

Policy toolkit

Belgian Economic Potential in the Industry of Defence and Security

What is the purpose of the measure?

A. Does the measure concern financial subsidies

YES

NO

B. Does the measure concern procurement of off-the-shelf defence products?

YES

NO

Is the measure a mix of A and B?

NO

YES

Does a Treaty derogation (Article 346 TFEU, Article 4(2) TEU or free movement rules) justify that the measure does not adhere to the Treaties?

Rules that frame design of the measure

C. State aid rules: Are the conditions in Article 107 TFEU fulfilled? [LINK to p. 5]

NO

NO

D. Is the measure a public contract covered by the DSD

NO

YES

E. Consider exceptions, exclusions and design of procedure

NO

F. Mixed contracts: Is the award of a single contract objectively justified?

NO

NO

YES

NO

As financial subsidies are not governed by the DSD the contract is outside the scope of the DSD. Consider whether free movement rule and EU principles require competition.

The DSD applies to the part of the measure concerning procurement: Step D.

Checks and choices

Check compatibility with other EU law, e.g. free movement

NO

De minimis? [LINK to p.21]

YES

G. Design to ensure compatibility with the internal market

NO

NO

Does the measure concern R&D?

YES

Consider detailed design options

Does a Treaty derogation (Article 346 TFEU, Article 4(2) TEU or free movement rules) justify that elements of the measure do not adhere to the Treaties?

Article 346 TFEU – essential security interests

“1. The provisions of the Treaties shall not preclude the application of the following rules:

(a) no Member State shall be obliged to supply information the disclosure of which it considers contrary to the essential interests of its security;

(b) any Member State may take such measures as it considers necessary for the protection of the essential interests of its security which are connected with the production of or trade in arms, munitions and war material; such measures shall not adversely affect the conditions of competition in the internal market regarding products which are not intended for specifically military purposes.

2. The Council may, acting unanimously on a proposal from the Commission, make changes to the list, which it drew up on 15 April 1958, of the products to which the provisions of paragraph 1(b) apply.”

Article 346 TFEU contains two derogations:

- 1) Derogation from an obligation to supply information that is imposed by EU law
- 2) Measures connected with the production of or trade in armaments on the list mentioned in Article 346(2) TFEU, unless the measure adversely affects competition in the civil market.

These derogations can be invoked if it is necessary to protect essential security interests of the Member State.

The derogations are narrow in scope and subject to proportionality. In the context of public procurement, the proportionality test requires that it is demonstrated that it is not possible to protect the essential security interest under adherence to the relevant public procurement directive.

Consider whether Article 346 TFEU may be invoked for specific requirements, e.g. concerning nationality or supply chain, rather than for the entire measure.

Consider the State aid rules.

Article 4(2) TEU – national security

To overview

R&D overview

“**The Union shall respect the equality of Member States before the Treaties as well as their national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government. It shall respect their essential State functions, including ensuring the territorial integrity of the State, maintaining law and order and safeguarding national security. In particular, national security remains the sole responsibility of each Member State.**”

The ECJ seems to acknowledge that Member States may in principle invoke Article 4(2) TEU as a derogation from the Treaties to protect national security, subject to the usual proportionality requirement.

Currently, the derogation has not been further qualified by the ECJ. It is probable that the ECJ will interpret a derogation from the Treaties based on Article 4(2) TEU very restrictively and will examine whether other derogations may apply, e.g. Article 346 TFEU or the “public security” derogation in the rules on free movement.

As these derogations have a limited scope, there seems to be room for another security derogation that could apply in sufficiently justified situations where the other derogations are not applicable. However, as mentioned, the scope of the derogation is yet unclarified, so there is legal uncertainty, and it should not be relied on if other derogations or designs of the measure are available to meet the objective.

Consider whether the entire measure needs to derogate from the Treaties, or a less restrictive and thus more proportional approach could be adopted.

At the current state of law, the scope of a possible Article 4(2) TEU derogation is unclear, thus relying solely on Article 4(2) TEU will entail significant legal risk.

The rules on free movement contain derogations to protect **public security** (and several other legitimate objectives, including the mandatory requirements of general interest acknowledged in the case law of the ECJ), subject to proportionality (appropriateness and least restrictive means). The scope of the derogation is the relevant right to free movement – e.g. free movement of goods.

D. State aid or public procurement?

State aid

- Conditions in Article 107(1) TFEU must be fulfilled (see further: link to State aid manual p. 5]).

Not State aid or public procurement?

If the measure is for example a license, special right or exclusive right, or constitutes “pure” regulation, consider:

- whether it entails foregoing of State resources (and whether this is justified, see [Notice on the Notion of State aid](#), points 51-56).
- compatibility with EU law, e.g. rules on free movement.

Public procurement

- Public contracts are contracts for pecuniary interest:
 - Synallagmatic.
 - For consideration/payment.
 - Direct economic interest for the public entity.
 - Legally binding for all parties.
- Between one or more contracting authorities (wide definition) and one or more economic operators (undertakings).
- For provision of goods, services or works.
- Value above threshold of the DSD (or national implementation) applies.
- If value below threshold of the DSD, the EU principles apply if the contract has a certain cross-border interest.
- If no cross-border interest, national procurement rules may apply.

E. Exceptions, exclusions and design of the procedure?

Article 13 of the DSD contains a list of **exceptions and exclusions**:

“This Directive shall not apply to the following:

(a) contracts for which the application of the rules of this Directive would oblige a Member State to **supply information the disclosure of which it considers contrary to the essential interests of its security**;

(b) contracts for the purposes of **intelligence activities**;

[...]

(d) **contracts awarded in a third country**, including for civil purchases, carried **out when forces are deployed outside the territory of the Union** where operational needs require them to be concluded with economic operators located in the area of operations;

(e) service contracts for the **acquisition or rental**, under whatever financial arrangements, **of land, existing buildings or other immovable property**, or concerning rights in respect thereof;

(f) contracts awarded by a **government to another government** relating to:

- (i) the supply of military equipment or sensitive equipment
- (ii) works and services directly linked to such equipment, or
- (iii) works and services specifically for military purposes, or sensitive works and sensitive services;

(g) **arbitration and conciliation** services;

(h) **financial services**, with the exception of insurance services;

(i) **employment contracts**;

[...]”

The exceptions for contracts for R&D services and the exclusion for contracts awarded under cooperative programmes based on R&D are covered elsewhere in the policy toolkit. See also Article 12 of the DSD on contracts awarded in accordance with international rules.

Note that the award of excepted or excluded contract may still be subject to the Treaties, in particular the rules on free movement and the EU principles. Consider State aid rules.

Design of the procedure

- Restricted procedure (defined in Article 1(19) of the DSD)
- Negotiated procedure with prior publication of a contract notice, (Article 26 of the DSD).
- Competitive dialogue (Article 27 of the DSD)
- Negotiated procedure without prior publication of a contract notice (Article 28 of the DSD)

The DSD does not provide for open procedures.

Certain conditions must be fulfilled for the use of competitive dialogue and negotiated procedure without prior publication of a contract notice.

Does the measure concern R&D?

Article 2(84)-(87) of the GBER and point 16(k)-(l) and (r) of the R&D&I Framework define four R&D activities:

Fundamental research: experimental or theoretical work undertaken primarily to acquire new knowledge of the underlying foundations of phenomena and observable facts, without any direct commercial application or use in view.

Industrial research: the planned research or critical investigation aimed at the acquisition of new knowledge and skills for developing new products, processes or services or aimed at bringing about a significant improvement in existing products, processes or services, including digital products, processes or services, in any area, technology, industry or sector (including, but not limited to, digital industries and technologies, such as super-computing, quantum technologies, block chain technologies, artificial intelligence, cyber security, big data and cloud technologies). Industrial research comprises the creation of components parts of complex systems, and may include the construction of prototypes in a laboratory environment or in an environment with simulated interfaces to existing systems as well as of pilot lines, when necessary for the industrial research and notably for generic technology validation.

Experimental development: acquiring, combining, shaping and using existing scientific, technological, business and other relevant knowledge and skills with the aim of developing new or improved products, processes or services, including digital products, processes or services, in any area, technology, industry or sector (including, but not limited to, digital industries and technologies, such as for example super-computing, quantum technologies, block chain technologies, artificial intelligence, cyber security, big data and cloud or edge technologies). This may also encompass, for example, activities aiming at the conceptual definition, planning and documentation of new products, processes or services. Experimental development may comprise **prototyping**, demonstrating, piloting, testing and validation of new or improved products, processes or services in environments representative of real life operating conditions where the primary objective is to make further technical improvements on products, processes or services that are not substantially set. This may include the **development of a commercially usable prototype** or pilot which is necessarily the final commercial product and which is too expensive to produce for it to be used only for demonstration and validation purposes. Experimental development does not include routine or periodic changes made to existing products, production lines, manufacturing processes, services and other operations in progress, even if those changes may represent improvements.

Feasibility study: the evaluation and analysis of the potential of a project, which aims at supporting the process of decision-making by objectively and rationally uncovering its strengths and weaknesses, opportunities and threats, as well as identifying the resources required to carry it through and ultimately its prospects for success;

Article 1(27) and Recital 13 of the DSD defines R&D to comprise three activities:

Fundamental research: same as GBER.

Applied research: original work undertaken with a view to acquiring new knowledge – it is directed primarily towards a particular practical end or objective.

Experimental development: work based on existing knowledge obtained from research and/or practical experience with a view to initiating the manufacture of new materials, products or devices, establishing new processes, systems and services or considerably improving those that already exist. May include the realisation of technological demonstrators, i.e. devices demonstrating the performance of a new concept or a new technology in a relevant or representative environment.

Research and development does *not* include the making and qualification of **pre-production prototypes**, tools and industrial engineering, industrial design or manufacture.

The cores of the definitions are similar. However, note the different regulation of prototypes and feasibility studies. NB: prototypes may be procured by use of the negotiated procedure without prior publication of a contract notice; see [Article 28\(2\)\(b\) of the DSD](#).

G. Design to ensure compatibility with the internal market

To overview 

R&D overview 

According to Article 107(3) TFEU the following kinds of State aid *may* be considered to be compatible with the internal market:

- “(a) aid to promote the economic development of areas where the standard of living is abnormally low or where there is serious underemployment, and of the regions referred to in Article 349, in view of their structural, economic and social situation;
- (b) aid to promote the execution of an important project of common European interest or to remedy a serious disturbance in the economy of a Member State;
- (c) aid to facilitate the development of certain economic activities or of certain economic areas, where such aid does not adversely affect trading conditions to an extent contrary to the common interest;
- (d) aid to promote culture and heritage conservation where such aid does not affect trading conditions and competition in the Union to an extent that is contrary to the common interest;
- (e) such other categories of aid as may be specified by decision of the Council on a proposal from the Commission.”

Note that State aid is also compatible with the internal market if it fulfils the conditions in Article 107(2) TFEU, but they are considered less relevant in the context of the policy toolkit.

Aid must be notified to and approved by the Commission prior to granting of the aid, cf. Article 108(3) TFEU, unless an exemption applies. On State aid procedures see further information [here \[link to p. 29 of the state aid manual\]](#).

State aid granted according to the General Block Exemption Regulation (GBER – note: the link is to the unofficial consolidated version), or another block exemption regulation, does not have to be notified to the Commission

The Commission has issued guidelines for several specific State aid measures, for State aid with specific objectives and for State aid to specific sectors. The guidelines are available on the Commission’s [State aid website](#). The guidelines explain which conditions the measure must fulfil to be approved by the Commission. However, if the measure does not fulfil the conditions in the guidelines, it is also possible to rely directly on the relevant provision of the Treaty (listed in the blue box) in *exceptional circumstances*.

F. Mixed contract – objectively justified to award single contract?

Article 3(2) of the DSD:

“The award of a contract having as its object works, supplies or services falling partly within the scope of this Directive, with the other part not being subject to either this Directive, [or to other procurement directives], shall not be subject to this Directive, provided that the award of a single contract is justified for objective reasons.”

If for example a contract for R&D services is outside the scope of the DSD – see [Step D](#) – and it is objectively justified to combine the award of this contract with a contract for the procurement of the results, then the single contract falls outside the scope of the DSD.

Note that the rules on free movement and the EU principles may apply to the award of such contracts.

Objectively justified to award a single contract?

The DSD does not provide any clarification on when it is objectively justified to award a single contract. However, there is a body of case-law concerning mixed contracts that may be useful for making the assessment of whether it could be justified for objective reasons to characterise a specific mixed contract as a single contract.

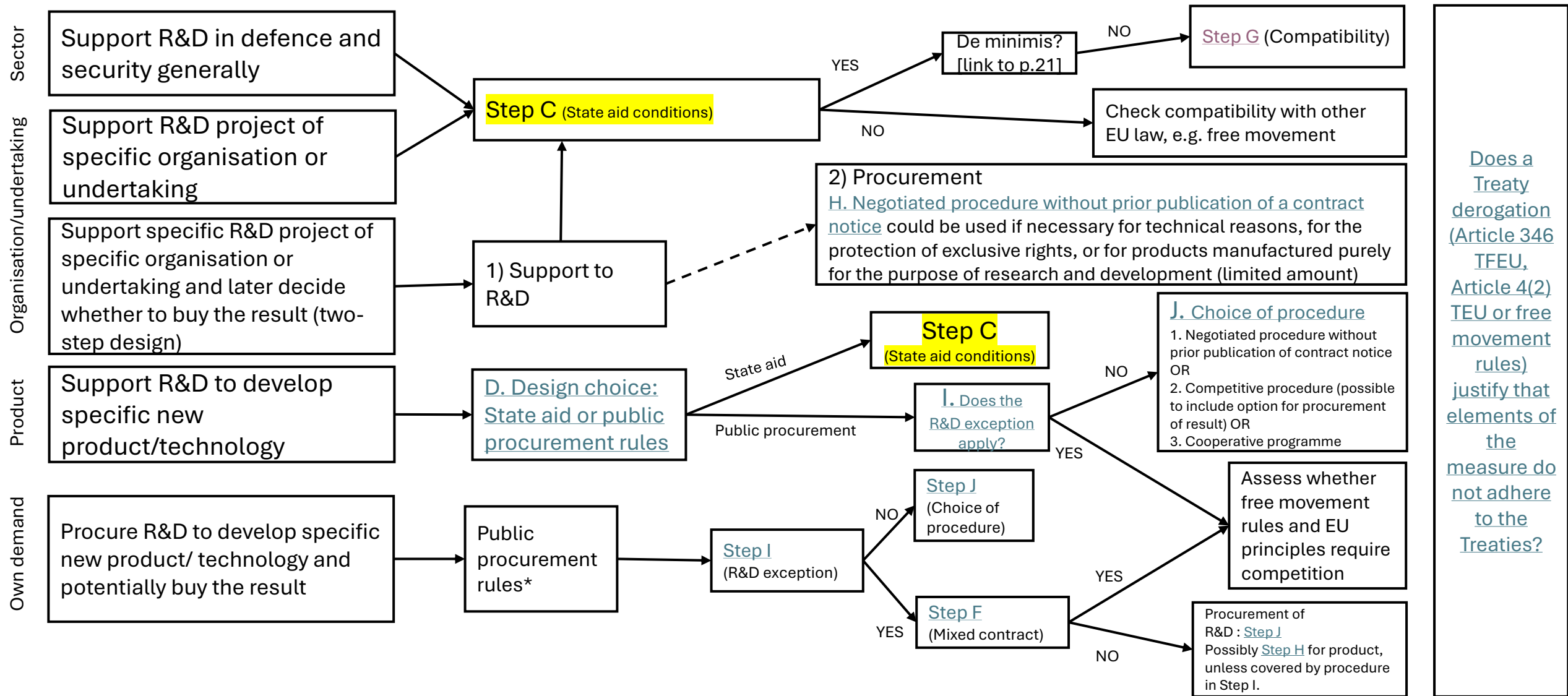
This case-law is partially reflected in Recital 11 of [Directive 2014/24](#).

