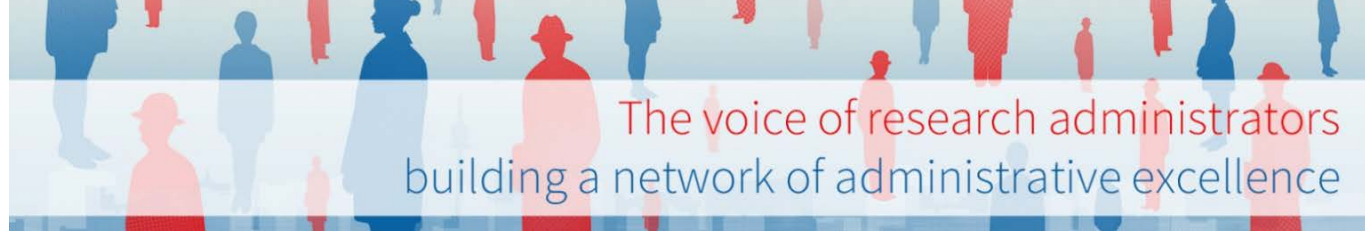


II/ WHAT IF THERE IS STATE AID?

De-minimis?

Art.3(2) Regulation: undertaking has not received more than € 200K eur de-minimis aid over last 3 fiscal years -> chances of successfully invoking this regulation is unlikely for research organisations

Justification under GBER? most relevant clauses

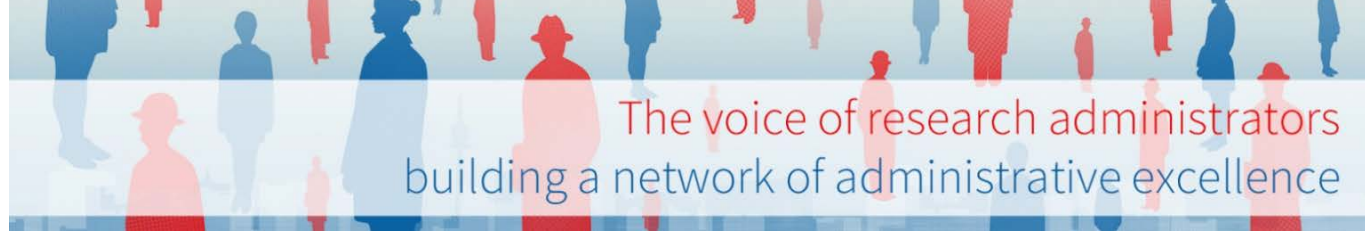


.Art.25: aid for research and development projects

Eligible costs?	<ul style="list-style-type: none"> .Personnel .Instruments and equipment (for duration of the project)
aid/ %	<ul style="list-style-type: none"> .100% for fundamental research .50% for industrial research .25% for experimental development .50% for eligibility studies + increases for SME's (+10%) / + effective collaboration or broad dissemination (+15%)

.Art.26: investment aid for research infrastructures

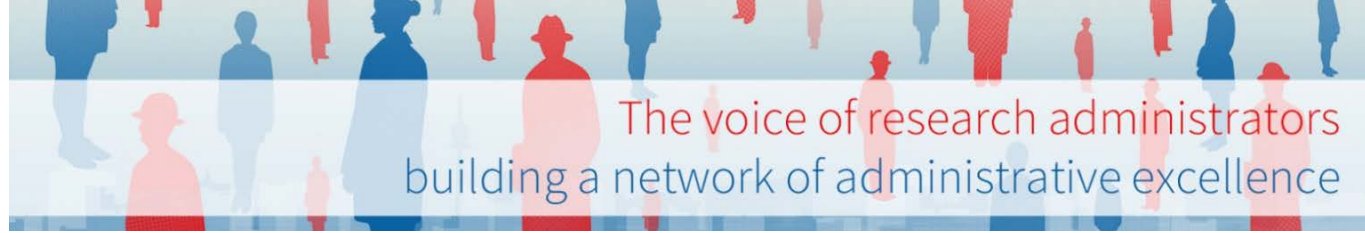
Eligible costs	Investment costs in tangible and intangible assests
Criteria	<ul style="list-style-type: none">.Price charged for operation or use of infrastructure at market price.Access to research infrastucture open to several users, non-discriminatory and transparent (but: undertakings co-financing may be granted preferential access)
Aid %	50%



