

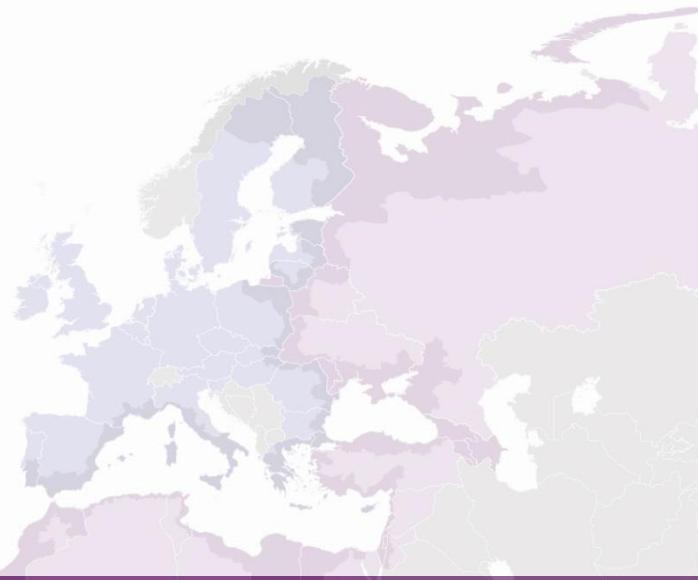
The State aid discipline in ENI CBC programmes

(GUIDANCE – August 2016)

DISCLAIMER

This non-binding document has been developed by the TESIM project.

It does not necessarily reflect the views of the European Commission on the topic and is presented to programme practitioners for illustrative purposes only.



A) General overview

Article 12 of the ENI CBC Implementing Rules states that
“Public support granted by the programmes must comply with State aid rules”

According to Article 107 of the Treaty on the Functioning of the European Union, State aid is defined as “**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**”, therefore affecting trade between Member States.

The definition of State aid includes several criteria. These criteria are cumulative, meaning that all five elements must be met for the measure to be considered aid:

- the existence of an undertaking,
- financing of the measure through State resources,
- the granting of an advantage,
- the selectivity of the measure, and
- its potential effect on competition and trade within the Union.



The most important step is to establish whether an applicant/partner acts as an undertaking in the context of the project. From the remaining criteria the decisive one most often will be whether an advantage is granted to the applicant/partner.

IMPORTANT!

The way State aid will be handled by each programme must be decided beforehand, and explained at the moment of launching the call through the provision of relevant information in the guidelines for grant applicants.

In order to manage State aid, it must be first identified!

B) How to identify and manage State aid?

The presence of activities relevant to State aid can only take place during the evaluation process. There are a number of approaches on how State aid is managed in EU funded programmes. However, regardless the approach chosen, a set of core elements should be considered when preparing the guidance for applicants and partners in relation to this topic. Such elements are:

1. Which are the actors involved?

On the basis of the systems consulted, the most frequent approach is represented by the combination of two elements: the submission of a State aid self-assessment checklist by applicants and partners at application stage and an own assessment from the Managing Authority during the evaluation process.

It has to be underlined that the assessment from the Managing Authority should be put at the core of the State aid identification exercise. Therefore, and mainly in order to reduce the administrative burden, Managing Authorities might consider not asking the self-assessment checklist from the applicants and partners at all. Whatever the case, such checklist supports the self-assessment through guiding questions, and it can serve as awareness raising and education tool about the State aid discipline itself¹. An intermediate option is that of requesting the self-assessment only from applicants and partners of preselected projects.

Depending of the experience and internal know-how of the Managing Authority, the assessment of the State aid as part of the project evaluation can be organised in the following ways:

- based on **in-house capacity** within the Managing Authority/Joint Technical Secretariat;
- based on the **cooperation with national State aid bodies**. In such cases, all practical arrangements should be carefully investigated: the willingness and availability of experts in national State aid bodies, the time needed by them for performing State aid assessments and its impact in the whole evaluation process, the procedural arrangements for the flow of documents, etcetera;
- based on **external experts contracted for performing the State aid assessment**². In such cases, practical arrangements, such as the requirements to be met by the external experts, the procedure for selecting the experts themselves, the assessment work flow (i.e., when

¹ Also for the purposes of understanding how to handle indirect State aid, if applicable.