It is plausible that the ECJ would be lenient in the assessment of objective justification when it comes to contracts for armaments or in the defence sector more generally.

What is the purpose of the measure?

Rules that frame design of the measure

Checks and choices



Does a Treaty derogation (Article 346 TFEU, Article 4(2) TEU or free movement rules) justify that elements of the measure do not adhere to the Treaties?

*Directive 2009/81, Defence and Security Directive

H. Negotiated procedure without prior publication of a contract notice – only product

Article 28(1)(e) of the DSD:

“when, for technical reasons or reasons connected with the protection of exclusive rights, the contract may be awarded only to a particular economic operator;”

This provision is not covered by the research conducted under the BEPIDS project. However, the following general considerations may be made:

- Interpretation of these grounds for using the negotiated procedure without prior publication of a contract notice is narrow.
- Using the procedure based on conditions arising after the R&D has been carried out by an undertaking that has been granted State aid may be viewed as circumvention.
- Consider State aid rules.
- Consider other design of the measure.

Article 28(2)(b) of the DSD:

“for products manufactured purely for the purpose of research and development, with the exception of quantity production to establish commercial viability or recover research and development costs;”

According to the Commission, “products manufactured purely for the purpose of R&D” means not only the supply of tailor-made products needed for conducting research activities (measuring instruments, testbeds, etc.), but also products resulting from these research and development activities.

The wording “with the exception” probably means that the contracts awarded shall not include quantity production to establish commercial viability or to recover costs of the R&D activities.

This procedure could probably be used to partially close the commercialisation gap. Consider State aid rules.

I. The R&D exception in the DSD

Article 13(j) of the DSD:

“This Directive shall not apply to the following:

[...]

research and development services other than those where the benefits accrue exclusively to the contracting authority/entity for its use in the conduct of its own affairs, on condition that the service provided is wholly remunerated by the contracting authority/entity.”

Inside scope of the DSD (i.e. the exception does *not* apply): the contracting authority fully finances the activities and obtains all benefits*. The two conditions are cumulative.

Award:

- Use the negotiated procedure without prior publication of a contract notice, cf. Article 28(2)(a) of the DSD. Consider State aid rules.
- Use a competitive procedure, which may include an option to award a contract for procurement of the final product, cf. Recital 55 of the DSD.

Outside scope of the DSD (i.e. the exception applies): where these conditions are not fulfilled, e.g. if the economic operator (undertaking) covers certain cost or receives some benefits or if third party contributes to financing.

Award:

- The EU principles may apply.
- NB: See also entry on mixed contracts.

*In this context, “benefits” means the Intellectual Property Rights (IPR) and all rights to use and/or disclose foreground and (embedded) background information related to the findings of the research conducted under the contract in question.

J. Design choice for procurement of R&D services and the results

Procurement of R&D service

Negotiated procedure without prior publication of a contract notice

Article 28(2)(a) of the DSD:

“for research and development services other than those referred to in Article 13”

This procedure can thus be used where the contracting authority fully finances the R&D services and obtains all benefits.

Use of this procedure essentially allows for the direct award of the contract to an economic operator. A contract award notice must be published and provide the justification for using the procedure.

Competitive procedure

- Restricted procedure (defined in Article 1(19) of the DSD)
- Negotiated procedure with prior publication of a contract notice, (Article 26 of the DSD).
- Competitive dialogue (Article 27 of the DSD)

The DSD does not provide for open procedures.

Cooperative programme based on R&D

Article 13(c) of the DSD: “This Directive shall not apply to the following: [...]”

(c) contracts awarded in the framework of a cooperative programme **based on research and development**, conducted jointly by **at least two Member States** for the **development of a new product** and, where applicable, the **later phases of all or part of the life-cycle of this product**. Upon the conclusion of such a cooperative programme between Member States only, Member States shall indicate to the Commission the share of research and development expenditure relative to the overall cost of the programme, the cost-sharing agreement as well as the intended share of purchases per Member State, if any.”

Cooperative programmes may be organised in the auspices of e.g. OCCAR, NATO or the EDA, or merely between participating Member States. The cooperative programme must be notified to the Commission.

Note that the rules on free movement and the EU principles may apply to the award of contracts.

Combined with procurement of results

Negotiated procedure without prior publication can be used to buy R&D services and results thereof (only limited amount) – see [Step B](#) – this can be planned upfront with low legal risk.

If a competitive procedure is used to procure R&D services, where the contracting authority fully finances the services and obtains all benefits – see [Step D](#) – the contract for R&D services may contain an option to buy the final results of the R&D services.

NB: In this design, the contracting authority will own the benefits of the R&D services which could allow for .

The scope of a cooperative programme can be confined to R&D but may also involve production, maintenance and other phases of the life cycle of the product.

Note that *if* the [proposed EDIP Regulation](#) is adopted, the Structures for European Armament Programme (SEAP) may be an alternative to a cooperative programme. The formal requirements for a SEAP are higher, but approval of the SEAP opens possibilities for e.g. funding. This is subject to the reservation that the SEAP instrument may be changed by the EU legislator before the EDIP Regulation is finally adopted.

For all designs, consider the State aid rules,

The Belgian Economic Potential in the Industry of Defence and Security

A State aid framework

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Abstract

This report, prepared in the context within the framework of the BEPIDS project (Belgian Economic Potential in the Industry of Defence and Security), provides a basic understanding of the State aid rules of the European Union. These rules stipulate, amongst others, that it is in principle prohibited for EU Member States to grant State aid to one or more undertakings. The main purpose of this report is to develop a framework setting out what R&D&I aid EU Member States may grant in line with said rules. In a later stage of the BEPIDS project, which is conducted in the context of the Belgian Defence, Industry and Research Strategy, when we will assess what measures are desirable to support the Belgian defence and security sector, this report will be used as a framework against which the legality of the recommended measures will be assessed.

Executive summary

The following executive summary highlights the key takeaways of this report:

- This report maps out how EU State aid law does or does not allow EU Member States to grant aid to undertakings to boost R&D&I. It provides a framework for subsequent research carried out in the context of a research project conducted by researchers from the *Royal Military Academy* and the *Vrije Universiteit Brussel*, namely, the BEPIDS Project.
- According to Article 107(1) TFEU, EU Member States are in principle prohibited from granting State aid to one or more undertakings.
- **The concept of ‘State aid’ in Article 107(1) TFEU is an objective concept.** A public measure constitutes State aid where this measure meets the ‘State aid criteria’ (see next bullet point), regardless of the purpose of such a measure or the societal need for it.
- **When Belgium grants financial aid to support the Belgian defence and security industry, this aid measure constitutes State aid within the meaning of Article 107(1) TFEU.** Indeed, it can be assumed that such a measure meets the EU State aid criteria:
 - state resources: it is certain that Belgian State aid measures financially supporting the Belgian defence and security industry entail a transfer of state resources.
 - imputability: aid measures adopted by the Belgian Ministry of Defence are imputable to the Belgian State.
 - economic advantage: subsidies and certain other types of support measures provide the beneficiary concerned with an economic advantage, regardless of whether the market is experiencing one or more market failures, whether the State imposes a particular public service obligation(s) on the undertakings or whether the measure has been taken in the context of a State policy, such as the Belgian Defence, Industry and Research Strategy (or ‘DIRS’).
 - selectivity: the fact that the State wants to support a particular sector shows selectivity of the aid measures.
 - (potential) distortion of competition: given the broad interpretation of this State aid criterion by the EU Courts, it can be assumed that it is fulfilled when the Belgian State supports the Belgian defence and security sector.
 - (potential) effect on trade between EU Member States: given the flexible interpretation of this State aid criterion by the EU Courts, it can be assumed that it is in principle fulfilled when the Belgian State supports the Belgian defence and security industry.
- Only State aid to ‘undertakings’ falls under the scope of Article 107(1) TFEU. The EU Courts define an ‘undertaking’ as “*any entity engaged in an economic activity, regardless of its legal status and the way in which it is financed*”. This leads to the following conclusions:

- **‘Aid’ to the Belgian Ministry of Defence (‘the Army’) falls outside the scope of Article 107(1) TFEU.** The latter is part of the State and does not qualify as an undertaking.
- **Many operators active in the Belgian defence and security sector** (e.g. entities that develop, produce, and sell (military) equipment and services) **conduct economic activities and therefore qualify as undertakings.** It is indeed well-established that these activities constitute *economic* activities.
- **Research institutions (including the Royal Military Academy, NOH and oruniversities,) qualify as undertakings when they carry out economic activities and can be the beneficiary of State aid.** However, when the percentage of their economic activities is less than 20% of their entire activities, the Commission considers them as being non-undertakings.
- Where an entity carries out both economic and non-economic activities and receives aid, it must keep separate accounts. It must therefore be able to demonstrate that the aid is only used to finance its non-economic activities.
- **Article 346 TFEU provides that EU Member States may disregard the EU State aid rules under very strict conditions when taking measures to protect their national security interests.** This provision will be discussed in separate report. As described in the second report, the scope and the application of this Treaty provision is very limited. Therefore, it is safe to say that Belgium will in principle have to consider the EU State aid rules when implementing its Defence, Industry and Research Strategy.
- In principle, EU Member States must notify any intention to implement new State aid within the meaning of Article 107(1) TFEU to the Commission. **If an aid plan is implemented without notification to and approval by the Commission, the aid plan qualifies in principle as unlawful State aid.** Unlawful aid must be recovered from the beneficiary or beneficiaries concerned.
- **EU State aid law provides important opportunities for EU Member States to grant R&D&I aid:**
 - **EU Member States may grant so-called ‘de minimis aid’, i.e. aid below a de minimis threshold set by the Commission.** However, the granting of de minimis aid is subject to various formalities.
 - Articles 25 up to and including 30 of the **General Block Exemption Regulation (or ‘GBER’)**, which allows EU Member State to grant State aid without approval by the Commission, mention various categories of State aid for R&D&I that are exempt from the notification requirement *ex* Article 108(3) TFEU. It concerns:
 - aid for research and development project;
 - aid for projects awarded a Seal of Excellence quality label;
 - aid for Marie Skłodowska-Curie actions and ERC Proof of Concept actions;
 - aid involved in co-funded research and development projects;
 - aid for Teaming actions;

- aid involved in the co-funding of projects supported by the European Defence Fund or the European Defence Industrial Development Programme;
 - investment aid for research infrastructures;
 - investment aid for testing and experimentation infrastructures;
 - aid for innovation clusters;
 - innovation aid for SMEs;
 - aid for process and organisation innovation; and
 - aid for research and development in the fisheries and aquaculture sector.
- State aid that is exempt from the notification requirement, for example under the GBER, is, however, subject to important **evaluation and monitoring formalities**.
 - **The Commission has adopted a Framework in which it has set out which R&D&I State aid is compatible with the internal market.** Some important points of attention:
 - The principles set out in this Framework concern State aid for R&D&I in all sectors, including 'defence R&D&I'.
 - The aid categories which may be approved under the Framework concern: aid for R&D projects, aid for feasibility studies, aid for the construction and upgrade of research infrastructure, aid for the construction and upgrade of testing and experimentation infrastructure, aid for innovations activities, aid for process and organisation innovation and aid for innovation clusters.
 - Even though the aid concerned may be compatible with the internal market, **such aid must always be notified to and approved by the Commission before it can be granted.**
 - The Commission will only approve State aid for R&D&I where the measure meets the **conditions and criteria** set out in said 2022 Framework. This also includes important monitoring and evaluation obligations.
 - Various other State aid policy documents may be relevant for the DIRS, such as the Commission Communication on 'important project of common European interest' or the Commission guidelines on State aid for broadband.
 - In these documents the Commission has set out under what conditions a State measure may be compatible with internal market. However, a measure that is compatible with the internal market may only be adopted after notification to and approval by the Commission.
 - Given the scope of this report, we will mainly focus on the R&D&I Framework.

1. Introduction

1.1. Background

This report has been prepared in the context of the research project '*The Belgian Economic Potential in the Industry of Defence and Security*' (the 'BEPIDS Project'), conducted by researchers of the Belgian *Royal Military Academy* and the *Vrije Universiteit Brussel* with financial support of the *Federal Public Planning Service Science Policy* ('Belspo') and the *Belgian Royal Higher Institute for Defence*. This project aims, amongst others, to contribute to the development of a strategy to support research and technology in the Belgian defence and security sector and, indirectly, the Belgian economy and society.¹ This goal links the BEPIDS Project to the Defence, Industry and Research Strategy (the 'DIRS') of the Belgian Ministry of Defence, which aims to develop and consolidate a Belgian Defence technological and industrial base.² One aspect of the BEPIDS Project is to examine what (aid) measures the Belgian State can and should take to achieve the goals of the DIRS.

In summary, this report provides a basic understanding of the State aid rules of the European Union ('EU'). These rules stipulate that it is in principle prohibited for EU Member States to grant State aid to one or more undertakings (Article 107(1) of the Treaty on the Functioning of the European Union ('TFEU')). **The main purpose of this report is to develop a framework setting out what aid EU Member States may grant in line with said State aid rules. In a later stage of the BEPIDS Project, when we will discuss what support measures are desirable to support the Belgian defence and security sector, this report will be used as a framework against which the legality of the recommended measures will be assessed.** Given the scope of the BEPIDS Project and the DIRS, the report will mainly focus on measures aimed at supporting research, development, and innovations ('R&D&I').³

¹ For more about the BEPIDS Project, see: <https://www.geoeconomicsgroup.be/>

² The goals of the DIRS are to contribute to supporting the Belgian national security and defence policy and strengthening the EU's open strategic autonomy; to position Belgium as a relevant, reliable and competitive technological partner in European and trans-Atlantic capability development, to guarantee the degree of national autonomy required in critical fields as regards scientific research, technological expertise and industrial capacity, and to generate the necessary economic and social return in the form of knowledge, technology and employment. For more about the DIRS, see <https://www.defence-institute.be/en/defence-industry-and-research-strategy/> (accessed on 1 April 2023).

³ In Section 8.9., we provide a list of some basic State aid law manuals for those who want to know more about EU State aid law.

1.2. Scope and structure

First, we will discuss the basic principles of the EU prohibition *ex* Article 107(1) TFEU to grant State aid (Chapter 2). Since the EU State aid rules only apply when *State aid* is granted to one or more *undertakings*, it is important to discuss the concepts of ‘State aid’ and ‘undertaking’ in more detail. In other words, we will explain when a support measure adopted by Belgium falls within the scope of the EU State aid rules.

In Chapter 3, we will briefly analyse the EU State aid procedures. First, we will tackle the notification procedure for new State aid. If Belgium would wish to adopt a State aid measure, it must in principle notify this measure to the European Commission (‘the Commission’) (‘notification obligation’). The latter will analyse whether the measure is State aid within the meaning of Article 107(1) TFEU and, if so, whether it is compatible with the internal market. Moreover, the notified measure may not be implemented without the Commission’s approval (the so-called ‘standstill obligation’) (Article 108(3) TFEU). If the Commission finds that a notified measure is incompatible with the internal market, it may not be implemented.

Would Belgium grant State aid without notification to and approval by the Commission, this aid constitutes ‘unlawful State aid’. In the second part of Chapter 3, we will briefly describe how the Commission and the national courts of EU Member States can act against such aid. However, since the BEPIDS Project is focussed on ‘new aid’, rather than on aid that has been already granted (so-called ‘existing aid’), we will tackle the enforcement of EU State aid law only briefly.

