INTERACT

EUROPEAN UNION

Q&A: State Aid and GBER

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Q&A from participants

European Regional Development Fund

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Questions and answers

Part I: Questions and answers

1. Identifiable/non-identifiable eligible costs

How to differentiate "aid with identifiable eligible costs" from "aid without identifiable eligible costs"? Is there a definition?

No, there is no definition of them, neither in the GBER nor in the other parts of the State aid rulebook. These terms are relatively self-explanatory, which is perhaps the reason why they have not been formally defined or further explained.

In the lack of legal definition, we have tried to elaborate an empirically meaningful definition. Starting from the beginning, in State aid, the assessment of the presence and compatibility of State aid takes place at the level of the beneficiary and the project. The eligible costs are the costs necessary to build a given project and that are authorised for public funding under the EU rules. It follows that the eligible costs can be lower than the total project costs, as for certain types of aid, certain categories of aid are excluded from funding, i.e. while these might form part of the costs of a given projects, State aid rules might provide that they have to be fully paid by the beneficiary itself and do not qualify for aid. In this scenario, cost items that are not eligible for aid have to be subtracted from the full project costs and only the result, which will be the eligible costs, are eligible for State aid. The eligible costs are identifiable if they are predefined, can be distinguished and quantified. Conversely, aid granted not directly linked with specific costs would be considered to be without identifiable eligible costs.

Most of the forms of aid covered under GBER are based on predefined eligible costs. E.g. regional investment aid (Article 14), aid for research and development projects (Article 25) and what interests us the most - aid for costs incurred by undertakings participating in European Territorial Cooperation projects (Article 20). For ETC, these are the costs determined in Articles 38-43 of the 2021/1059 ETC Regulation. Conversely, certain categories of aid, where the link with a given project is indirect, are delimited under GBER only by the total amount of aid but are not delimited/expressed as a percentage of predefined eligible costs. This is typically the case of risk finance type of aid for SMEs, granted in accordance of Articles 21, 22 (Aid for start-ups) and 23 (Aid to alternative trading platforms specialised in SMEs) of the GBER. Other categories of aid may also be considered as 'without identifiable eligible costs', such as:

- Article 19b (Limited amounts of aid to SMEs in CLLD or EIP Operational Group projects);
- Articles applicable to aid involved in financial products supported by the InvestEU Fund.

Article 20a “Limited amounts of aid to undertakings for participation in European Territorial Cooperation (ETC) projects” provides, in addition to the conditions laid down in Chapter I, a specific compatibility condition applicable to small amounts of aid. It requires that the total amount of aid does not exceed EUR 20,000, per project and per undertaking. Article 20a may or may not be based on eligible costs, depending on the set up of the project or operation. However, it appears that in the majority of cases the indirect aid in the context of ETC is granted for identifiable costs.

Categorisation with or without identifiable eligible costs is pertinent for the purposes of verifying compliance of the specific cumulation rule, laid down in Article 8.4, which in turn ensures the respect of the notification thresholds & the maximum aid intensities to avoid double financing.

Article 8.4 GBER on cumulation rules, as amended in July 2021, stipulates first that aid without identifiable eligible costs exempted under Article 20a may be cumulated with any other State aid with identifiable eligible costs. It means in ETC context that such aid may be cumulated with aid granted under Article 20 or with other specific category of aid under the GBER.

Second, it stipulates that aid without identifiable eligible costs may be cumulated with any other State aid without identifiable eligible costs, up to the highest relevant total financing threshold fixed in the GBER or decision adopted by the Commission. It means that such aid may be cumulated up to the higher threshold of the two provisions concerned by the cumulation.

Additional question: Is it possible to use Article 20a for calls of proposals where identifiable costs are specified? In other words, is it possible to use Article 20a for aid with identifiable cost? If so, how does the rule about cumulation work?

The application of Article 20a is not based on eligible costs but on maximum aid amount solely. It follows therefrom that Article 20a applies to aid regardless if it is granted for identifiable or not identifiable costs. The cumulation rules applicable to aid granted for identifiable costs under Article 20a are laid down in Article 8.3(a), Article 8.3(b) and Article 8.4 GBER.