² Either ad-hoc experts or experts contracted also for performing the quality assessment.

applications are given to the experts, what is the foreseen time given to them for the assessment and its impact on the overall evaluation process) should be considered. Arrangements concerning the non-disclosure of information should be foreseen as well.

In case the project selection is done in two steps, the approach in relation of State aid can also differ. For example, the applicant and partners can be asked to check the State relevance of their activities already when preparing the concept note. However, if the planned format of the concept note is of general nature, the Managing Authority might not ask for the self assessment as it will not have any practical benefit. In such case, the applicant and partners will be asked to assess the State aid relevance when preparing a full application (i.e., after their concept notes have been selected by the Joint Monitoring Committee and lead beneficiaries have been invited to proceed to the second application stage).

2. Which are the elements to look for when assessing State aid relevance?

The notion of “undertaking” is crucial. In order for State aid to be present, the recipient must act as an undertaking in the framework of the project. Such classification will depend on the nature of the activities performed, NOT the legal status of the entity. In other words, and opposite to what normally thought, this notion does not refer exclusively to private actors. Public bodies can act as undertakings!

Undertakings are entities engaged in an “economic activity”, regardless of their legal status (they can be public bodies, non-governmental organisations or universities, as well as private firms) and regardless of whether they aim to make a monetary profit from the economic activity³ or not.

Accordingly, **a first step** concerns information about the nature of the project activities and whether any of the can be considered as an “economic activity”. This is broadly defined as ‘offering goods or services on a given market’. The key question is whether, in principle, the activity could be similarly carried out by a private body operating in the market. If so, the activity will most likely be considered as “economic” and the applicant/partner will be thus considered as an “undertaking”. If the activity is not economic, the applicant/partner is not an undertaking for State aid purposes and it can be concluded that there is no State aid.

As a **second step**, the project activities which are identified as being “economic” have to be assessed for their State aid relevance. The most crucial question is whether there is a selective advantage involved in supporting a certain activity. This is, whether there is a benefit that the undertaking would not gain under ‘normal market conditions’ or whether it is relieved of costs that it would normally have to meet. If there is no selective advantage or benefit to the applicant/partner, then there is no State aid.

³ ‘Economic advantage’ within the meaning of the State aid discipline and ‘profit’ within the meaning of PraG, as used by ENI CBC programmes, are different concepts.

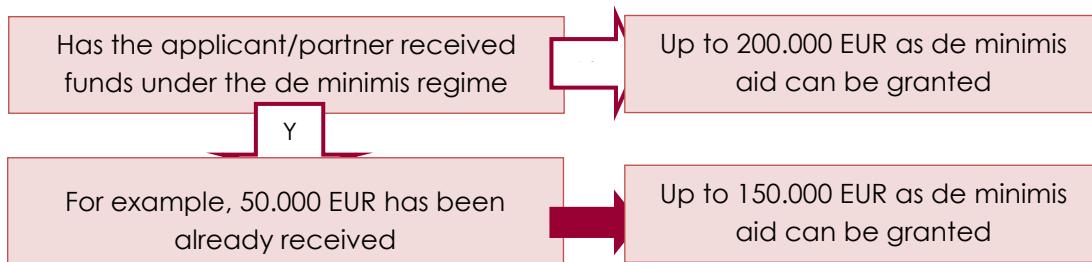
As a **third step**, the impact of such economic activities on the intra-community market must be assessed. Even in presence of economic activities, should the selective advantage have an effect only at national level, there is no State aid within the meaning of Article 107 of the Treaty. Programmes may decide to anyway exclude such activities.