The notification obligation *ex* Article 108(3) TFEU is not absolute. Indeed, as discussed in Chapter 4, the Commission has exempted many categories of State aid from the notification requirement because these categories are deemed to be compatible with the internal market. For example, the General Block Exemption Regulation⁴ (‘GBER’), the Commission’s most important block exemption regulation, provides that aid to support research, development, and innovation (‘R&D&I’), can be granted without notification to the Commission when it meets certain general and specific criteria. In Chapter 4, we will discuss these criteria in more detail.

Thereafter, in Chapter 5, we will examine the conditions under which the Commission will approve R&D&I State aid. The Commission will first examine whether the measure constitutes State aid within the meaning of Article 107(1) TFEU and, if so, whether the measure is compatible with the internal market. The Commission will conduct the compatibility analysis based on its policy documents (e.g. frameworks, guidelines, or communications). For example, when it assesses the

⁴ 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, (last version is available on the following link: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A02014R0651-20210801> (accessed on 1 April 2023)).

compatibility of R&D&I State aid with the internal market, it will consider the principles elaborated in its 2022 Framework for State aid for R&D&I.⁵ If there is no relevant policy document available, the Commission will examine whether a general exception to the State aid prohibition applies.

The EU State aid rules also apply to the measures financing so-called ‘services of general economic interest’ (‘SGEIs’), being services of an economic nature that public authorities identify as being of particular importance, but which are not supplied by the market, or at least not to the extent and under the conditions required by societal needs. As we will briefly discuss in Chapter 6, EU law specifies under which criteria EU Member States may compensate undertakings entrusted with the operation of an SGEI. However, as will be shown, these rules are less relevant to the BEPIDS Project.

Chapter 7 includes a glossary. In Chapter 8, we list some of the most relevant legal sources. Chapter 9 includes a few ‘decision trees’ and schemes that the readers of this report can use to fully grasp the dynamics of the EU State aid rules.

The report provides a ‘framework’ for subsequent research and cannot be regarded as an exhaustive overview of the EU State aid rules, nor as an *ad hoc* legal advice. Moreover, the report has been prepared on a tailor-made basis for the BEPIDS Project, and thus focusses on the Belgian defence and security policy on the one hand, and R&D&I on the other. **The scope of the report is limited to EU State aid law and does not consider other EU rules that may apply, such as public procurement, the EU rules on free movement of goods and services, etc.**

We will devote a separate report to Article 346 TFEU. This Treaty provision allows EU Member States to take measures they consider necessary for the protection of the essential interests of their security which are connected to the production of or trade in arms, munitions, and war material. For example, Belgium can ‘switch off’ the EU State aid rules by invoking this Treaty provision. However, as will be shown in the separate report, Article 346 TFEU can only be invoked under very strict conditions. **Therefore, when implementing the DIRS, Belgium must in principle follow the EU State aid rules.**

⁵ Communication from the Commission - Framework for State aid for research and development and innovation, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.C_.2014.198.01.0001.01.ENG&toc=OJ:C:2014:198:TOC (accessed on 1 April 2023).

1.3. Methodology

The research for this report has been conducted by employing a classic legal positivist research approach, which is characterised by the traditional legal research strategies of reviewing legally binding instruments, case law of European and national courts, the decisional practice of the Commission, policy documents of the European and national authorities, literature, etc. As the law *in se* constitutes the starting point for the methodology being applied in this report, there is (for now) no added value to use empirical research methods such as, for example, surveys or interviews. In a later stage of this BEPIDS Project, the desk research will be supplemented where necessary, for example by engaging in a dialogue with experts and stakeholders who may point out to possible problems of a more practical nature.

2. The State aid prohibition ex Article 107(1) TFEU

2.1. Starting point

Article 3(1)(b) TFEU provides that the EU has exclusive competence to adopt competition rules necessary for the functioning of the European internal market. Article 3(3) of the Treaty on the European Union ('TEU') further provides that the EU's objective is to establish an internal market. According to Article 26(2) TFEU, the internal market comprises an area without internal frontiers in which the free movement of goods, persons, services, and capital is ensured. Protocol 27, annexed to the TFEU, states that the internal market includes a system that ensures that competition is not distorted.

Based on these Treaty provisions, it is well-established that the EU competition rules aim to protect the integrity of the European internal market by avoiding distortions caused by the actions of undertakings and governments. The latter can distort competition in many ways, not only by tolerating cartels or granting special or exclusive rights to one or more undertakings, but also by supporting undertakings. **Therefore, EU law prohibits EU Member States to grant State aid to one or more undertakings. Article 107(1) TFEU provides the following:**

“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.”

In the following two Sections, we will discuss which State measures fall under the scope of Article 107(1) TFEU and, therefore, are prohibited. As we will discuss, it concerns State measures that imply State aid (see Section 2.2.) to one or more undertakings (see Section 2.3.).

2.2. The concept of *State aid* within the meaning of Article 107(1) TFEU

2.2.1. The State aid criteria

A first important question to answer is which aid measures fall under the scope of Article 107(1) TFEU. According to well-established case law of the General Court ('GC') and the European Court

of Justice ('ECJ') (together 'the EU Courts'), a State measure is 'State aid' within the meaning of said Treaty provision when it meets the following cumulative 'State aid criteria':

- The measure is taken by the State through state resources and is imputable to that State.
- The measure confers a selective economic advantage to one or more undertakings.
- The measure distorts or threatens to distort competition in the EU internal market.
- The measure affects or threatens to affect trade between EU Member States.⁶

The concept of 'State aid' in Article 107(1) TFEU is an objective and legal concept.⁷ This means that a measure is State aid as soon as said criteria are met. The purpose, the background and the form of a measure have no impact whatsoever on its classification as State aid. Moreover, the fact that a measure is adopted from a particular social, societal, or political point of view does not play any role. **Therefore, the fact that the Belgian State would adopt a measure from a defence or security perspective does not impact the State aid qualification of this measure.**⁸

Logically, measures that do not meet the State aid criteria fall outside the scope of Article 107(1) TFEU. For example, aid granted to all undertakings is not selective and therefore falls outside the scope of the EU State aid rules. However, this does not mean that other EU legal rules do not or cannot apply (EU rules on public procurement, free movement of goods and services, etc.). However, as mentioned above, we do not address the possible application of other rules.

In 2016, the Commission published an important policy document clarifying the aforementioned State aid criteria.⁹ While this 'Notice on the notion of 'State aid' can serve as a guide when assessing whether a measure qualifies as State aid within the meaning of Article 107(1) TFEU, it should always be borne in mind that the concept of 'State aid' is subject to changing and/or clarifying views of the EU Courts and/or the Commission. **Whether a measure meets the criteria**

⁶ E.g. ECJ 21 March 1990, C-142/87, *Belgium v Commission*, ECLI:EU:C:1990:125, para 25; ECJ 14 September 1994, C-278/92, C-279/92 and C-280/92, *Spain v Commission*, ECLI:EU:C:1994:325, para 20; ECJ 17 July 2008, C-206/06, *Essent Netwerk Noord BV and Alumimum Delfzijl BV*, ECLI:EU:C:2008:413, paras 63-64; ECJ 2 December 2008, C-399/08 P, *Commission v Deutsche Post AG*, ECLI:EU:C:2010:481, paras 38-39; ECJ 4 June 2015, C-15/14, *Commission v MOL Magyar Olaj-és Gázipari Nyrt*, ECLI:EU:C:2015:362, para 47; ECJ 6 March 2018, C-579/16 P, *Commission v FIH Holding A/S and FIH Erhvervsbank A/S*, ECLI:EU:C:2018:159, para 43; ECJ 21 October 2020, C-556/19, *Société Eco TLC v Ministre d'État, ministre de la Transition écologique et solidaire and Ministre de l'Économie et des Finances*, ECLI:EU:C:2020:844, para 18.

⁷ ECJ 2 July 1974, nr. 173/73, *Italy v Commission*, ECLI:EU:C:1974:71, para 13.

⁸ In this report, we assume that Article 346 TFEU does not apply. We discuss the scope and the application of this provision in a separate report.

⁹ Commission Notice on the notion of State aid as referred to in Article 107(1) of the Treaty on the Functioning of the European Union, [https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52016XC0719\(05\)](https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52016XC0719(05)) (accessed on 1 April 2023).

of Article 107(1) TFEU must always be assessed on a case-by-case basis. In case of doubt as to whether a measure constitutes State aid, it is recommended to (informally) contact the Commission, which can advise EU Member States on the legality of (aid) measures. In the following Sections, we will discuss the different State aid criteria, as explained by the EU Courts.

2.2.2. First criterion: financed through State resources and is attributable to the State

A State aid measure is a measure adopted by an EU Member State through State resources (see 2.2.2.1.) and is imputable to that Member State (see 2.2.2.2.). These are two separate sub-criteria that must be fulfilled cumulatively.¹⁰

2.2.2.1. Financed through State resources

Key takeaway

A measure taken by the Belgian Ministry of Defence must entail a transfer of State resources to one or more undertakings in order to qualify as State aid.

Only aid financed through State resources can be qualified as State aid within the meaning of Article 107(1) TFEU. State resources include all resources of public authorities, regardless of the level of these authorities (for example the federal level, the regions, the provinces, or the municipalities).¹¹ No distinction is made between aid granted directly by the State or indirectly by public or private entities established or appointed by the State to administer aid.¹² **Thus, the first State aid criterion is met when part of the DIRS budget were to flow to the Belgian defence and security industry.**

Importantly, the scope of the criterion is not limited to a *positive* transfer of State resources. Indeed, it is sufficient that the measure conferring an economic advantage leads to a 'loss' of State resources.¹³ Also a reduction or remission of tax and social security revenues, or the creation of a concrete risk that the State will have to bear a burden in the future, are therefore considered to be financed with state resources.

¹⁰ ECJ 16 May 2002, C-482/99, *France v Commission*, ECLI:EU:C:2002:294, para 24.

¹¹ Notice on the Notion of State aid, para 48.

¹² ECJ 21 October 2020, C-556/19, *Société Eco TLC v Ministre d'État, ministre de la Transition écologique et solidaire and Ministre de l'Économie et des Finances*, ECLI:EU:C:2020:844, paras 26-27.

¹³ ECJ 21 October 2020, C-556/19, *Société Eco TLC v Ministre d'État, ministre de la Transition écologique et solidaire and Ministre de l'Économie et des Finances*, ECLI:EU:C:2020:844, para 35.

The resources of an entity that is controlled by the State, in the sense that the State, without being an owner, can appoint or dismiss the board of directors or management of that entity and thus influence the entity's decisions, are also considered state resources.¹⁴ In addition, state resources are also resources related to tasks assigned by the State to private entities where those entities have no discretion regarding the use of those resources.

Thus, aid granted through state resources means funding from resources that come under the control of the state, even when such resources do not enter the budget of the State.¹⁵ For example, revenue from levies imposed on users of electricity and used to subsidise production of green electricity is in principle considered a state resource. This is because the levies are imposed by law, the right to collect the revenue is granted to electricity distributors by law and their obligation to transfer that revenue to green electricity producers is also laid down by law. Although these resources do not normally flow through the budget of a public authority, they are controlled by the State. The law, which is an act of the State, determines who pays them, how much they pay and who receives them.

There is an important distinction between EU funds that flow through a national authority and EU funds that are paid directly by an EU institution to the final beneficiary. Resources from the EU (e.g. from the Structural Funds, such as the European Regional Development Fund (ERDF), the European Investment Bank or the European Investment Fund), or from international financial institutions are considered state resources provided that the EU Member States have a discretion as to its use, for example regarding the choice of beneficiary(ies).¹⁶

Contributions from EU structural and investment funds (or ESI funds, such as ERDF, ESF, EMFF) are paid to final beneficiaries by national (or regional) managing authorities or agencies acting on behalf of these authorities. A managing authority is a public authority which is responsible to design operational programmes, determine the objectives of these operational programmes and the area of their implementation and define criteria for the selection of eligible beneficiaries. The definition of objectives, the area of implementation and the eligibility criteria are indicators that the managing authority exercises control over the EU funds that it manages. It is irrelevant that the operational programmes are in line with the EU cohesion policy or that the EU (Commission or Court of Auditors) checks compliance with the relevant EU rules or that the EU may perform some coordination role. This is because the managing authority has considerable *discretion* in determining the precise targets of their programmes and eligible beneficiaries. This discretion is sufficient to confer to them control over EU structural funds. Whenever EU structural funds, alone

¹⁴ Notice on the Notion of 'State aid', para 64.

¹⁵ Notice on the Notion of 'State aid', paras 57 etc.

¹⁶ Notice on the Notion of 'State aid', para 60.

or together with national funds, contribute to a research project or to a research infrastructure, they should be considered as state resources which are subject to the EU State aid rules.

However, in the absence of such discretion for the EU Member States, EU resources do not constitute State resources within the meaning of Article 107(1) TFEU. Indeed, Article 8(2) GBER explicitly stipulates that “*where Union funding centrally managed by the institutions, agencies, joint undertakings or other bodies of the Union that is not directly or indirectly under the control of the Member State is combined with State aid, only the latter shall be considered for determining whether notification thresholds and maximum aid intensities or maximum aid amounts are respected [...]*” and thus clarifies that direct EU funding does not fall within the scope of Article 107(1) TFEU.

This is in principle the case, for example, with the funding of projects under the Horizon 2020 programme, the EU Program for the Competitiveness of Enterprises and for Small and Medium-sized Enterprises (COSME), and EU funds for the trans-European transport network (TENT). Indeed, under these programmes, aid is in principle granted directly to the beneficiaries without any involvement of the EU Member States. Payments made directly by the Commission to undertakings or research institutions are thus not considered to be state resources for the simple reason that they do not come under the control of a national public authority. National authorities do not have discretion to determine the eligible beneficiaries. On the contrary, it is the Commission that decides on the eligible beneficiaries, how much they may receive and for which purposes. Member State authorities are in principle not involved in these decisions. Should the EU Member States nevertheless gain an influence over the aid granted, state resources are of course involved.

Financial support from the European Defence Fund also remains in principle outside the scope of the European State aid law. This support does not involve state resources. However, if there is co-financing by the Member State, the support involves state resources.

2.2.2.2. Attributable to the State

Key takeaway

Measures taken by the Belgian State to support the Belgian defence and security industry are attributable to the Belgian State.

A State aid measure must be imputable to the EU Member State which adopts the measure. This is clearly the case when aid is financed by the State budget.¹⁷ **Measures taken by the Belgian Ministry of Defence to support the Belgian defence and security industry are therefore imputable to the Belgian State, just like measures taken by Belgian regional or local authorities.**

However, aid measures are not imputable to a EU Member State when the latter is obliged to take these measures to implement an EU measure without any discretion.¹⁸ For example, when Belgium would exempt an excise duty on aviation fuel this measure is not imputable to that State because this exemption is imposed by EU law. Moreover, aid granted in the context of the EDF is not attributable Belgium. However,

Belgium cannot circumvent the EU State aid rules by setting up independent institutions charged with granting State aid. Even if the State designates a public or private law entity to adopt and/or implement an aid measure, this measure is indeed deemed to be imputable to the State.¹⁹ However, any co-financing by Belgium is attributable to the Belgian governments.

Unfortunately, however, it is not always clear whether a support measure taken by a 'public company' is imputable to the State. It is therefore important to check on a case-by-case basis whether the State was involved in the adoption of the measure taken by a public company. The mere fact that a measure is taken by a public undertaking is not sufficient to consider that the measure imputable to the State.²⁰ In its Notice on the concept of 'State aid', the Commission provides some indications for determining whether a measure taken by a public company is imputable to a State.²¹ For example, the Commission mentions the following indications: the fact that a public undertaking through which the aid is granted could not take the measure in question without regard to requirements imposed by the State; the presence of organic factors linking a public company to the State; the fact that a public company has to take into account indications from the State; the fact that a public company is part of the structure of the public administration; etc. However, this list is non-exhaustive and should be approached with caution. Each measure must be assessed individually.