2. Article 20a – Verification of small amounts

In our programme, Article 20a will be applied to aid of limited amount given by project partners (in the form of free of charge services, trainings, etc.) to final beneficiaries. The value of the aid given is verified by the programme only ex-ante. Is this correct?

The moment at which the respect of the compatibility and exemption criteria are fulfilled is verified at the moment when the aid is granted. We recall that in accordance with Article 5, aid under Article 20a is considered to be transparent, where it provides for a cap, ensuring that the applicable threshold laid down in Article 20a is not exceeded. If the EUR 20,000 threshold is nevertheless exceeded the managing authority/the lead

partner should propose for the concerned support an alternative assessment, typically under Article 20.

3. Monitoring

The only monitoring measure we are planning to enforce for aid granted under Article 20a is the verification of the respect of the EUR 20,000 threshold. No further measures are planned. Is this correct?

State aid rules conformity is ensured by a monitoring exercise done by DG Competition on a few schemes per year. Other than this verification exercise, national and EU Audit services verify compliance with EU rules.

Concerning exempted aid, granted under Article 20a of the GBER, the main condition is the respect of the EUR 20,000 threshold. In addition, compliance with rules on audit trail and with the general provisions in Chapter I of the GBER (for most of these conditions, exemptions for Article 20a have been introduced) must be ensured.

4. Case study

A project partner receives ERDF co-financing of EUR 200,000. The Programme grants the full amount as de minimis aid. Can the partner use part of the EUR 200,000 to support a company which participates in the project with e.g. consultancy services under Article 20a (indirect aid)? Or is this in contradiction with the rules because two different State aid measures are used? Or does the support to the company (indirect aid) not have to be covered by a State aid instrument, because it was already covered at the level of the project partner? Or does the Programme have to split the amount into EUR 180,000 under de minimis and EUR 20,000 under Article 20a? What is the implication of the latter on the actual implementation of the project, i.e. what happens if the project supports the company with less than EUR 20,000 and needs more for other project activities? Does this require close monitoring of actual spending and modification of the project in case it is not? The application of Article 20a is supposed to be simple but close monitoring of actual spending would make it more complicated and would move the focus from direct aid (which is simple in application) to indirect aid.

As a matter of principle, State aid is assessed at the level of the beneficiary and at the level of the project. In the instant case, this implies that both public financings, 1) the ERDF and possible national co-financing, granted to the project partner and 2) the advantage passed on the company to benefit from consultancy services (indirect aid), will have to be assessed under the State aid rules.

At the level of the project partner: since the public financing does not exceed the EUR 200,000 threshold, it may be cleared under the 1407/2013 De minimis Regulation. Obviously, this would also require fulfilment of all the other conditions laid down in the De minimis Regulation. If in this example all State resources combined would exceed

the de minimis levels, then the de minimis regulation would not be applicable. In such case, the aid remains however approvable under the GBER.
The de minimis assessment of the public financing granted to the project partner will not cover the advantage granted to the company benefitting from consultancy services. Given that the project partner has passed part of the economic advantage to another undertaking, its own advantage will be reduced accordingly and would in this case amount to EUR 180,000.

At the level of the company benefitting from consultancy services: it gets a quantified advantage of EUR 20,000. Since the ceiling applicable to small amounts of aid has not been exceeded, the public support may be assessed and cleared under Article 20a GBER. In this regard, it is useful to recall that the GBER applies only to transparent aid, meaning - aid in respect of which it is possible to calculate precisely the gross grant equivalent ex-ante without any need to undertake a risk assessment. If the aid takes the form of a grant, it is considered to be transparent (Article 5(2)(a)). In other cases of small amounts granted to Interreg project participants, the aid would be considered to be transparent if it provides for a cap ensuring that the applicable threshold laid down in Article 20a is not exceeded (Article 5(2)(ea)). With this safeguard in place, close monitoring of actual spending at the level of the company (indirect aid) is therefore not necessary. What however remains necessary is to compute all aid granted to the lead partner, in order to ensure that the de minimis aid ceiling is not exceeded ever a period of three fiscal years.