3. Which State aid instruments can be applied?

Once activities are identified as being relevant for State aid purposes, the Managing Authority should decide on how to treat the support to the project, as there are a number of options available⁴:

- **The de minimis regime**

The de minimis regime is based on the principle that the negative effects of a competitive advantage and the distortion of the intra-community market are reduced if financial aid is kept to a minimum. In case of applying the de minimis regime, projects can be supported on the basis of Commission Regulation 1407/2013 of 24 December 2013 that allows support of up to EUR 200.000 in a three-year period to fall outside the scope of State aid. The EUR 200.000 ceiling applies to all types of support, whether from national or EU-sources⁵. Besides grants, all other forms of support, such as loans and guarantees, are also taken into consideration. The three-year period refers to the fiscal year concerned plus the previous two fiscal years.



Once the respective project is approved, and always before the grant contract is signed, the submission of a de minimis declaration should be required by the Managing Authority confirming the de minimis amount already received by the respective applicant/partner in the preceding 3 years.

According to the *de minimis* regulation (No 1407/2013), aid under **de minimis is granted by Member States**. In a CBC context, de minimis would be provided to the beneficiary(ies) according to one of the following options:

- a) in full by the EU Member State where the MA of the programme is located,

⁴ The rejection of a project involving State aid relevant activities is considered as disproportionate, especially when considering the list of thematic objectives primarily selected by the ENI CBC programmes. Whenever possible, the Programme should aim at supporting such activities through the available tools.

⁵ The fisheries and aquaculture sector (threshold of EUR 30,000) is subject to a different de minimis Regulation. Also, there is a lower limit for road freight transport (EUR 100,000) and for agriculture (EUR 15,000).

- b) by the EU Member State(s) where the beneficiary(ies) implementing State aid relevant activities are located,
- c) by the EU Member State(s) where the State aid relevant activities are implemented, irrespective the nationality of the beneficiary(ies).

Therefore, **a clear identification of the budget planned for the State aid relevant activities is crucial!**

For cases b) and c), if due to the nature of the activity it is not possible to exactly calculate the State aid relevant project budget in relation to the respective country, any justified proportionality rule could be applied by the Programme. Such proportional approach has been confirmed by DG COMP, as stated in the INTERACT Questions and Answers document '*State Aid and European Territorial Cooperation*'. When choosing this option though, it is important to clarify with the concerned Member States whether the decision to apply such system will have consequences at national level preventing the award process. Please note that, in case a programme applies any sort of national co-financing scheme, these funds will also count as aid under the de minimis regime.

- General Block Exemption Regulation

As a general rule, State aid must be notified to and cleared by the Commission before it is granted. The General Block Exemption Regulation (GBER) exempts Member States from this notification obligation, as long as all the GBER criteria are fulfilled. GBER simplifies the procedure for aid-granting authorities and allows them to provide measures ranging from job creation and boosting competitiveness to measures that create a favourable environment for the Small and Medium-sized Enterprises (hereafter SMEs). In relation to the GBER, the Managing Authority can consider matching programme priorities and specific objectives to the Articles of the GBER that are most relevant to each of them. For example, a specific objective 'Technology transfer to SMEs through university-enterprise cooperation' could be matched to Article 25 of the GBER 'Aid for research and development projects'. Similarly, by studying GBER articles, linkages can be defined for each programme priority to help the applicants/partners when carrying out their self-assessment exercise. In order to get familiar with the concept of GBER, please refer to the [Frequently Asked Questions](#) (click here for the link) on GBER prepared by the European Commission.

The Managing Authority can also consider setting up State aid schemes for the GBER articles that are most relevant for the programme – for example, SME aid / research and development and innovation aid / training aid / environmental aid scheme. The aid schemes set specific eligibility rules and aid intensities. The eligibility requirements of the aid schemes apply to specific State aid relevant activities and must be strictly adhered to. The aid intensities set the maximum rates at which the State aid relevant activities can be financed within the GBER. These rates can be equal or lower, but never higher than the maximum co-financing rates used by the programme.

In case of de minimis and GBER, the decision on whether to apply the one or the other should be taken by the Managing Authority. However, in case both options are possible, the Managing Authority can also consult with the applicant/partner about which state aid instrument would be preferable.