¹⁷ ECJ 6 September 2006, C-88/03, *Portugal v Commission*, ECLI:C:2006:511, para 55.

¹⁸ ECJ 23 April 2009, C-460/07, *Sandra Puffer v Unabhängiger Finanzsenat, Außenstelle Linz*, ECLI:EU:C:2009:254, para 70.

¹⁹ GC 12 December 1996, T-358/94, *Air France v Commission*, ECLI:EU: T:1996:194, para 62.

²⁰ Notice on the notion of 'State aid', para 41.

²¹ Notice on the notion of 'State aid', para 41.

2.2.3. Second criterion: the conferral of a selective economic advantage

A State aid measure within the meaning of Article 107(1) TFEU entails an economic advantage (see 2.2.3.1.) which is also selective (see 2.2.3.2.).

2.2.3.1. Economic advantage

Key takeaways

- An economic advantage is deemed to exist as soon as the recipient is (potentially) relieved of certain costs that it would have to bear itself under normal market conditions.
- However, measures that are advantageous to an undertaking without having an impact on its budget do not imply an economic advantage within the meaning of Article 107(1) TFEU.
- Thus, financial support from the Belgian Ministry of Defence to the Belgian defence and security industry entails an economic advantage.

2.2.3.1.1. Introduction

A State aid measure *ex* Article 107(1) TFEU implies an ‘economic advantage’ for the recipient of the aid. The EU Courts apply a broad interpretation of this concept: an economic advantage is an advantage that would not be obtained by the recipient under normal market conditions.²² In other words, an economic advantage is deemed to exist as soon as the recipient is (potentially) relieved of certain costs that it would have to bear itself under normal market conditions.

The classic example of an ‘economic advantage’ is a subsidy. However, given the broad interpretation of the concept of ‘economic advantage’, also other measures, such as the non-enforcement of debts, tax benefits and/or exemptions, advice given free of charge or not at market price, making assets (e.g. intellectual property rights) available free of charge or not at market price, etc, qualify as economic advantages.²³

Thus, it is not the form of a measure, but its effect that is relevant to assess whether it implies an economic advantage. The following elements are thus irrelevant when analysing whether a measure confers an economic advantage to one or more undertakings:

²² ECJ 3 March 2005, C-172/03, *Wolfgang Heiser v Finanzamt Innsbruck*, ECLI:EU:C:2005:130, para 36.

²³ E.g. ECJ 19 September 2000, C-156/98, *Germany v Commission*, ECLI:EU:C:2000:467, para 25

- The relieved costs are only limited.
- The relieved costs are imposed by the State or incurred to comply with (new) legal requirements.
- The reduction appears insufficient to create a competitive advantage over rivals of the aid recipient.
- Competing undertakings receive higher subsidies or enjoy other advantages or privileges, whether from a Belgian or from foreign (European or non-European) authorities.
- Competing undertakings bear lower costs, pay lower taxes, or have access to larger markets.
- A market failure or imperfect competition.
- The conferral of an economic advantage to one or more undertakings is part of the State's policy (see, however, Articles 346 and 348 TFEU).²⁴

Yet, the criterion of 'economic advantage' is not fulfilled merely because a State measure is beneficial for an undertaking. The measure concerned must entail an *economic* advantage, being an advantage that takes costs away that the recipients normally would have to bear themselves. **Thus, regulations that are advantageous to an undertaking without having a direct impact on its budget do not imply an economic advantage. For example, the fact that an undertaking must comply with more lenient conditions to obtain a licence to operate an activity constitutes an advantage, but not an *economic* advantage.** Of course, in that case it still must be considered whether this 'advantage' complies with other applicable rules, such as, for example, the European or national discrimination rules.

When an EU Member State (in)directly enters into economic transactions, in whatever form, ranging from capital participations, loans, to (rental) agreements, it is subject to EU State aid law. In other words, if a State acts as an economic actor, its actions must be assessed against the behaviour that a private market participant would have acted in the same situation. This is the so-called *Market Economy Operator Principle* ('MEOP'): if a State measure entails 'favourable conditions' that a private undertaking would not accept, this measure is deemed to imply an economic advantage.²⁵

The EU Courts and the Commission have upheld the MEOP in relation to various situations where an EU Member State enters into economic transactions. In summary, it is assumed that EU Member States grant an economic advantage with the following transactions:

²⁴ For a broad discussion on the concept of 'economic advantage', see Notice on the Notion of 'State aid', paras 66 etc.

²⁵ E.g. ECJ 21 March 1990, C-142/87, *Belgium v Commission*, ECLI:EU:C:1990:125, para 29; ECJ 21 March 1991, C-305/89, *Italy v Commission*, ECLI:EU:C:1991:142, paras 18-19.

- loans on non-market terms (such as a lower interest rate, longer maturity, or favourable repayment terms; subordination of loan);
- the (re)purchase or (re)lease of infrastructure at a higher (lower) price than the market price;
- guarantees on non-market terms (e.g. with a lower premium);
- taking over an undertaking's losses;
- granting more favourable terms than originally planned after going through a tendering procedure;
- participating in capital participations on terms more favourable than those private investors would accept;
- making staff or goods available free of charge or at a lower price than the market price; or
- if an undertaking builds or develops non-publicly accessible infrastructure on behalf of public authorities and the latter waives the costs that an undertaking would normally have to pay.²⁶

2.2.3.1.2. Secondary effect vs. indirect effect of an aid measure

All State aid has effects beyond the benefits enjoyed by the direct recipients of the aid. For example, an investment subsidy helps the beneficiary to cover part of the purchase cost of new equipment, leading to an increase in demand for the sellers of that equipment that would not have occurred without said aid. Thus, if a subsidy qualifies as State aid, it affects the beneficiary's position in the market and therefore also the transactions between the beneficiary and third parties. This unavoidable effect is called the 'secondary effect' and in principle does not imply an economic advantage for its recipients.²⁷

However, the secondary effect of an aid measure must be distinguished from its 'indirect effect', which is an economic benefit that flows through the direct aid recipient to predetermined or predefined third parties. These third parties are classified as 'indirect beneficiaries' and also receive an economic advantage (and thus State aid within the meaning of Article 107(1) TFEU if the other State aid criteria are also met). Indeed, in paragraph 115 of its Notice on the concept of 'State aid', the Commission explains that an economic advantage may be granted to undertakings other than those to which state resources are directly transferred (i.e. an indirect advantage).

²⁶ See e.g. ECJ 21 March 1990, C-142/87, *Belgium v Commission*, ECLI:EU:C:1990:125, paras 22-29; ECJ 24 October 2013, C-214/12 P, C-215/12 P and C-223/12 P, *Land Burgenland and Austria v Commission*, ECLI:EU:C:2013:682; ECJ 29 June 1999, C-256/97, *Déménagements-Manutention Transport SA*, ECLI:EU:C:1999:332, para 25; GC 13 June 2000, T-204/97 and T-270/97, *EPAC v Commission*, ECLI:EU:T:2000:148, para 47.

²⁷ Notice on the notion of 'State aid', para 116.

Thus, a measure may constitute both a direct economic advantage for the recipient undertaking and an indirect economic advantage for other undertakings.

To assess whether a measure implies an indirect economic advantage, the foreseeable effects of the measure should be examined *ex ante*.²⁸ An indirect economic advantage exists if the measure is designed to channel its secondary effects to identifiable undertakings or groups of undertakings. In practice, an indirect advantage is granted when an aid measure predetermines how the aid beneficiary can dispose of that aid by requiring them to buy certain products from certain companies (sellers) or supply certain products to certain companies (users).

To indicate how State measures can lead to an indirect economic benefit for third parties, we discuss some examples in the following Sections. In particular, we will discuss how undertakings may receive aid by interacting with a research institution subsidised by the State (e.g. a university).

2.2.3.1.3. The conferral of an ‘indirect economic advantage’ through ‘State-funded research organisations’

Introduction

In this Section, we will discuss some examples of situations where an undertaking receives indirect aid *via* a research institution or research infrastructure²⁹ subsidised by the State. We address the situations where such an organisation conducts contract research on behalf of an undertaking, where such an organisation collaborates with an undertaking, and, lastly, where such an organisation offers advice to or shares information with an undertaking. We always provide a (fictitious) example to explain the rules.

Contract research on behalf of an undertaking

When a subsidised research organisation or research infrastructure carries out contract research on behalf of an undertaking, for example resulting in a transfer of intellectual property rights, this

²⁸ Notice on the notion of ‘State aid’, para 116.

²⁹ A research infrastructure “*means facilities, resources and related services that are used by the scientific community to conduct research in their respective fields and covers scientific equipment or set of instruments, knowledge-based resources such as collections, archives or structured scientific information, enabling information and communication technology-based infrastructures such as grid, computing, software and communication, or any other entity of a unique nature essential to conduct research. Such infrastructures may be ‘single-sited’ or ‘distributed’ (an organised network of resources)*” (Framework for State aid for R&D&I, para 16, *sub* (gg)).

transaction does not involve State aid if the research organisation charges a fee at market price.³⁰ For example, when a Belgian university carries out research on behalf of an undertaking active in the Belgian defence and security industry, the latter will receive no indirect economic advantage when it pays the market price for the conducted research.

However, if the university would charge a price lower than the market price for said research, the undertaking receives an (indirect) economic advantage and, if all State aid criteria are met, State aid within the meaning of Article 107(1) TFEU.³¹ Indeed, in that case the State finances a research institution to conduct research on behalf of an undertaking, leading to the conferral of an indirect economic advantage to the latter.

If the market price is not calculable, a subsidised research organisation or research infrastructure avoids being the source of an indirect economic advantage when:

- It charges a rate that reflects the full cost of the service, which generally includes a margin determined on the basis of the margins usually charged by undertakings conducting similar research; or
- It charges a rate that is the result of arm's length negotiations where the research organisation or research infrastructure, in its capacity as service provider, negotiates in order to obtain the maximum economic benefit at the moment when the contract is concluded and covers at least its marginal costs.³²

Where the ownership of, or access rights to intellectual property rights remain with the research organisation or research infrastructure, their market value may be deducted from the price payable for the services concerned.³³

'Collaboration' between a subsidised research organisation and an undertaking

An effective collaboration³⁴ between a subsidised research organisation or infrastructure and an undertaking does not involve the conferral of an indirect economic advantage to the latter when:

- **The research results of the collaboration are widely disseminated.** Wide dissemination of research results means that all the relevant information is placed in the public domain without any exclusive, privileged or first access by any undertaking involved in the entity. For example, publication in scientific journals is a legitimate method for disseminating research results. Proper dissemination should include all useful or

³⁰ Framework for State aid for R&D&I, para 26.

³¹ Framework for State aid for R&D&I, para 26.

³² Framework for State aid for R&D&I, para 26.

³³ Framework for State aid for R&D&I, para 27.

³⁴ A project is considered to be carried out through effective collaboration where at least two independent parties pursue a common objective based on the division of labour and jointly define its scope, participate in its design, contribute to its implementation, and share its financial, technological, scientific, and other risks, as well as its results (see Framework for State aid for R&D&I, para 28).

relevant data. Incomplete data are not consonant with the purpose of wide dissemination of research results. This is because the purpose of dissemination is to provide the same advantage to anyone who may want to use the research results. Any data that remain unpublished should not be accessible to companies on a privileged basis.

- **When the costs that lead to the research results are borne by the ‘private’ actors involved in the collaboration.** In summary, to prevent undertakings from receiving indirect State aid through research funded by public money, each partner of a project should at least pay for the cost of the project in proportion to its contribution or involvement. This also leads to the conclusion that each partner may keep the intellectual property rights that relate to the part of the project that is fully paid by that partner.
- **Participating undertakings may also contribute in kind.** For example, they may participate in a project by contributing researchers, equipment, and material. This contribution must be significant in the sense that it provides an indispensable input to the project, with commensurate sharing of risks and benefits. At any rate, the in-kind contribution needs to be costed and the research results must be apportioned according to the share of the in-kind contribution to the total costs.
- **Any intellectual property rights resulting from the project, as well as related access rights are allocated to the different collaboration partners in a manner which adequately reflects their work packages, contributions, and respective interests.**
- **The research organisation or research infrastructure receives compensation equivalent to the market price for the IPR which result from their activities and are assigned to the participating undertakings, or to which participating undertakings are allocated access rights.** The absolute amount of the value of any contribution, both financial and non-financial, of the participating undertakings to the costs of the research organisations or research infrastructures' activities that resulted in the IPR concerned, may be deducted from that compensation.³⁵

Offering advice to and/or sharing information with undertakings

It is intrinsic to the concept of a research organisation that the results of research are widely disseminated through publications, educational programmes, and training. Therefore, state-funded research organisations may provide information to the public, either in the context of educational activities defined by it or on demand. It is not relevant that the users of the information are private individuals or undertakings.³⁶ The only relevant issue is that the information is generated through the non-economic activities of the research organisation (e.g. research, gathering and dissemination of information on subjects that fall within the mission of the research organisation), which are publicly funded because their purpose is to enhance knowledge. Moreover, there is also no ‘State aid problem’ if a research organisation keeps a register of experts and directs inquiries to those experts when it cannot provide the requested information.

However, it is important to note that when there is a request from an undertaking for information or data, the subsidised research organisation or infrastructure should only

³⁵ Framework for State aid for R&D&I, para 29. See also para 30.

³⁶ Framework for State aid for R&D&I, para 20, *sub* (a)(iii).

provide information or data that it already has at its disposal and for which there is no need to carry out extra research that would result in the provision of a customised service that may be economic in nature. Such information and data must be in principle available to all those who request them. Otherwise, the research organisation runs the risk of providing exclusive services containing proprietary information and, by offering these services, becomes a source of State aid. The State then funds a research institution that grants economic benefits to the partner companies involved. In other words, the undertaking then receives an indirect economic advantage.

However, subsidised research organisations or infrastructures do not confer an indirect economic advantage to an undertaking when they merely charge a nominal fee to cover the administrative cost of processing requests for information of an undertaking. Such a fee naturally excludes the much larger cost of the research that generated the information and data in the first place.

2.2.3.1.4. Public procurement and the conferral of an economic advantage

If an EU Member State applies the relevant public procurement procedures, it does in principle not confer an economic advantage.³⁷ The following points must be taken into account in this regard: the market must be informed as fully as possible with regard to the subject matter and organisation of the government procedure, the discretionary power of assessment of the contracting authority must be kept as limited as possible, the award criteria must be objective and also relevant for the subject of the assignment, and all participants must be treated equally.³⁸ **We will not go further into the interaction between public procurement and the EU State aid rules because public procurement falls outside the scope of the BEPIDS Project.**

2.2.3.1.5. Access to infrastructure of the State or of a subsidised research institution

In our view a measure restricting access to research infrastructure, for example to undertakings active in the Belgian defence and security industry, falls *prima facie* outside the scope of Article 107 TFEU. **Such restriction does not confer any economic advantage to the undertakings that do have access to the research infrastructure but constitutes merely confers a regulatory advantage (only they have access to the infrastructure, their competitors not).** Of course, other rules, such as European and national discrimination rules and the EU rules on the four freedoms, must be considered.

³⁷ Framework for State aid for R&D&I, para 33.

³⁸ Framework for State aid for R&D&I, para 34.