5. Use of SCOs in small projects under EUR 100,000 for which support constitutes State aid

Can SCOs be used for the implementation of small projects in a small project fund, even if the project is subject to State aid. The wording for the Interreg Regulation Article 25.6 is not 100% clear on it. In our opinion the mandatory use is only lifted in case the small project is State aid relevant, but not that the use of SCOs is forbidden. We think this is accordingly reflected in Article 7 of the GBER Regulation, which clearly states that State aid and SCOs are compatible. A short confirmation would be highly appreciated.

Your understanding is correct. Under the ETC regulation, the use of the SCO is mandatory for small projects, for which the public contribution is below EUR 100,000. If the support involves State aid, the use of SCO is only optional but certainly not prohibited. This means that for small amounts administrated for State aid purposes under Article 20a the use of the SCO is optional but not prohibited.

A more detailed analysis:

Answering this question requires indeed to interpret Article 25(6) ETC Regulation.

> Article 25(6) ETC Regulation:
>
> "Where the public contribution to a small project does not exceed EUR 100 000, the contribution from the ERDF or, where applicable, an external financing instrument of the Union shall take the form of unit costs or lump sums or flat rate financing, except for projects for which the support constitutes State aid".

This provisions comes quite straightforwardly from the 2014-2020 CPR (see Article 67(2a) CPR 2014-2020 on forms of grants and repayable assistance stipulating:

> Article 67(2a) CPR 2014-2020
>
> "For an operation or a project not covered by the first sentence of paragraph 4 [public procurement] and which receive support from the ERDF and the ESF, grants and repayable assistance for which the public support does not exceed EUR 100 000 shall take the form of standard scales of unit costs, lump sums or flat rates, except for operations receiving support within the framework of State aid that does not constitute de minimis aid".

Although the wording has been adjusted, the meaning remains the same: in case of de minimis (and no aid), the use of SCO is mandatory; in case the contribution involves State aid, the use of SCO is optional.

Prima facie there should not be many occurrences, where such level support would be anything else than de minimis. The tricky situation comes with the new Article 20a GBER on small amount of aid, which, according to Article 107(1) TFEU, would qualify as State aid. Due to different timings and work streams, the ETC Regulation does not, while it probably should, specify that State aid under Chapter III Section 2a GBER falls under the mandatory use of the SCO.

Another complex situation would arise if within the same operation, in addition to ERDF granted under the de minimis, the additional national support would fall under a State aid regime. If such combined funding would be even possible in ETC. Anyway, feel free to consult the answer attached we provided on interpretation of Article 67(2a) CPR 2014-2020.

Why have a derogation: the most plausible motive is the impossibility to apply SCO in certain State aid operations although those appear rather exceptional (e.g. operations where public procurement procedures have been applied to select the provider of SGEI).

You will find further information on the interaction between SCO and State aid in the two Q&A, published on our Wiki.

IQ00382 - SCO and State aid rules on SGEI (Services of General Economic Interest) - QA 14-20 - RegioWiki (europa.eu)

IQ00383 - SCO and State aid rules outside SGEI - QA 14-20 - RegioWiki (europa.eu)

To reduce administrative burden programmes should indeed use systematically SCO for small State aid operations. Highlighting the advantages associated with the SCOs would be in this context essential.

6. Aid granted in the sector of processing and marketing of agricultural products

Article 1(3) states that "This Regulation shall not apply to: [...] (c) aid granted in the sector of processing and marketing of agricultural products, in the following cases: (i) where the amount of the aid is fixed on the basis of the price or quantity of such products purchased from primary producers or put on the market by the undertakings concerned; (ii) where the aid is conditional on being partly or entirely passed on to primary producers;". Theoretically speaking: If there is a project partner that provides indirect aid in a way that it fulfils the criteria of Article 1(3)(c), does this mean that the partner is providing aid in the sector of primary agricultural production instead? And then Article 1(3)(b) would apply? Or, is it clearly out of the scope of the regulation then?