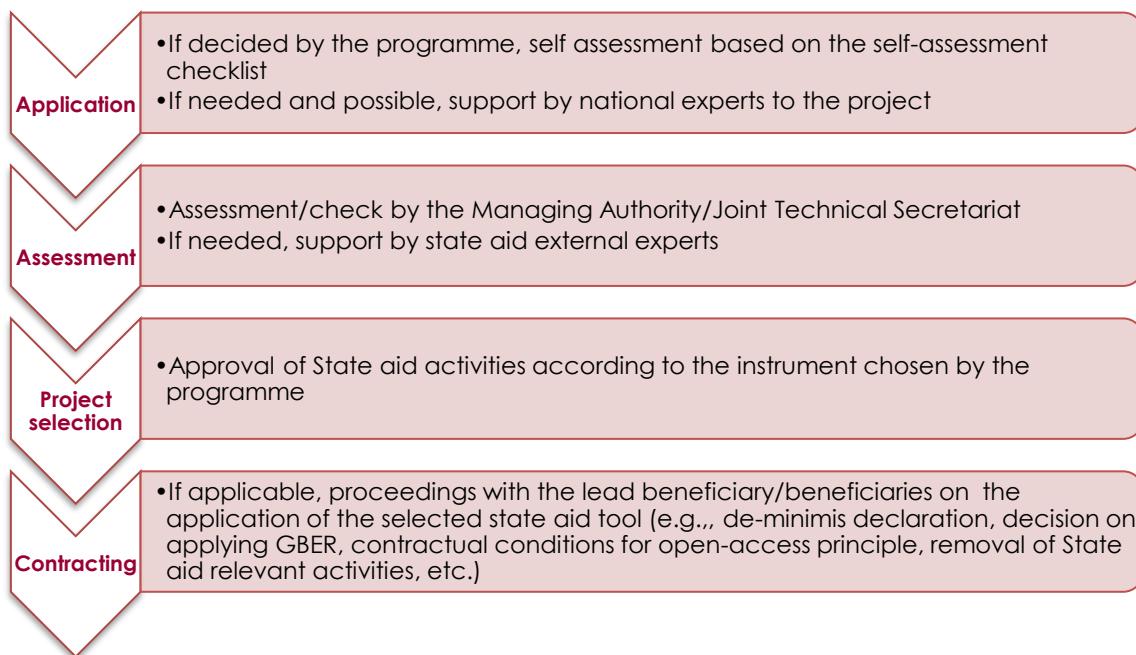
- Cancelling comparative advantage

Once the State aid relevant activities are identified, the Managing Authority may proceed with cancelling the comparative advantage by forcing projects to follow the open-access principle. This is, rendering the project products providing a competitive advantage available to all undertakings operating in the same market. This can be enforced through the inclusion of ad-hoc conditions in the grant contract. The respect of these conditions will then be subject to monitoring during project implementation and their fulfilment must be ensured latest by project closure. Please note that, even if open access is ensured, this sometimes may not exclude in full the advantage received; decisions in this respect must be subject to individual analysis.

- Cancelling State aid relevant activities

The programmes may decide that no State aid is allowed at all, thus will proceed to the cancellation of the comparative advantage by simply removing the activity(ies) from the project application. However, in such case it should be considered whether the removal of the activity(ies) affect or not the overall evaluation of the project. In case the project is affected, there will be a need to re-assess the project application.

As a summary of what presented so far, the process of management of State aid can be summarised in the following steps:



4. Indirect state aid

It may also be that the project applicant/partners, in case of project approval, will grant State aid to other undertakings outside the project partnership. In other words, even though the applicant/partner will not directly be recipients themselves of a competitive advantage, project activities could mean an advantage for third parties. Examples include:

- consultancy or other subsidised services provided to SMEs;
- training courses provided to SMEs;
- access to research facilities for companies.