However, things are different if these undertakings do not have to pay the market price for using this infrastructure. In that case, the State (indirectly) relieves costs that these undertakings would normally have to pay under market conditions. In other words, in that case they receive an economic advantage. In addition, one should emphasise that such aid is in principle incompatible with the internal market. It is indeed a general principle of EU law that State aid is not compatible with the internal market if it infringes any other provision of the EU Treaty or secondary legislation.³⁹ Moreover, Article 1(5) GBER stipulates that *“this Regulation shall not apply to State aid measures, which entail, by themselves, by the conditions attached to them or by their financing method a non-severable violation of Union law”*.

The same analysis applies to access which is made conditional on reciprocal arrangements with institutions in other EU Member States. As long as a foreign researcher is willing to pay the fee that is requested by a subsidised research institution access must be granted. However, reciprocal arrangements can be considered to determine whether access may be offered at a lower price or for free.

2.2.3.2. Selectivity

Key takeaway

When the Belgian State adopts a measure to support (a part of) the Belgian defence and security industry, this measure is selective.

State aid within the meaning of Article 107(1) TFEU only exists when an EU Member State favours *certain* undertakings or sectors over other undertakings or sectors which are in a comparable factual and legal situation.⁴⁰ For example, selectivity exists when a measure is formally reserved to certain undertakings (for example of a certain size, a sector or a category of undertakings with certain characteristics).⁴¹ **Where a measure is tailored to one undertaking or sector, such as the Belgian defence and security sector, this measure is presumed to be selective.** However, measures that (may) favour all market players - for example, a general corporate tax reduction or the award of a subsidy to all undertakings - do not fall under EU State aid law.⁴² For

³⁹ See, for example, ECJ 19 September 2000, C-156/98, *Germany v Commission*, ECLI:EU:C:2000:467, para 78; ECJ 22 December 2008, *Régie Networks v Rhone Alpes Bourgogne*, C-333/07, ECLI:EU:C:2008:764, paras 94-116.

⁴⁰ ECJ 3 March 2005, C-172/03, *Wolfgang Heiser v Finanzamt Innsbruck and Commission*, ECLI:EU:C:2005:130, para 40.

⁴¹ Notice on the notion of 'State aid', para 121.

⁴² Notice on the notion of 'State aid', para 118.

example, the Belgian authorities promote investment in R&D&I activities with the so-called 'notional interest'. Since all undertakings under the scope of Belgian corporate taxation can benefit from this 'economic advantage', this tax measure does not constitute State aid. However, an aid measure open to a large number of companies is selective if certain companies are excluded.⁴³

However, general measures that *prima facie* apply to all undertakings but are limited by the discretion of the competent public authorities, are in principle selective.⁴⁴ Public authorities have a discretion to apply a measure when the criteria for granting aid are very general or vaguely formulated.⁴⁵ Lastly, it should be recalled that the EU Courts have developed a specific test to assess whether a tax measure is selective. This test includes the following steps:

1. First, the general reference system must be determined (i.e. the set of rules generally applicable to all undertakings in a comparable factual and legal situation);⁴⁶
2. It should then be determined whether the measure deviates from this reference system;⁴⁷ and
3. If the answer to the previous question is negative, then there is no selectivity. If the answer is positive, then it should be examined whether this deviation is justified by the nature or design of the scheme (for example: the need to combat fraud or interest avoidance, or the progressive nature of income taxation).⁴⁸

2.2.4. Third criterion: (potential) distortion of competition

Key takeaway

When the Belgian State grants a selective economic advantage to (a part of) the Belgian defence and security industry, competition is deemed to be (potentially) distorted.

If a measure taken by an EU Member State perpetuates or strengthens the competitive position of an undertaking *vis-à-vis* other competing undertakings, thus freeing the recipient of the advantage from the costs that it should have borne, this measure is deemed to (potentially) distort competition.⁴⁹ In practice, this third criterion is met when an EU

⁴³ ECJ 8 November 2001, C-143/99, *Adria-Wien Pipeline GmbH and Wietersdorfer & Peggauer Zementwerke GmbH Finanzlandesdirektion für Kärnten*, ECLI:EU:C:2001:598, para 35.

⁴⁴ Notice on the notion of 'State aid', para 123.

⁴⁵ Notice on the notion of 'State aid', para 124.

⁴⁶ Notice on the notion of 'State aid', paras 132-134.

⁴⁷ Notice on the notion of 'State aid', paras 135-137.

⁴⁸ For more about this test, see Notice on the notion of 'State aid', paras 138-141. See also ECJ 21 December 2016, C-524/14 P, *Commission v Hansestadt Lübeck*, ECLI:EU:C:2016:97, para 55).

⁴⁹ ECJ 17 September 1980, 730/79, *Philip Morris Holland BV v Commission*, ECLI:EU:C:1980:209, para 11.

Member State grants a selective economic advantage to an undertaking that is active in a sector where there is or could be competition. The Commission is in no way required to demonstrate effectively that a measure (may) distort competition.⁵⁰ **Since the Belgian defence and security sector is a sector with significant cross-border commercial presence and investments, it is safe to conclude that competition is (potentially) distorted would the Belgian State grant a selective economic advantage to (a part of) the Belgian defence and security industry.**

2.2.5. Fourth criterion: (potential) affection of trade between EU Member States

Key takeaway

When the Belgian State grants a selective economic advantage to (a part of) the Belgian defence and security industry, trade between the EU Member States is deemed to be (potentially) affected.

Where a State measure results in an improvement of the competitive position of an undertaking compared to other competing undertakings, trade between EU Member States is deemed to be (potentially) affected by aid granted by an EU Member State. **The EU Courts have clarified in this regard that the beneficiary undertaking does not even have to be active in more than one EU Member State.**⁵¹ Indeed, aid can make it more difficult for competitors from other EU Member States to enter the beneficiary's market, because the aid maintains or expands the local supply. **The amount of aid, whether small or not, or the fact that the recipient undertaking is relatively small does not *a priori* exclude the possibility that trade between EU Member States is or may be (potentially) affected** (however, see *infra* about de minimis aid).⁵²

It is true that in a very limited number of cases the Commission found that, given the specific circumstances of the cases concerned, the measures in question were purely local in nature and that it was therefore not foreseeable that the measures would or could have more than a marginal effect on the conditions for cross-border investments or cross-border establishment (e.g. aid to a local swimming pool).⁵³ **However, these exceptions are not relevant for measures that favour undertakings active in the Belgian defence and security industry. This industry is indeed characterised by its international character.**

⁵⁰ ECJ 14 February 1990, C-301/87, *France v Commission*, ECLI:EU:C:1990:67, para 33.

⁵¹ ECJ 14 January 2015, C-518/13, *Eventech Ltd v The Parking Adjudicator*, ECLI:EU:C:2015:9, para 67; ECJ 8 May 2013, C-197/11 and C-203/11, *Eric Libert e.a. v Vlaamse regering and All Projects & Developments NV e.a. v Vlaamse regering*, ECLI:EU:C:2013:288, para 78.

⁵² ECJ 14 January 2015, C-518/13, *Eventech Ltd v The Parking Adjudicator*, ECLI:EU:C:2015:9, para 67.

⁵³ E.g. Commission Decision 4 August 2016, SA.44942; Commission Decision 4 May 2018, SA.34815.

2.2.6. De minimis aid

2.2.6.1. Introduction

The Commission has adopted several de minimis regulations, in which it set out that if an aid measure does not exceed a specific aid amount (or 'de minimis threshold'), the measure does not qualify as State aid within the meaning of Article 107(1) TFEU. The idea behind these de minimis regulations is that a low amount of aid does not (potentially) distort competition or does not (potentially) affect trade between EU Member States. Given their practical importance, we briefly explain the main principles of these regulations in the next Sections. We highlight the scope and de minimis threshold of the general de minimis regulation 2023/2831⁵⁴, the formalities to be followed by EU Member States when granting de minimis aid, and the calculation of de minimis aid. We cover only the general de minimis regulation and do not tackle other de minimis specific regulations, which relate to specific sectors, such as agriculture or fisheries.⁵⁵ In Chapter 6, we briefly discuss de minimis rules for undertakings which carry out a service of general economic interest.

2.2.6.2. Scope and aid threshold of the general de minimis regulation

The scope and aid threshold of the general de minimis regulation are as follows:⁵⁶

SCOPE	TRESHOLD
<p>All aid falls within the scope of the general de minimis regulation 2023/2831 unless it is explicitly excluded.</p> <p><u>Excluded aid</u> is:</p> <ul style="list-style-type: none"> - certain aid in the fisheries and aquaculture sector and the agricultural sector; - export aid; and 	<ul style="list-style-type: none"> - 300,000 euros to one undertaking over a period of three tax years

⁵⁴ Commission Regulation (EU) No 2023/2831 of 13 December 2023 on the application of Articles 107 and 108 of the Treaty on the Functioning of the European Union to de minimis aid, <https://eur-lex.europa.eu/eli/reg/2023/2831/oj> (accessed on 8 October 2023).

⁵⁵ The de minimis regulations are available on the website of the Commission: https://competition-policy.ec.europa.eu/state-aid/legislation/regulations_en#de-minimis-regulation (accessed on 8 October 2024).

⁵⁶ In the following, the possibility to grant de minimis aid through financial intermediaries is not described.

- | | |
|--|--|
| - aid contingent upon the use of domestic over imported goods. | |
|--|--|

De minimis aid can be cumulated with other de minimis aid and other State aid if the aid received by an undertaking does not exceed the applicable aid threshold.⁵⁷ If an undertaking has already received de minimis aid and receives additional aid exceeding the ceiling within three fiscal years, the last aid measure will not be considered as de minimis aid.⁵⁸ For example, if an undertaking has already received 160,000 euros of de minimis aid and would then receive a further 150,000 euros, the latter amount will fall entirely outside the scope of the de minimis Regulation.

2.2.6.3. Formalities

As de minimis aid is not State aid within the meaning of Article 107(1) TFEU, it can be granted without notification to and approval by the Commission. However, granting de minimis aid is still subject to a set of formalities:

- From 1 January 2026, Member States must report all de minimis aid in a central register at national or EU level within 20 working days from its granting.⁵⁹ Until the register covers three years, the following obligations apply:⁶⁰
 - 1) The EU Member State concerned must inform the beneficiary in writing of the amount of granted aid and of the fact that the aid constitutes de minimis aid. The Member State should also refer to the general de minimis Regulation 2023/2831 and the regulation's publication reference in the *Official Journal of the EU*.
 - 2) Before granting de minimis aid, the EU Member State must obtain a declaration from the beneficiary, in written or electronic form, about any de minimis aid it already received during the previous two fiscal years and the current fiscal year.
- The EU Member State must maintain detailed records regarding de minimis aid granted for 10 fiscal years from the granting of the aid. The Commission may also request in writing any information it considers necessary to verify that the conditions of the general de minimis regulation are met.⁶³

2.2.6.4. Calculation of de minimis aid

When granting de minimis aid it is important to consider the following calculation rules:

⁵⁷ Article 5 Regulation 2023/2831.

⁵⁸ Article 3(7) Regulation 2023/2831.⁵⁹ Article 6(1)-(2) Regulation 2023/2831.

⁵⁹ Article 6(1)-(2) Regulation 2023/2831.

⁶⁰ Article 7(4) Regulation 2023/2831

⁶³ Article 6(3) and (7) Regulation 2023/2831.

- All amounts provided by de minimis schemes are gross amounts (i.e. before deduction of taxes or other charges).⁶⁴
- The de minimis threshold is calculated on an undertaking-per-undertaking basis. As we will describe *infra*, the EU concept of ‘undertaking’ is very broad (and sometimes) uncertain. The concept is indeed interpreted more broadly than the concepts of ‘*vennootschap/société*’ or ‘*VZW/ASBL*’ under Belgian law. To provide legal certainty to stakeholders, the general de minimis regulation provides that several beneficiaries form a ‘single undertaking’ when they have one of the following links to each other:⁶⁵
 - o One enterprise has a majority of the shareholders’ or members’ voting rights in another enterprise.
 - o One enterprise has the right to appoint or remove a majority of the members of the administrative, management or supervisory body of another enterprise.
 - o One enterprise has the right to exercise a dominant influence over another enterprise pursuant to a contract entered into with that enterprise or pursuant to a provision in its memorandum or articles of association.
 - o One enterprise, which is a shareholder in or member of another enterprise, controls alone, pursuant to an agreement with other shareholders in or members of that enterprise, a majority of shareholders’ or members’ voting rights in that enterprise.

In the case of a merger or an acquisition of undertakings, any de minimis aid previously granted to each of the merging undertakings has to be considered to determine whether new de minimis aid to the new or acquiring undertaking exceeds the relevant threshold.⁶⁷

De minimis aid lawfully granted before the merger or acquisition remains lawful. If one undertaking is split into two or more separate undertakings, the de minimis aid granted before the split is attributed to the undertaking that received the aid, which is in principle the undertaking that takes over the activities for which the de minimis aid was used.⁶⁸ If such allocation is not possible, de minimis aid shall be allocated proportionally on the basis of the book value of the share capital of the new companies at the time of division.

The general de minimis regulation provides for specific conditions and criteria for loans, capital injections, risk financing measures and guarantees. Given the specificity of these conditions, we will not pursue them further (at least for now).

⁶⁴ Article 3(5) Regulation 2023/2831.

⁶⁵ Article 2(2) Regulation 2023/2831. The term “enterprise” is probably used to avoid confusion with the term “undertaking” in the State aid rules.

⁶⁷ Article 3(8) Regulation 2023/2831.

⁶⁸ Article 3(9) Regulation 2023/2831.

2.3. The concept of ‘undertaking’

2.3.1. Introduction: what is an ‘undertaking’?

Only State aid to one or more *undertakings* falls under the State aid prohibition ex Article 107(1) TFEU. Hence, it is clear that the granting of State aid to private individuals or public authorities falls outside the scope of the EU State aid rules. It is therefore crucial to know exactly which entities qualify as ‘undertakings’.

The EU Courts define an ‘undertaking’ as “*any entity engaged in an economic activity, regardless of its legal status and the way in which it is financed*”.⁶⁹ Whether an entity should be regarded as an undertaking therefore depends on the nature of its activities. In other words, the term ‘undertaking’ cannot be interpreted by referring to national legal concepts such as ‘company’, ‘non-profit association’ or ‘de facto association’, nor by the fact whether the entity is set up to generate profit, or the private or public-law nature of an entity. Moreover, the definitions of the concept of ‘undertaking’ in Belgian law, such as contained in Book I of the Belgian Economic Law Code, are irrelevant in determining whether an entity qualifies as an ‘undertaking’ within the meaning of EU state aid law.

Given the broad interpretation of an ‘undertaking’, it is clear that universities, research centres, non-profit organisations, (social) associations, etc. qualify as undertakings when they carry out economic activities. Even more, the broad interpretation of the concept of ‘undertaking’ by the EU Courts may even lead to the fact that (parts of) public authorities qualify as ‘undertaking’. Indeed, as the ECJ emphasised in *Enirisorse*, the fact that an entity is entrusted with certain general interest tasks does not prevent it from being considered an undertaking for certain other (economic) tasks they conduct.⁷⁰ An entity qualifies as undertaking as soon as it performs economic activities.

The broad concept of ‘undertaking’ may even result in one entity being both a recipient (with regard to the financing of its economic activities) and a source of State aid (for example, when it finances another undertaking) at the same time. To the extent that a public institution carries out an economic activity that is separable from the exercise of its public authority powers, that institution acts as an undertaking in relation to that activity.

⁶⁹ E.g. ECJ 23 March 2006, C-237/04, *Enirisorse SpA v Sotocarbo SpA*, ECLI:EU:C:2006:197, para 28; ECJ 27 June 2017, C-74/16, *Congregación de Escuelas Pías Provincia Betania v Ayuntamiento de Getafe*, ECLI:EU:C:2017:496, para 41.

⁷⁰ ECJ 23 March 2006, C-237/04, *Enirisorse SpA v Sotocarbo SpA.*, ECLI:EU:C:2006:197, para 34.