Under Article 1(3)(b) of the GBER "aid granted in the primary agricultural production" is excluded from the scope of the Regulation, except for certain derogation including "aid to ETC projects". This derogation is applicable without prejudice to the exclusion of Article 1(3)(c) GBER, which concerns a different type of aid that is to be considered excluded from the scope of the Regulation if the two conditions (i) and (ii) are fulfilled.

N.B. Article 2(9) GBER: 'primary rural production' means production of products of the soil and of stock farming, listed in Annex I to the Treaty, without performing any further operation changing the nature of such products;

7. Recovery due to bankruptcy

We still have problems with the unsolved situation in which the state aid cannot be recovered from the entity due to the bankruptcy. The situation might be problematic for MA granting the aid in particular to foreign beneficiaries. There are no provisions as such in the GBER. Are there any possibilities to regulate it?

We understand your concern. However, this aspect cannot be regulated in the GBER. In accordance with the Enabling Regulation, the scope of the GBER is to define compatibility conditions for exempting certain categories of aid from the obligation of prior notification. Anything else would go beyond the Commission's mandate. This

aspect should be regulated at national level, in full respect of cohesion policy rules applicable to recovery of irregular expenditure.

What is regulated by State aid rules is the recovery of unlawful and **incompatible** State aid. The Commission issued in July of 2019 the revised Notice on recovery. The purpose of this Notice is to explain the European Union rules and procedures governing the recovery of State aid, and how the Commission works with Member States to ensure compliance with their obligations under European Union law and most specifically under Article 108(2) of the Treaty. The notice is addressed to the authorities of the Member States in charge of implementing a decision by which the Commission has ordered the recovery of State aid. This guidance is of little importance for the programmes since so far that the Commission has not issued any negative decision with recovery against one or several member States for and aid granted in the context of an Interreg programme.

Part II: Plans for the future

8. Is de minimis regulation to be revised after the fitness check?

Regulation 1407/2013 or - the general de minimis regulation was set to expire at the end of 2020. In July 2020, the Commission extended this regulation together with the GBER, until 31 December 2023 to provide predictability and legal certainty, while preparing for a possible future update of the State aid rules. In the context of the European Green Deal and the European Digital Agenda, the Commission has already announced its intention to revise a series of guidelines by the end of 2021. The De minimis regulation is not part of the package to be revised by the end of 2021.

The Staff working document published on 30 October 2020 and closing the fitness check* exercise concluded that: the current De minimis regulation may not reflect the impact of the economic development. In particular, the de minimis ceiling may need to be adapted by notably taking into account the inflation in the internal market. The De minimis regulation could also benefit from clarification and simplification, in particular with regard to financial instruments in order to increase their use. Finally, the requirements on monitoring could be reviewed given the flaws of the current dual system (registers or self-declarations). It follows that the De minimis regulation should be amended in the medium term, possibly by 31.12.2023.

Note should be made that two other exemption regulations - the ABER and the FIBER - are currently under review.

N.B. Fitness checks are comprehensive policy evaluations assessing whether the regulatory framework for a policy sector is “fit for purpose”. The current Fitness Check provides a comprehensive policy evaluation of the State aid modernisation.

9. Revision of GBER due to “Green Deal”. Can we expect that the Articles 20 and 20a will be kept in the future GBER?

Clearly yes, above all for reasons of legal certainty and predictability.

The 2014-2020 GBER has been undergoing a gradual revision. The third[1] amendment, adopted in July 2021, is intended to improve the articulation between the State aid and funding rules in the context of the current MFF cycle. On 6 October 2021, the Commission submitted for public consultation another set of draft GBER amendments, this time - intended to facilitate the implementation of aid measures promoting the green and digital transition. As you can see from the draft text: State aid: Comments on draft revised GBER (europa.eu), the proposal preserves the benefit of new provisions and does not include amendments of Section 2a. The Commission proposes to rebuild Article 9 on publication obligation and Article 14 on Regional investment aid, while taking into account the changes that had been made with the July 2021 amendment.

[1] The MFF GBER amendment was the third amendment of the 2014 GBER, the first one was the extension of the GBER for ports and airports in 2017 and the second one was its prolongation adopted in the summer of 2020.