Where a beneficiary, including the lead beneficiary⁶, expects providing State aid to end users, it will be necessary for the beneficiary providing the advantage to calculate the value of the supportive activities. Then consideration may be given by it to eliminating any State aid element; for instance, framing such support within the de minimis regime. In this case, the concerned beneficiary is responsible for ensuring that the terms of the de minimis Regulation are met by the end users served, including the monitoring and administrative arrangements (e.g., collection of de minimis self-declarations, informing the third party in writing of the prospective amount of de minimis aid, informing central registers for de minimis, if existing, maintaining records regarding individual de minimis aid, etc).

Even if in this case they will not act as granting body for the aid, due to the practical implications, it is important that the Managing Authorities identify these activities already during the selection process. This will allow them to support the beneficiaries the moment come.

C) State aid equivalent measures in Partner Countries

While State aid as a legal concept is relevant for the EU Member States, programmes may also consider whether, following national legislations in Partner Countries, State aid equivalent measures – where existing – should be applied as well. *Mutatis mutandis* (if there are no other national provisions in Partner Countries), for the assessment of the State aid equivalent measures the first four criteria described above can be used. The fifth criteria⁷ can be read from the perspective, where existing, of the Association Agreements. Such agreements rule out “any official aid which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods”.

It is important to highlight that for Partner Countries EU State aid instruments, the Managing Authorities have to define clear provisions about how to proceed with the project application if among the project activities to be carried out by applicants and/or partners from Partner Countries state aid equivalent measures are detected.

If possible, the Managing Authorities can use similar structure in order to address State aid equivalent measures:

- Self-assessment on application phase,
- assessment from the Managing Authority,
- project selection and confirmation of selected State aid equivalent measures in the project, if applicable,
- contracting and legal proceedings according to the respective legal requirements.

⁶ No longer applicant/partner at this stage.

⁷ Distortion of intra-community market.

ANNEX 1:

MODEL STATE AID SELF-ASSESSMENT CHECKLIST

STATE-AID SELF ASSESSMENT CHECKLIST

Project acronym:	
Applicant/Partner number:	
Name of the organisation in original language:	
Name of the organisation in the Programme language:	

Beneficiaries of [ENI CBC Programme] from [EU countries of the Programme] are bound to comply with the EU rules on State aid. The aim of this self-assessment checklist is, first, to establish whether State aid is present, and second, assist on what steps need to be taken to ensure compliance (i.e., whether the State aid granted by the Programme can be granted under the State aid instruments chosen by the Programme [for example, de minimis Regulation or the General Block Exemption Regulation]).

In the first step, evidence that State aid issues have been considered will be required. Therefore, this checklist raises a number of points that should be assessed to conclude whether the planned project activities are State aid relevant or not. These are, in particular:

- whether the beneficiary is engaged in an economic activity in the project (support for non-economic activities does not involve State aid);
- whether the beneficiary would gain an advantage from the support received under the Programme (support not resulting in an advantage does not constitute State aid).

The analysis involved in reaching a conclusion on whether State aid is present is not always straightforward and self-assessment is only a first step.

However, the final decision and responsibility for identifying State aid relevant activities and the suitable State aid instrument remains with the Managing Authority. Where a conclusion of 'no State aid' is reached, this must be justified with appropriate reasoning.

In the second step, this declaration will be assessed by the Programme together with the application form in order to conclude on the State aid relevant activities.

1. Is the applicant engaged in an economic activity?

Economic activity means any activity consisting of offering goods or services on a given market. Typical examples of "non-economic" activities are: police, armed forces, air and maritime traffic control, organisation of public education and compulsory social security contributions. "Non-economic" activities also could be public roads or bridges that are available for public use without any charge and are not for commercial exploitation. This could further be extended to facilities such as cycle paths, nature trails, promenades, piers, etc. that are available for public use without any charge (condition of not distorting the market applies to all examples mentioned).

1.1. In the context of the project, do you undertake any activities and/or offer goods/services for which a market exists?

- Yes, in the context of the project my organisation implements activities for which a market exists.
- No, in the context of the project, my organisation does not undertake activities for which a market exists.