On the other hand, if that economic activity cannot be separated from the exercise of its powers of public authority, all activities carried out by that institution are related to the exercise of those powers, and therefore do not fall within the concept of an 'undertaking'.⁷¹ It is important that both categories of activities (economic and non-economic), and their revenues and costs, are clearly separated to avoid cross-subsidisation. This can be done, for example, by using separate accounting. Without such an accounting system, there is a high probability of 'cross-subsidisation'.

2.3.2. The concept of 'economic activities'

The term 'economic activities' is defined by the EU courts as "*any activity consisting in offering goods or services on the market*".⁷² There is no exhaustive list of all possible economic activities and it is therefore necessary to assess in each individual case whether or not an entity that may be the beneficiary of State aid is engaged in economic activities, hereby taking into account the case law of the EU Courts and the practice of the Commission.

If an entity performs 'public tasks', it does not qualify as an undertaking. These tasks must, by their nature, purpose, and applicable regulations, involve the exercise of government prerogatives. In its Notice on the concept of 'State aid', the Commission gives the following examples of public tasks: **the army** or the police, air traffic safety and control, maritime safety and traffic management, environmental inspection services and the organisation of public hospitals. **The Belgian army thus clearly qualifies as a public entity and is therefore not regarded as an undertaking.** However, the mere fact that an entity is entrusted with tasks by a political decision does not show that the entity's activities involve government prerogatives.

In contrast, commercial entities active in the defence and security industry in the purchase/(re)sale of (military) goods clearly qualify as undertakings. Indeed, it needs little explanation that commercially developing and/or selling (military) goods and/or services is an economic activity. Given its relevance to the study, the following Section will analyse in further detail which activities are deemed to be 'economic' in an R&D&I context. This analysis will be substantiated with examples.

⁷¹ Notice on the notion of 'State aid', para 18.

⁷² ECJ 16 June 1987, 118/85, *Commission v Italy*, ECLI:EU:C:1987:283, para 7; ECJ 18 June 1998, C-35/96, *Commission v Italy*, ECLI:EU:C:1998:303, para 36.

2.3.3. The concept of an ‘undertaking’ in the context of R&D&I

The 2022 Commission Framework for State aid for R&D&I provides some indications as to the nature of (non-)economic activities.⁷³ They are only indicative, which means that each case must be assessed individually. Nevertheless, these indications enjoy a certain authority and can be taken as a starting point in determining whether a research activity is economic in nature.

Non-economic activities	Economic activities
<ul style="list-style-type: none"> - primary activities of research organisations and research infrastructures, in particular: <ul style="list-style-type: none"> (i) education for more and better skilled human resources; 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 activity⁷⁴; (ii) independent R&D for more knowledge and better understanding, including collaborative R&D where the research organisation or research infrastructure engages in effective collaboration; or (iii) 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. - 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. 	<ul style="list-style-type: none"> 3) rental of material, equipment, and laboratories to undertakings; 4) supplying services to undertakings; 5) contract research on behalf of undertakings; 6) research results are not shared or are shared to a limited extent (e.g. for a price).

⁷³ Commission Framework for State aid for R&D&I, paras 20 and 22.

⁷⁴ See also ECJ 7 December 1993, C-109/92, *Stephan Max Wirth v Landeshauptstadt Hannover*, ECLI:EU:C:1993:916, para 15.

The normal activities of universities and public research organisations (including the Belgian Royal Military Academy), such as education and publicly available research are thus not economic in nature. Therefore, we consider these entities not to be undertakings when they act to enhance scientific knowledge and disseminate new knowledge, information, or data without pursuing profit. However, they become undertakings, and are therefore subject to the EU State aid rules, whenever they engage in an economic activity. This happens when they provide knowledge, data or advice on remuneration or carry out contract research on behalf and for the benefit of undertakings.

In summary, research activities are economic in nature when they are carried out for the purpose of profit or on the basis of a remunerated contract. Research activities are not economic in nature when the results following these activities are widely disseminated through, for example, publications and any income from research is ploughed back into the primary activities (i.e. education & research) of the university or research organisation. If knowledge is widely disseminated in the form of publications in scientific journals, it follows that it is not commercially exploited for profit.

Research may lead to patentable outputs. The ensuing intellectual property rights may then be licensed to generate revenue for the organisation conducting the research. The definition of research organisation explicitly provides that 'knowledge transfer' can be part of its activities and does not prejudice the non-economic nature of the organisation when all income from the licensing of Intellectual property rights is ploughed back into education and research. Therefore, intellectual property rights are not a cause of concern when they are priced properly, licensed out in a non-discriminatory manner and the income is used to support the primary functions of a research organisation. The price of intellectual property rights should either be negotiated at arm's length or be determined by independent experts. State aid rules do not require wide dissemination of data linked to intellectual property rights. They may be distributed together with the licensing of the corresponding rights.

2.3.4. Ancillary activities and the 20% threshold

When a research organisation or infrastructure is used for both economic and non-economic activities, public funding is subject to EU State aid law only to the extent that it covers costs related to the economic activities.⁷⁵ Consequently, separate accounting is necessary to demonstrate that public funding is only used to support the non-economic activities.⁷⁶ Evidence of due allocation of costs, funding and revues can consist of annual financial statements of the relevant entity.

Moreover, where a research organisation or infrastructure is used almost exclusively for non-economic activities, its funding falls completely outside the scope of EU State aid rules provided that the economic activities are purely supportive, i.e. correspond to activities directly related and necessary to the functioning of the research organisation or infrastructure, or intrinsically related to its main non-economic use, and be limited in size. In its Framework for State aid for R&D&I, the Commission states that this is the case provided that the economic use remains purely ancillary, that is to say corresponds to an activity which is directly related to and necessary for the operation of the research organisation or research infrastructure or intrinsically linked to its main non-economic use, and which is limited in scope.⁷⁷ **The Commission will consider this to be the case where the economic activities consume exactly the same inputs (such as material, equipment, labour, and fixed capital) as the non-economic activities and the capacity allocated each year to such economic activities does not exceed 20 % of the relevant entity's overall annual capacity.**⁷⁸

Ancillary activities are economic activities, which are linked to the non-economic activities of research organisations or research infrastructures. Under the current EU State aid rules, research organisations or research infrastructures are thus not considered to be undertakings as long as their ancillary (economic) activities remain below 20% of their capacity.

Capacity is measured in terms of inputs, such as buildings, equipment, or personnel, which are commonly used for both economic and non-economic activities. By keeping their ancillary (economic) activities below 20% of their capacity, research organisations or research infrastructures can continue receiving public funding up to 100% of their investment and operating cost

⁷⁵ GC 12 December 2000, T-128/98, *Aéroports de Paris v Commission*, ECLI:EU:T:2000:290, para 108.

⁷⁶ Framework for State aid for R&D&I, para 19.

⁷⁷ Framework for State aid for R&D&I, para 21.

⁷⁸ Framework for State aid for R&D&I, para 21.

3. The EU State aid procedures in a nutshell

3.1. The notification obligation

An EU Member State wishing to grant State aid within the meaning of Article 107(1) TFEU must, in principle, notify the Commission of its intention to grant aid and wait for the latter to approve the notified measure before to proceed with its implementation (Article 108(3) TFEU). Following this notification, the Commission will launch an investigation into the aid nature of the proposal and its (in)compatibility with the internal market. The EU procedure for new State aid, primarily reflected in Article 108 TFEU, was elaborated in Procedural Regulation 2015/1589⁷⁹ and is further explained in several Commission policy documents.⁸⁰

3.2. How and by whom must State aid be notified

Only the EU Member States can notify new State aid to the Commission.⁸¹ Neither the beneficiary nor other parties can notify the aid. It is therefore clear that the Belgian State must notify new aid.

Notification of new State aid is done *via* an official notification form.⁸² Unless otherwise agreed with the Commission, notification is made via the SANI (State Aid Notification Interactive) web application. The Belgian federal government as well as the regions have access to this web application and can thus notify their aid plans via this web application. However, it is the Permanent Representation of Belgium to the EU that must validate these notifications before the Commission will receive them.

The Commission will notify the notifying EU Member State of receipt of the notification and will assign a case number to the file.⁸³ The EU Member State concerned must provide all factual and legal information necessary for the Commission to make such a judgement. This applies not only

⁷⁹ Council Regulation (EU) 2015/1589 of 13 July 2015 laying down detailed rules for the application of Article 108 of the Treaty on the Functioning of the European Union, <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=celex:32015R1589> (accessed on 1 April 2023).

⁸⁰ E.g. the 2018 Commission Code of Best Practices for the conduct of State aid control procedures https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.C_.2018.253.01.0014.01.ENG&toc=OJ:C:2018:253:TOC (accessed on 1 April 2023).

⁸¹ ECJ 11 July 1996, C-39/94, *SFEI e.a. v La Poste e.a.*, ECLI:EU:C:1996:285, para 73.

⁸² See https://competition-policy.ec.europa.eu/state-aid/legislation/forms-notifications-and-reporting_en (accessed on 1 April 2023).

⁸³ Article 2(1) Procedural Regulation 2015/1589.

to the proposal itself, but also to the measure that the State will implement to finance the aid measure.⁸⁴ Furthermore, it is important that the EU Member State indicates why it considers the notified measure to be compatible with the internal market. If the Commission considers the notified information insufficient, it may address requests for additional information to the EU Member State concerned.⁸⁵

3.3. The notification procedure

3.3.1. Informal prenotification contacts

The Commission encourages EU Member States to contact the Commission informally before officially notifying an aid measure.⁸⁶ This allows the Commission and the EU Member State concerned to discuss the legal and economic aspects of the planned aid measure informally and confidentially, and this in order to improve the completeness and quality of the subsequent notification.

3.3.2. First phase of the notification procedure

When an EU Member State notifies a measure to the Commission, the latter will examine whether the notified measure constitutes State aid within the meaning of Article 107(1) TFEU and, if so, whether it is compatible with the internal market. However, at the first stage of the procedure, the Commission will only conduct a *prima facie* investigation. The Commission is indeed not obliged to inform itself fully about the notified measure.⁸⁷ Moreover, interested parties, such as, for example, competitors of the beneficiary(ies), have no legal right to comment on the notified aid plan during this first phase of the procedure, and neither does the beneficiary(ies), although the Commission prefers to involve beneficiary(ies) (if known) in its contacts with the EU Member State concerned.

The Commission is required to take a decision within two months following the official notification of a measure.⁸⁸ If the Commission fails to adopt a decision the plan is deemed to have been approved and the EU Member State can implement the plan, albeit after prior notification to the

⁸⁴ ECJ 21 October 2003, C-261/01 and C-261/01, *Belgische Staat v Eugène van Calster and Felix Cleeren and Openbaar Slachthuis NV*, ECLI:EU:C:2003:571, paras 49 and 51.

⁸⁵ Article 5(1) Procedural Regulation 2015/1589.

⁸⁶ Code of Best Practices for the conduct of State aid control procedures, para 9.

⁸⁷ Case 19 May 1993, C-198/91, *William Cook plc v Commission*, ECLI:EU:C:1993:197, para 22.

⁸⁸ Article 4(5) Procedural Regulation 2015/1589.

Commission; the Commission can then still take a decision within a period of fifteen days from this notification.⁸⁹

At the end of the preliminary investigation, the Commission will take one of the following decisions:

- 7) The notified measure does not constitute State aid within the meaning of Article 107(1) TFEU. The procedure ends with a Commission decision and the EU Member State concerned may implement the notified measure.
- 8) The notified measure does constitute State aid within the meaning of Article 107(1) TFEU, but there are no doubts as to its compatibility with the internal market. The Commission takes a 'no-objection decision' and the notifying State concerned is allowed to implement the notified measure.
- 9) The Commission faces serious difficulties to decide whether the measure constitutes State aid (in)compatible with the internal market. The Commission therefore opens a formal investigation procedure to further investigate the measure concerned.⁹⁰

The Commission cannot conclude the first stage of the notification procedure with a decision prohibiting the notifying EU Member State to implement the notified aid measure. It can only adopt such a 'negative' decision after conducting a formal investigation procedure (see *infra*). Moreover, during this preliminary investigation phase, the Commission cannot impose any conditions on the EU Member State concerned. However, an EU Member State may adapt the modalities of the notified aid proposal in order to allay any concerns of the Commission, in order to obtain the approval of the latter or in order to eliminate the State aid qualification of the measure in question.

In [TO COMPETE], a schematic overview of the procedure is given.

3.3.3. Formal investigation procedure

At the start of a formal investigation procedure, the Commission asks the EU Member State concerned and interested parties⁹¹ to comment on the notified measure.⁹² It may also call on external experts during this phase.

In principle, the Commission completes a formal investigation procedure within 18 months.⁹³ However, it is not bound by this deadline and in practice it often exceeds this deadline. After the

⁸⁹ Article 4(6) Procedural Regulation 2015/1589.

⁹⁰ See Article 4 Procedural Regulation 2015/1589.

⁹¹ Article 1(h) Procedural Regulation 2015/1589 defines an 'interested party' as "*any Member State and any person, undertaking or association of undertakings whose interests might be affected by the granting of aid, in particular the beneficiary of the aid, competing undertakings and trade associations*".

⁹² Article 6(1) Procedural Regulation 2015/1589.

⁹³ Article 9(6) Procedural Regulation 2015/1589.

expiry of this deadline, the notifying EU Member State may request the Commission to take a decision within a period of 2 months.⁹⁴

The Commission takes one of the following decisions to complete a formal investigation procedure:

- The notified measure does not imply State aid within the meaning of Article 107(1) TFEU. The procedure ends with a Commission decision, after which the State is allowed to implement the measure.
- The notified measure does imply State aid within the meaning of Article 107(1) TFEU, but it is compatible with the internal market. The Commission takes a positive decision, after which the State may implement the aid measure.
- The notified measure does imply State aid within the meaning of Article 107(1), but it is conditionally compatible with the internal market (a 'conditional decision'), which means that the State may only implement the aid proposal if it complies with the conditions stipulated in the decision.
- The notified measure does imply State aid incompatible with the internal market (a 'negative decision'). Consequently, the State is not allowed to implement the aid measure.⁹⁵

In [TO COMPETE], a schematic overview of the procedure is given.

3.4. Unlawful State aid and the enforcement of the EU State aid rules

If an EU Member State grants State aid without approval by the Commission, this aid qualifies as 'unlawful State aid'. According to case law of the EU Courts, an EU Member State which finds that it has granted unlawful State aid in the past must recover it on its own initiative, irrespective of whether the Commission has already launched an investigation into that aid.⁹⁶ **Should Belgium find that it has granted unlawful State aid, it is thus required to proceed with the recovery of such aid (including an interest) on its own initiative.**⁹⁷ This interest is not calculated in accordance with the interest rate used by the Commission in its decision-making practice on unlawful and incompatible State aid, but in accordance with the applicable national law.⁹⁸

⁹⁴ Article 9(7) Procedural Regulation 2015/1589.

⁹⁵ Article 9(2-5) Procedural Regulation 2015/1589.

⁹⁶ ECJ 5 March 2019, C-349/17, *Eesti Pagar AS v Ettevõtlike Arendamise Sihtasutus and Majandus- ja Kommunikatsiooniministeerium*, ECLI:EU:C:2019:172, paras 93-95.

⁹⁷ ECJ 5 March 2019, nr. C-349/17, *Eesti Pagar AS v Ettevõtlike Arendamise Sihtasutus and Majandus- ja Kommunikatsiooniministeerium*, ECLI:EU:C:2019:172, para 142.

⁹⁸ ECJ 5 March 2019, nr. C-349/17, *Eesti Pagar AS v Ettevõtlike Arendamise Sihtasutus and Majandus- ja Kommunikatsiooniministeerium*, ECLI:EU:C:2019:172, para 135.