.Art.27: aid for innovation clusters

Eligible costs	<ul style="list-style-type: none"> .Investment aid: investment costs in tangible and intangible assets .Operational aid: personnel and administrative costs (marketing cluster, management cluster facilities,...)
Criteria	.- Access to cluster on transparent, non-discriminatory basis (but: undertakings that co-finance at least 10% may be granted preferential access)
Aid %	50%

5. CASE STUDIES



1. ERDF project (Flanders)

Partners	<p>UGent: funds level 0-1-2: 'hosts' technology accelerator: primary activities research organisation (independent R&D, dissemination)</p> <p>IIC NV: funds level 3-4: 'hosts' business accelerator: economic activities: offering services for start-ups: renting office space, providing access to labs...</p>

State aid assessment?

= 'creative' exercise, with
support of policy advisors
Flanders' Innovation Agency
and external law office:

assessment of activities for



2. INTERREG (Flanders-Netherlands region) project

Partners	<ul style="list-style-type: none"> .Industrial partners (incl. pilot builder): .Collaboration for design and development of installation .On-site testing on 3 industrial chemical sites .clusterorganisations in Flanders and Netherlands: communication .Research organisations: research, innovation, optimisation

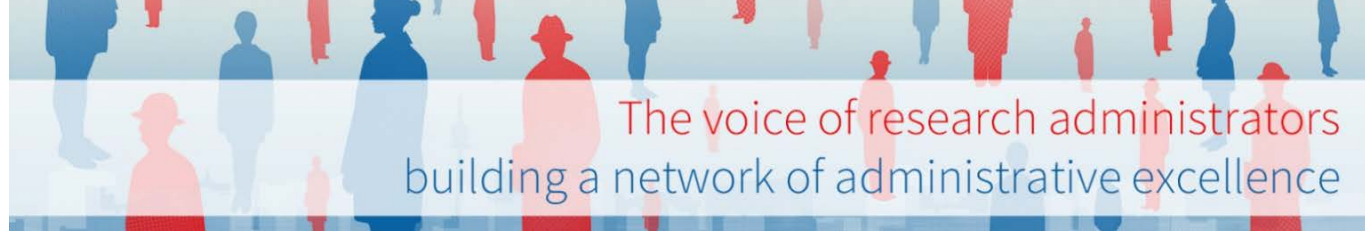
State aid assessment?

• Arguments for independent R&D and broad dissemination of results (pt. 19a) and knowledge transfer (pt. 19b) of Commission Communication: would justify 100% public funding

On the other hand:

- close involvement of industry (on site testing, working on data from industry) <> fully independent?

- Budget: 50% EFRO + 15% government East-Flanders = 62% public funding, justified under Art.25 GBER



6. APPROACH AT GHENT UNIVERSITY

WHAT WE EXPERIENCED SO FAR?

- DG COMP: strict focus on aid from structural funds (ERDF) (“area of interest for 2014-2020”)
- researchers think state aid is ‘not an issue’ for a research organisation
- researchers think state aid is an administrative issue without any legal consequences: not aware of impact of wrong state aid assessment (risk of ‘claw back’)

POLICY (WORK IN PROGRESS)

• In case maximum % public funding required:

✓ can only be justified if there are sufficient arguments for non-economic activities: independent R&D and/or knowledge transfer

✓ avoid public funding for purely economic activities (as per pt. 21 Communication): remove from project proposal or separate this workpackage from the others by clearly stating that these economic activities will be covered by private funding



** IN-KIND CONTRIBUTION BY RESEARCH ORGANISATION?

<u>Non-economic activities / no state aid</u>	<u>Economic activities</u>
Up to 100% public funding	Limited % public funding
Co-funding with any means, irrespective of source of means: hours research personnel, other public grants,...	Co-funding with 'own', private means: labeled private: coming from contract research, contributions from companies,...

ACTIONS (WORK IN PROGRESS)



- Increasing awareness amongst research workshops

- Internal policy

- Seeking external legal advice

- Screening project proposal **prior to submission:**

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