Annex AG\_M – State Aid

**State aid**

According to Article 107 (1) of the Treaty on the Functioning of the European Union, state aid refers to financial support granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition and intra-community market trade by favoring certain undertakings or the production of certain goods. In order to meet the requirements of the European Commission and in order to allow a smooth implementation of the Programme and its approved projects, in the framework of Interreg VI-A Romania-Bulgaria, State Aid is not permitted.

In case that during project implementation, or during 5 years after the end of project implementation period, illegal state-aid incidence is discovered the MA may apply a correction up to 100% financial correction for the respective project, including penalties and debts from the date of grant award to date.

For state aid to take place the recipient of project funding must be an undertaking, and the Court of Justice has consistently defined undertakings as entities engaged in an economic activity, regardless of their legal status and the way in which they are financed. The term "undertaking" is in this context used in a wide sense as any entity which has an activity of an economic nature and which offers goods and services on the market, regardless the legal form and the way of financing of this entity. Also if an entity is not profit-oriented, state aid rules will apply as long as it competes with companies that are profit-oriented. Therefore, not only private companies are subject to state aid rules but also public authorities, if they carry out an economic activity on the market.

The next step in establishing state aid is to use the set of five criteria that all have to be fulfilled cumulatively in order to be state aid.

As defined in Article 107 paragraph (1) of the Treaty on the Functioning of European Union, State aid exists if the following conditions (cumulatively) are met:

* Economic advantage to an undertaking: within the meaning of Article 107(1) TFEU, is any economic benefit which an undertaking could not have obtained under normal market conditions, that is to say in the absence of State intervention.
* As mentioned above, the classification of an entity as an undertaking is always relative to a specific activity, not the status of that entity such as public or private. An entity that carries out both economic and non-economic activities is to be regarded as an undertaking only with regard to the former. Furthermore, the application of the State aid rules as such does not depend on whether the entity is set up to generate profits, as also non-profit entities can offer goods and services on a market too. The only relevant criterion is to decide is whether or not the entity carries out an economic activity in the context of the ETC project. Also, the State authorities may themselves be considered as undertakings when they are involved in economic activities. Whenever the State acts in the exercise of its public powers, respectively the activity in question is a task that forms part of the essential functions of the State or is connected with those functions by its nature, its aim and the rules to which it is subject, it is not to be considered an undertaking. Examples are activities related to: maritime traffic control and safety, anti-pollution surveillance, the army or the police, as well as air navigation safety and control etc.
* Economic transactions carried out by a public body or a public undertaking do not confer an advantage on its counterpart, and therefore do not constitute aid, if they are carried out in line with normal market conditions. In this respect, if the procurement procedure is open (to allow all interested and qualified bidders to participate in the process), transparent (in order to allow all interested tenderers to be equally and reasonably informed at each stage of the tender procedure), sufficiently well publicised, non-discriminatory and unconditional, in compliance with the principles of the EU and National Public procurement rules, it can be presumed that the transactions are in line with market conditions. Also, to establish whether a transaction is in line with market conditions, it can be assessed in the light of the terms and conditions under which comparable transactions carried out by comparable private operators have taken place in comparable situations.
* An advantage can be conferred on undertakings other than those to which State resources are directly transferred (indirect advantage). An indirect advantage is present if the measure is designed in such a way so as to channel its secondary effects towards identifiable undertakings or groups of undertakings (e.g. if the funds received by a direct beneficiary are used for building up infrastructure that is to be used for economic activities and the operation of this infrastructure is not granted through open, transparent and unconditional public procurement procedure that has been sufficiently publicized, or if the funds are used by the beneficiary in order to train the employees of certain undertakings and does not pay market price for that, so it has an advantage etc.). This is the case, for example, if the direct aid is, de facto or de jure, made conditional on the purchase of goods or services produced by certain undertakings only.
* State resources: the state-aid norms comprise exclusively the measures that imply the public sources/resources transfer (including from national, regional and local authorities, banks and public foundations, etc.). Moreover, the aid does not need to be granted by the state as such. The aid can be granted by a public or private intermediate body appointed by the state. For the Interreg Programmes, the criterion is automatically fulfilled.
* Selectivity: a measure is considered selective when it favours “certain undertakings or the production of certain goods”. Not all measures which favour economic operators fall under the notion of aid, but only those which grant an advantage in a selective way to certain undertakings or categories of undertakings or to certain economic sectors.
* Distortion of competition: a measure granted by the State is considered to distort or threaten to distort competition when it is liable to improve the competitive position of the recipient compared to other undertakings with which it competes.

A distortion of competition within the meaning of Article 107 TFEU is thus assumed as soon as the State grants a financial advantage to an undertaking in a liberalized sector where there is, or could be, competition. A possible distortion of competition is excluded if (1) a given service is subject to a legal monopoly (established in compliance with EU law), the legal monopoly not only excludes competition on the market, but also for the market (2), the service is not in competition with other services and (3) the service provider is active in another (geographical or product) market that is open to competition, cross-subsidisation has to be excluded.

* Effect on trade between Member States: an advantage granted to an undertaking operating in a market which is open to competition will normally be assumed to affect trade between Member States. Public support can be considered capable to affect intra-EU trade even if the recipient is not directly involved in cross-border trade. For instance, the subsidy may make it more difficult for operators in other Member States to enter the market by maintaining or increasing local supply. However, if the service in question is of a purely local impact there is no effect on trade between Member States. In order to assert that this criterion is not fulfilled, the project in question must have a mere local impact. Some examples of situations where the Commission found that public support was not liable to affect trade between Member States:
* sports and leisure facilities serving predominantly a local audience and unlikely to attract customers or investment from other Member States;
* cultural events and entities performing economic activities which however are unlikely to attract users or visitors away from similar offers in other Member States (the Commission considers that only funding granted to large and renowned cultural institutions and events in a Member State which are widely promoted outside their home region has the potential to affect trade between Member States);
* hospitals and other health care facilities providing the usual range of medical services aimed at a local population and unlikely to attract customers or investment from other Member States;
* news media and/or cultural products which, for linguistic and geographical reasons, have a locally restricted audience; etc.