The Commission monitors compliance with the standstill obligation through the procedure for unlawful State aid, which is quite similar to the procedure for new State aid.⁹⁹ Should the Commission open such a procedure, on its own initiative or following a complaint from an interested party and find that a measure effectively qualifies as unlawful State aid, the Belgian State could still try to argue that the aid in question is compatible with the internal market. In that case, the Commission would declare the aid unlawful and compatible with the internal market, meaning that the Belgian State would not have to proceed to recover the aid. However, considering of the decisional practice of the Commission, the chances of the Commission reaching such a decision are low. Indeed, in most cases the Commission finds that unlawful State aid is incompatible with the internal market and must therefore be recovered by the State concerned.

The standstill obligation *ex* Article 108(3) TFEU has vertical 'direct effect' and can therefore be invoked before national courts.¹⁰⁰ National courts thus also play a (complementary) role in the enforcement of EU State aid law.¹⁰¹ The Belgian courts can also act against unlawful state aid. In summary, this means that they must ensure that the market-distorting effect caused by illegal state aid is eliminated. In Belgium, depending on the aid measure in question, both the Constitutional Court, the Council of State and the ordinary courts can function as 'State aid judges'.¹⁰²

At the current stage of the research, it is not necessary to further discuss the procedural consequences of unlawful State aid.

⁹⁹ See Chapter III Procedural Regulation 2015/1589.

¹⁰⁰ Case 11 December 1973, 120/73, *Gebrüder Lorenz GmbH v Germany and Land Rheinland-Pfalz*, ECLI:EU:C:1972:152, para 8.

¹⁰¹ See W. De Cock, *Belgische rechtscolleges als Europese staatssteunrechtters. Een pleidooi voor een staatssteunkader*, Antwerp, Intersentia, 2023, 562p.

¹⁰² For more on the enforcement of the EU State aid rules by Belgian courts: see W. De Cock, *Belgische rechtscolleges als Europese staatssteunrechtters. Een pleidooi voor een staatssteunkader*, Antwerp, Intersentia, 2023, 562p.

4. Exemptions from the notification obligation

4.1. Starting point

Not every State aid measure within the meaning of Article 107(1) TFEU needs to be notified to the Commission. Indeed, the latter has adopted a number of exemption regulations stipulating that aid measures that fall within the scope of an exemption regulation and meet the applicable conditions are exempt from the notification requirement, and this because they are deemed to be compatible with the internal market. In addition to the current 2014 General Block Exemption Regulation, the Commission has adopted several sectoral exemption regulations, as well as an exemption decision for compensation for the provision of services of general economic interest (see *infra*).¹⁰³ Since the GBER is the most relevant exemption regulation for the BEPIDS Project, we will only discuss this regulation.

The GBER covers regional aid, aid to SMEs in the form of investment aid, operating aid and SMEs' access to finance, aid for environmental protection, **aid for research and development and innovation (or 'R&D&I')**; training aid, recruitment and employment aid for disadvantaged workers and workers with disabilities, aid to make good the damage caused by certain natural disasters, social aid for transport for residents of remote regions, aid for broadband infrastructures, aid for culture and heritage conservation, aid for sport and multifunctional recreational infrastructure, aid for local infrastructures, aid for regional airports, aid for ports, aid for European Territorial Cooperation projects; and aid involved in financial products supported by the InvestEU Fund.¹⁰⁴

For an aid measure to fall within the scope of the GBER, it must meet a number of general and specific criteria. The general criteria apply to all aid measures falling within the scope of the GBER and can be found in Chapter I. Chapter III of the Regulation lists separate special criteria for each category of aid. In the next Sections we will briefly discuss the general criteria (see 4.2.) and the specific criteria for aid for R&D&I (see 4.3.).

4.2. GBER: general criteria

The main general criteria of the GBER are as follows:

¹⁰³ See https://competition-policy.ec.europa.eu/state-aid/legislation_en (accessed on 1 April 2023).

¹⁰⁴ Article 1 GBER.

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- In order to ensure that the aid in question does not (or would not) affect competition and trade to an extent contrary to the common interest, the GBER contains several aid thresholds that apply depending on the aid in question.
 - The aid must be transparent. The GBER therefore only applies to aid whose exact amount can be calculated in advance.
 - The aid must have an incentive effect.
 - The GBER provides for maximum aid intensities for different categories of aid, in order to ensure that the aid granted is appropriate and proportionate.¹⁰⁵

State aid exempted from notification may be cumulated with other State aid as long as it concerns other identifiable eligible costs.¹⁰⁶ Even cumulation with other State aid granted in relation to the same eligible costs is allowed on condition such cumulation does not result in exceeding the applicable maximum aid intensity and/or aid threshold.¹⁰⁷

Where an undertaking has received aid that is exempted from notification under the GBER, this aid does not count towards the calculation of the de minimis ceiling. However, de minimis aid will be cumulated with such aid if it is used to finance specific costs which have also been partially financed by State aid exempted from the notification obligation.¹⁰⁸ In that case, it is necessary to verify under which exemption in the GBER the earlier aid was granted, and which aid intensities (maximum gross aid amount expressed as a percentage of eligible costs before deduction of tax or other charges)¹⁰⁹ and aid thresholds (maximum exempted aid amount)¹¹⁰ apply; thus, must be verified whether there is still room for additional de minimis aid. Cumulation between GBER aid and de minimis aid can be avoided by granting de minimis aid for eligible costs other than those for which GBER aid was previously granted.

In addition to the general and specific criteria, the GBER also contains reporting and monitoring requirements. For example, the EU Member States must inform the Commission of each aid measure exempted from notification, together with a link giving access to the full text of the aid measure, within 20 days of its entry into force.¹¹¹ They must also include all aid measures exempted from notification in an annual report to be submitted to the Commission. Exemption records must also be kept for at least 10 years.¹¹² It is also important that EU Member States refer in exempted aid measures to the GBER and its publication reference in the Official Journal of the EU.

¹⁰⁵ Articles 5-8 GBER.

¹⁰⁶ Article 8(3), *sub a*) GBER.

¹⁰⁷ Article 8(3), *sub b*) GBER.

¹⁰⁸ Consider Article 25 GBER; Article 5(3) De Minimis Regulation 2023/2831.

¹⁰⁹ Article 2(16) GBER.

¹¹⁰ Article 4 GBER.

¹¹¹ Article 11(1) *sub a*) GBER.

¹¹² Article 12(2) GBER.

4.3. GBER: criteria for R&D&I

4.3.1. Introduction

Articles 25 up to and including 30 of the GBER mention six categories of State aid for R&D&I that are exempt from the notification requirement. It concerns aid for research and development projects (Article 25), aid for projects awarded a Seal of Excellence quality label (Article 25a), aid for Marie Skłodowska-Curie actions and ERC Proof of Concept actions (Article 25b), aid involved in co-funded research and development projects (Article 25c), aid for Teaming actions (Article 25d), aid involved in the co-funding of projects supported by the European Defence Fund or the European Defence Industrial Development Programme investment (Article 25e), aid for research infrastructures (Article 26), investment aid for testing and experimentation infrastructure (Article 26a), aid for innovation clusters (Article 27), innovation aid for SMEs (Article 28), aid for process and organisation innovation (Article 29), and aid for research and development in the fisheries and aquaculture sector (Article 30).

In the next Section, we will summarise the most important specific criteria for these aid categories. This summary will use the following definitions, which come from the GBER:

- **'research and knowledge-dissemination organisation'**: *"an entity (such as universities or research institutes, technology transfer agencies, innovation intermediaries, research-oriented physical or virtual collaborative entities), irrespective of its legal status (organised under public or private law) or way of financing, whose primary goal is to independently conduct fundamental research, industrial research or experimental development or to widely disseminate the results of such activities by way of teaching, publication or knowledge transfer. Where such entity also pursues economic activities the financing, the costs and the revenues of those economic activities must be accounted for separately. Undertakings that can exert a decisive influence upon such an entity, in the quality of, for example, shareholders or members, may not enjoy preferential access to the results generated by it"*;
- **'fundamental research'**: *"experimental or theoretical work undertaken primarily to acquire new knowledge of the underlying foundations of phenomena and observable facts, without any direct commercial application or use in view"*;
- **'industrial research'**: *"the planned research or critical investigation aimed at the acquisition of new knowledge and skills for developing new products, processes or services or for bringing about a significant improvement in existing products, processes or services. It comprises the creation of components parts of complex systems, and may include the construction of prototypes in a laboratory environment or in an environment with simulated interfaces to existing systems as well as of pilot lines, when necessary for the industrial research and notably for generic technology validation"*;
- **'experimental development'**: *"acquiring, combining, shaping and using existing scientific, technological, business and other relevant knowledge and skills with the aim of developing new or improved products, processes or services. This may also include, for example, activities aiming at the conceptual definition, planning and documentation of new products, processes or services; Experimental development may comprise prototyping, demonstrating, piloting, testing and validation of new or improved products,*

processes or services in environments representative of real life operating conditions where the primary objective is to make further technical improvements on products, processes or services that are not substantially set. This may include the development of a commercially usable prototype or pilot which is necessarily the final commercial product and which is too expensive to produce for it to be used only for demonstration and validation purposes. Experimental development does not include routine or periodic changes made to existing products, production lines, manufacturing processes, services and other operations in progress, even if those changes may represent improvements;

- **'feasibility study'**: "the evaluation and analysis of the potential of a project, which aims at supporting the process of decision-making by objectively and rationally uncovering its strengths and weaknesses, opportunities and threats, as well as identifying the resources required to carry it through and ultimately its prospects for success";
- **'personnel costs'**: "the costs of researchers, technicians and other supporting staff to the extent employed on the relevant project or activity";
- **'arm's length'**: "the conditions of the transaction between the contracting parties do not differ from those which would be stipulated between independent enterprises and contain no element of collusion. Any transaction that results from an open, transparent and non-discriminatory procedure is considered as meeting the arm's length principle";
- **'effective collaboration'**: "collaboration between at least two independent parties to exchange knowledge or technology, or to achieve a common objective based on the division of labour where the parties jointly define the scope of the collaborative project, contribute to its implementation and share its risks, as well as its results. One or several parties may bear the full costs of the project and thus relieve other parties of its financial risks. Contract research and provision of research services are not considered forms of collaboration".
- **'research infrastructure'**: "facilities, resources and related services that are used by the scientific community to conduct research in their respective fields and covers scientific equipment or sets of instruments, knowledge-based resources such as collections, archives or structured scientific information, enabling information and communication technology-based infrastructures such as grid, computing, software and communication, or any other entity of a unique nature essential to conduct research. Such infrastructures may be 'single-sited' or 'distributed' (an organised network of resources) in accordance with Article 2(a) of Council Regulation (EC) No 723/2009 of 25 June 2009 on the Community legal framework for a European Research Infrastructure Consortium";
- **'innovation clusters'**: "structures or organised groups of independent parties (such as innovative start-ups, small, medium and large enterprises, as well as research and knowledge dissemination organisations, non-for-profit organisations and other related economic actors) designed to stimulate innovative activity through promotion, sharing of facilities and exchange of knowledge and expertise and by contributing effectively to knowledge transfer, networking, information dissemination and collaboration among the undertakings and other organisations in the cluster";
- **'highly qualified personnel'**: "staff having a tertiary education degree and at least 5 years of relevant professional experience which may also include doctoral training";
- **'innovation advisory services'**: "consultancy, assistance and training in the fields of knowledge transfer, acquisition, protection and exploitation of intangible assets, use of standards and regulations embedding them";
- **'innovation support services'**: "the provision of office space, data banks, libraries, market research, laboratories, quality labelling, testing and certification for the purpose of developing more effective products, processes or services";

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- **'organisational innovation'**: *"the implementation of a new organisational method in an undertaking's business practices, workplace organisation or external relations, excluding changes that are based on organisational methods already in use in the undertaking, changes in management strategy, mergers and acquisitions, ceasing to use a process, simple capital replacement or extension, changes resulting purely from changes in factor prices, customisation, localisation, regular, seasonal and other cyclical changes and trading of new or significantly improved products"*;
 - **'process innovation'**: *"the implementation of a new or significantly improved production or delivery method (including significant changes in techniques, equipment or software), excluding minor changes or improvements, increases in production or service capabilities through the addition of manufacturing or logistical systems which are very similar to those already in use, ceasing to use a process, simple capital replacement or extension, changes resulting purely from changes in factor prices, customisation, localisation, regular, seasonal and other cyclical changes and trading of new or significantly improved products"*;
 - **'secondment'**: *"temporary employment of staff by a beneficiary with the right for the staff to return to the previous employer"*; ¹¹³
 - **'small and medium-sized enterprises'** or 'SMEs' means undertakings fulfilling the criteria laid down in Annex I of the GBER. ¹¹⁴

¹¹³ Article 2(83) GBER – Article 2(98) GBER.

¹¹⁴ Article 2(2) GBER.

4.3.2. Exemption from State aid notification requirement for R&D&I

4.3.2.1. Aid for research and development projects

Article 25 GBER provides that EU Member States may grant State aid without notification to and approval by the Commission to a research and development project¹¹⁵ when the aid meets the following conditions:

Aid threshold and maximum aid intensity(s)	Eligible costs	Specific criteria
<p><u>Aid thresholds</u></p> <p>Fundamental research (more than half of eligible costs are incurred for fundamental research): 55 million euros per undertaking, per project.</p> <p>Industrial research (more than half of the eligible costs are incurred for industrial research, or for industrial and fundamental research): 35 million euros per undertaking, per project.</p> <p>Experimental development (more than half of the project's eligible costs are incurred for</p>	<ul style="list-style-type: none"> - <u>Personnel costs</u>: researchers, technicians and other supporting staff to the extent employed on the project. - <u>costs of instruments and equipment</u> to the extent and for the period used for the project. Where such instruments and equipment are not used for their full life for the project, only the depreciation costs corresponding to the life of the project, as calculated on the basis of generally accepted accounting principles are considered as eligible. - <u>costs for of buildings and land</u>, to the extent and for the duration period used for the project. With regard to buildings, only the depreciation costs corresponding to the life of the project, as calculated on the basis of 	<ul style="list-style-type: none"> - The project falls within basic research, industrial research, experimental development, or feasibility studies (see <i>supra</i> for the relevant definitions).

experimental development): 25 million euros per undertaking, per project.

These aid thresholds are doubled if the project is an Eureka project or is implemented by a Joint undertaking.

If the aid for research and development projects is granted in the form of repayable advances which, in the absence of an accepted methodology to calculate their gross grant equivalent, are expressed as a percentage of the eligible costs and the measure provides that in case of a successful outcome of the project, as defined on the basis of a reasonable and prudent hypothesis, the advances will be repaid with an interest rate at least equal to the discount rate applicable at the time of grant, the aforementioned amounts are increased by 50%.

Feasibility studies: 8,25 million euros per study.

Aid intensities

Fundamental research: 100%

Industrial research: 50%

Experimental development: 25%*

Feasibility studies: 50%

The aid intensities for industrial research and experimental development may be increased up to a maximum aid intensity of 80 % of the eligible costs as follows: (a) by 10 percentage points for medium-sized enterprises and by 20 percentage points for small enterprises; (b) by 15 percentage points if the following conditions are fulfilled: (i) the project involves effective collaboration: -

generally accepted accounting principles are considered as eligible. For land, costs of commercial transfer or actually incurred capital costs are eligible.