If the answer is **YES**, please describe which activities of the project you consider as State aid relevant and quantify the planned budget for these activities.

Description of activities	Estimated costs

1.2. Do you implement activities or provide goods/services in the context of the project that could be carried out or provided by a private operator with the view to making profit (even if this is not your intention within the project)?

- Yes, there are activities/goods/services in the project that could be carried out by a private operator.
- No, there are no activities/goods/services in the project that could be carried out by a private operator.

If the answer is **YES**, please describe which activities of the project you consider as State aid relevant and quantify the planned budget for these activities.

Description of activities	Estimated costs

1.3. Do you plan to carry out any activities involving construction of infrastructure? In case of yes, Will the infrastructure be exploited commercially? and is not available for public use for free?

- Yes, there is infrastructure that will be exploited commercially.
- No. None of the infrastructure will be commercially exploited, neither during project implementation nor after project closure.

If the answer is **YES**, please describe which activities of the project you consider as State aid relevant and quantify the planned budget for these activities.

Description of activities	Estimated costs

2. Does the applicant gain an advantage from the project that it would not have had otherwise?



As a second step, the project activities which are identified in the 1st question as being “economic” (the non-economic activities of a given beneficiary in the project are not considered further in this context), have to be assessed for their State aid relevance.

The most crucial question is **whether there is a selective advantage** involved in supporting a certain activity, i. e. whether there is a benefit that the undertaking (beneficiary) would not gain under ‘normal market conditions’ or whether it is relieved of costs that it would normally have to meet.

If there is no selective advantage or benefit to the applicant, then there is no State aid.

Where the activity is economic and support is regarded as constituting an advantage, support from the Programme is likely to be State aid relevant. Consideration should then be given to whether any State aid element can readily be eliminated.

In case the planned activities meet at least one of the conditions below, this might be an indication for beneficiaries that these activities are (likely) not state aid relevant:

- The observation of the public procurement rules
- The respect of the open-access principle

You would have to check compliance with these conditions before concluding that there is no State aid involved in the project. In case of doubt whether these conditions can be realistically fulfilled it is not recommended to apply them. State aid relevant activities can still be covered by the State aid instruments (i.e., de minimis or the General Block Exemption Regulation).

Please note that you will be asked to decide on potential advantage for each economic activity that you have identified in section 1 of this declaration.

2.1. Do you gain any benefits from the programme support to the above-listed economic activity(ies), which you would not have received in the normal course of business, i.e. in the absence of Programme funding? Are you relieved of costs that you would normally have to meet?

- Yes, I gain benefits and/or am relieved from costs through programme support to the economic activity.
- No, I neither gain benefits nor am relieved from costs through programme support to the economic activity.

If the answer is **YES**, please describe which activities of the project you consider as State aid relevant and quantify the planned budget for these activities.

Description of activities	Estimated costs

3. Do certain project activities benefit third parties/organisations outside the project partnership?

It may also be that beneficiaries grant State aid to third parties outside the project partnership. This is because other undertakings (i.e. entities engaged in economic activities) not included as beneficiaries in the project partnership (e.g. target groups, etc.) could receive an advantage through the project's activities that they would not have received under normal market conditions. And this implies that they could be recipient of State aid. For example:

- Consultancy or other subsidised services provided to SMEs;
- Training courses provided to SMEs;
- Access to research facilities for companies.

It is worth mentioning, that even though the beneficiaries does not perform State aid relevant activities in the project, its activities could mean an advantage for third parties outside the partnership.

3.1. Does any economic operator (e.g. SME) that is outside the project partnership (i.e. not listed as beneficiary in the application form) receive an advantage through your activities in the project?

- Yes, certain project activities provide an advantage for economic operators outside our project partnership.
- No, there are no project activities that provide an advantage for economic operators outside our project partnership.

If the answer is **YES**, please describe which activities of the project you consider as State aid relevant and quantify the planned budget for these activities.

Description of activities	Estimated costs
	Amount for each economic operator responsible of State Aid relevant activities
.....	

Position, signature, date