- costs of contractual research, knowledge and patents bought or licensed from outside sources at arm's length conditions, as well as costs of consultancy and equivalent services used exclusively for the project.
- additional overheads and other operating expenses, including costs of materials, supplies and similar products, incurred directly as a result of the project; such R&D project costs may alternatively be calculated on the basis of a simplified cost approach in the form of a flat-rate of up to 20%, applied to total eligible R&D project costs referred to above. In this case, the R&D project costs used for the calculation of the indirect costs shall be established on the basis of normal accounting practices and shall comprise only said eligible R&D project costs.
- The eligible costs for feasibility studies shall be the costs of the study.

between undertakings among which at least one is an SME, or is carried out in at least two EU Member States, or in an EU Member State and in a Contracting Party of the EEA Agreement, and no single undertaking bears more than 70 % of the eligible costs, or - between an undertaking and one or more research and knowledge-dissemination organisations, where the latter bear at least 10 % of the eligible costs and have the right to publish their own research results; (ii) the results of the project are widely disseminated through conferences, publication, open access repositories, or free or open-source software. (iii) the beneficiary commits to, on a timely basis, make available licences for research results of aided R1D projects, which are projected by intellectual property rights, at a market price and on non-exclusive and non-discriminatory basis for use by interested parties in the EEA; (iv) the R&D project is carried out in an assisted region fulfilling the conditions of Article 107(3)(a) TFEU; (c) by 5 percentage points if the R&D project is carried out in an assisted region fulfilling the conditions of Article 107(3)(c) TFEU; (d) by 25 percentage points if the R&D project: (i) has been selected by a Member State following an open call to form part of a project jointly designed by at least three Member States or contracting parties to the EEA Agreement; and (ii) involves effective collaboration between undertakings in at least two Member States or contracting parties to the EEA Agreement when the beneficiary is a SME or in at least three Member States or contracting parties to the EEA Agreement when the beneficiary is a large enterprise; and (iii) if at least one of the following conditions is fulfilled: the results of the R&D project are widely disseminated in at least three Member States or contracting parties to the EEA Agreement through conferences, publication, open access

<p>repositories, or free or open source software; or the beneficiary commits to, on a timely basis, make available licences for research results of aided R&D projects, which are protected by intellectual property rights, at a market price and on non-exclusive and non-discriminatory basis for use by interested parties in the EEA.</p> <p>The aid intensities for feasibility studies may be increased by 10 percentage points for medium-sized enterprises and by 20 percentage points for small enterprises.</p>		
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4.3.2.2. Aid for projects awarded a Seal of Excellence quality label

Article 25a GBER provides that EU Member States may grant State aid without notification to and approval by the Commission to projects awarded a Seal of Excellence quality label¹¹⁶ when the aid meets the following conditions:

Aid threshold and maximum aid intensity(s)	Eligible costs	Specific criteria
<p><u>Aid threshold</u></p> <p>2,5 million euros per SME per research and development project of feasibility study.</p>	<ul style="list-style-type: none"> - The eligible activities of the aided research and development project or feasibility study shall be those defined as eligible under the Horizon 2020 or the Horizon Europe programme rules, excluding activities going beyond experimental development activities. 	

¹¹⁶ “The Seal of Excellence is a quality label awarded by the Commission to proposals which have been assessed in a call for proposals under a Union instrument and are deemed to comply with the quality requirements of that Union instrument but could not be funded due to budgetary constraints.” (https://research-and-innovation.ec.europa.eu/funding/funding-opportunities/seal-excellence_en (accessed on 1 April 2023)).

The total public funding for each research and development project or feasibility study shall not exceed the funding rate set out for that research and development project or feasibility study under the Horizon 2020 or under the Horizon Europe programme rules.	<ul style="list-style-type: none"> - The categories, maximum amounts, and methods of calculation of eligible costs of the aided research and development project or feasibility study shall be those defined as eligible under the Horizon 2020 or Horizon Europe programme rules. 	
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4.3.2.3. Aid for Marie Skłodowska-Curia actions and ERC Proof of Concept actions

Article 25b GBER provides that EU Member States may grant State aid without notification to and approval by the Commission to Marie Skłodowska-Curia¹¹⁷ and ERC Proof of Concept actions¹¹⁸ when the aid meets the following conditions:

Aid threshold and maximum aid intensity(s)	Eligible costs	Specific criteria
<p><u>No aid threshold, but</u> the total public funding provided for each aided action may not exceed the maximum level of support provided for in the Horizon 2020 or the Horizon Europe programme.</p>	<ul style="list-style-type: none"> - The eligible activities of the aided action shall be those defined as eligible under the Horizon 2020 or the Horizon Europe programme rules. - The categories, maximum amounts, and methods of calculation of eligible costs of the aided action shall be those defined as eligible under the Horizon 2020 or Horizon Europe programme rules. 	

¹¹⁷ <https://marie-skłodowska-curie-actions.ec.europa.eu/funding> (accessed on 1 April 2023).

¹¹⁸ <https://erc.europa.eu/funding> (accessed on 1 April 2023).

4.3.2.4. Aid involved in co-funded research and development projects

Article 25c GBER provides that EU Member States may grant State aid without notification to and approval by the Commission to co-funded research and development projects when the aid meets the following conditions:

Aid threshold and maximum aid intensity(s)	Eligible costs	Specific criteria
<p>This concerns aid provided to a co-funded research and development project or a feasibility study (including research and development projects implemented under an European institutionalised Partnership based on Article 185 TFEU or Article 187 TFEU or a programme co-fund action, as defined in the Horizon Europe programme rules) which is implemented by at least three EU Member States, or alternatively two EU Member States and at least one associated country, and selected on the basis of the evaluation and ranking made by independent experts following trans-national calls in line with the Horizon 2020 or Horizon Europe programme rules.</p> <p>The categories, maximum amounts, and methods of calculation of eligible costs shall be those defined as eligible under the Horizon 2020 or the Horizon Europe programme rules.</p> <p>The total public funding provided shall not exceed the funding rate established for the research and development project or feasibility study following the selection, ranking and evaluation under the</p>	<p>The eligible activities of the aided research and development project or feasibility study shall be those defined as eligible under the Horizon 2020 or the Horizon Europe programme rules, excluding activities going beyond experimental development activities.</p>	<p>The funding provided by the Horizon 2020 or Horizon Europe programme shall cover at least 30 % of the total eligible costs of a research and innovation action or an innovation action as defined under the Horizon 2020 or Horizon Europe programme.</p>

Horizon 2020 or Horizon Europe programme rules.		
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4.3.2.5. Aid for Teaming actions

Article 25d GBER provides that EU Member States may grant State aid without notification to and approval by the Commission to Teaming actions, involving at least two EU Member States when the aid meets the following conditions:

Aid threshold and maximum aid intensity(s)	Eligible costs	Specific criteria
<p>This concerns aid provided to co-funded Teaming actions, involving at least two EU Member States, and selected on the basis of the evaluation and ranking made by independent experts following transnational calls under the Horizon 2020 or the Horizon Europe programme rules.</p> <p><u>Aid intensities</u></p> <p>The categories, maximum amounts, and methods of calculation of eligible costs shall be those defined as eligible under the Horizon 2020 or the Horizon Europe programme rules. In addition, investment costs in project-related tangible and intangible assets shall be eligible.</p> <p>The total public funding provided shall not exceed the funding rate established for the Teaming action following the selection, ranking and</p>	<p>The eligible activities of the co-funded Teaming action shall be those defined as eligible under the Horizon 2020 or Horizon Europe programme rules. Activities going beyond experimental development activities are excluded.</p>	<p>For investment aid for infrastructures under a Teaming action the following additional conditions shall apply:</p> <p>(a) where the infrastructure pursues both economic and non-economic activities, the financing, costs, and revenues of each type of activity shall be accounted for separately on the basis of consistently applied and objectively justifiable cost accounting principles.</p> <p>(b) the price charged for the operation or use of the infrastructure shall correspond to a market price.</p> <p>(c) access to the infrastructure shall be open to several users and be granted on a transparent and non-discriminatory basis. Undertakings which have financed at least 10 % of the investment costs of the infrastructure may be granted</p>

<p>evaluation under the Horizon 2020 or the Horizon Europe programme rules. In addition, for investments in project related tangible and intangible assets the aid shall not exceed 70 % of the investment costs.</p>		<p>preferential access under more favourable conditions. In order to avoid overcompensation, such access shall be proportional to the undertaking's contribution to the investment costs and these conditions shall be made publicly available.</p> <p>(d) where the infrastructure receives public funding for both economic and non-economic activities, EU Member States shall put in place a monitoring and claw-back mechanism in order to ensure that the applicable aid intensity is not exceeded as a result of an increase in the share of economic activities compared to the situation envisaged at the time of awarding the aid.</p>
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4.3.2.6. Aid involved in the co-funding of projects supported by the European Defence Fund or the European Defence Industrial Development Programme

Recently, the scope of the GBER was enlarged. Article 25e GBER now allows Member States to grant aid to undertakings involved in the co-funding of research projects supported by the EDF or the European Defence Industrial Development Programme without notification to the Commission when the aid meets the following conditions:¹¹⁹

Aid threshold and maximum aid intensity(s)	Eligible costs	Specific criteria
It concerns aid provided to co-fund a research and development project which is evaluated,		

¹¹⁹ Article 25e (1) GBER.

<p>ranked and selected in line with the EDF or the European Defence Industrial Development Programme rules. The eligible costs of the aided project are those defined as eligible under these rules.</p> <p><u>Aid threshold</u></p> <p>80 million EUR per undertaking.</p> <p><u>Aid intensities</u></p> <p>In case the aid intensity received by the beneficiary exceed the maximum aid intensities discussed under 4.3.2.1., the beneficiary must pay a market price to the granting authority to use for non-defence applications the intellectual property rights or prototypes resulting from the project. In any event, the maximum amount to be paid to the granting authority for this use shall not exceed the difference between the aid received by the beneficiary and the maximum amount of aid the beneficiary could have received applying the maximum aid intensities discussed under 4.3.2.1.</p>	<p>The total public funding provided can reach up to 100% of the eligible costs of the project, meaning that the costs of the project not covered by EU funding can be covered by State aid.</p>	
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4.3.2.7. Investment support for research infrastructure

Article 26 GBER provides that EU Member States may grant State aid without notification to and approval by the Commission to investment support for research infrastructure when the aid meets the following conditions:

Aid threshold and maximum aid intensity(s)	Eligible costs	Specific criteria
<p><u>Aid threshold</u></p> <p>25 million euros per infrastructure.</p> <p><u>Aid intensity</u></p> <p>50%</p>	<p>Cost of investment in intangible and tangible assets.</p>	<ul style="list-style-type: none"> - Price charged for operation or use of the infrastructure corresponds to a market price. - Access to the infrastructure is open to multiple users and granted in a transparent and non-discriminatory manner (companies that have financed at least 10% of the investment costs may be granted preferential access on more favourable terms; however, this access must be proportional to this contribution and these terms must be publicly available). - Where research infrastructure is used to carry out both economic and non-economic activities: (i) separate accounting for funding, costs, and revenues of each type of activity; (ii) EU Member State elaborate a monitoring and recovery mechanism to ensure that applicable aid intensity is not exceeded due to an increase in the share of economic activities compared to the situation prevailing at the time of granting the aid.

4.3.2.8. Investment aid for testing and experimentation infrastructures

Article 26a GBER provides that EU Member States may grant State aid without notification to and approval by the Commission for testing and experimentation infrastructures when the aid meet the following conditions:

Aid threshold and maximum aid intensity(s)	Eligible costs	Specific criteria
<p>It concerns aid for the construction or upgrade of testing and experimentation infrastructures.</p> <p><u>Aid intensities</u></p> <p>The aid intensity may not exceed 25% of the eligible costs. The aid intensity may be increased up to a maximum aid intensity of 40%, 50% and 60% of the eligible investment costs of large, medium and small sized enterprises respectively as follows:</p> <ul style="list-style-type: none"> - by 10 percentage points for medium sized enterprises and 20 percentage points for small enterprises; - by additional 10 percentage points for cross-border testing and experimentation infrastructures which are subject to at least two Member States providing the public funding or for testing and experimentation infrastructures evaluated and selected at EU level; - by additional 5 percentage points for testing and experimentation infrastructures of which at least 80% of annual capacity is allowed to SMEs. 	<ul style="list-style-type: none"> - Investments costs in intangible and tangible assets 	<ul style="list-style-type: none"> - The price charge for the operation or use of the infrastructure must correspond to a market price or reflect their costs plus a reasonable margin in the absence of a market price. - Access to the infrastructure must be open to several users and be granted on a transparent and non-discriminatory basis. Undertakings which have financed at least 10% of the investment costs of the infrastructure may be granted preferential access under more favourable conditions. In order to avoid overcompensation, such access shall be proportional to the undertaking's contribution to the investment costs and these conditions must be made publicly available.

4.3.2.9. Aid for innovation clusters

Article 27 GBER provides that EU Member States may grant State aid without notification to and approval by the Commission for innovation when the aid meet the following conditions:

Aid threshold and maximum aid intensity(s)	Eligible costs	Specific criteria
<p><u>Aid threshold</u></p> <p>10 million euros per cluster.</p> <p><u>Aid intensities</u></p> <p>50% for investment aid, which may be increased by 15% for innovation clusters in aid areas meeting the conditions of Article 107(3)(a) TFEU, and by 5% for innovation clusters in aid areas meeting the conditions of Article 107(3)(c) TFEU.</p>	<p>Investment aid may be granted for the construction or upgrade of innovation clusters. The eligible costs shall be the investment costs in intangible and tangible assets.</p> <p>The eligible costs of operating aid for innovation clusters shall be the personnel and administrative costs (including overhead costs) relating to:</p> <p>(a) animation of the cluster to facilitate collaboration, information sharing and the provision or channelling of specialised and customised business support services.</p> <p>(b) marketing of the cluster to increase participation of new undertakings or organisations and to increase visibility.</p> <p>(c) management of the cluster's facilities; organisation of training programmes, workshops, and conferences to support knowledge sharing and networking and transnational cooperation.</p>	<ul style="list-style-type: none"> - Aid can be granted to the owner of the innovation cluster. Operating aid can be granted to the operator of the innovation cluster. The operator, when different from the owner, can either have a legal personality or be a consortium of undertakings without separate legal personality. In all instances separate account for the costs and revenues of each activity (ownership, operation and use of the cluster) has to be kept according to the applicable accounting standards by each undertaking. - Access to the cluster's premises, facilities and activities should be open to multiple users and shall be granted on a transparent and non-discriminatory basis. Undertakings that have financed at least 10% of the investment costs of the innovation cluster may be granted preferential access on more favourable terms. To avoid overcompensation, this access is proportional to the undertaking's contribution to the investment costs and these conditions are made publicly available. - The fees charged for using the cluster's facilities and for participating in the activities of the cluster's

		<p>activities must correspond to the market price or reflect their costs including a reasonable margin.</p> <ul style="list-style-type: none"> - The cluster shall correspond to the market price or reflect their cost. - Aid for personnel and administrative costs may be granted for a maximum of 10 years. - Operating aid may be granted for the operation of innovation clusters. It shall not exceed 10 years.
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4.3.2.10.***Innovation aid for SMEs***

Article 28 GBER provides that EU Member States may grant innovation aid to SMEs without notification to and approval by the Commission when the aid meets the following conditions:

Aid threshold and maximum aid intensity(s)	Eligible costs	Specific criteria
<p><u>Aid threshold</u></p> <p>10 million euros per undertaking, per project.</p> <p><u>Aid intensity</u></p> <p>50%*</p> <p>* The aid intensity may be increased to 100% for aid for innovation advisory services and innovation support services, provided that the</p>	<ul style="list-style-type: none"> - costs for obtaining, validating, and defending patents and other intangible assets. - costs for secondment of highly qualified personnel from a research and knowledge-dissemination organisation or a large enterprise, working on research, development, and innovation activities in a newly created function within the beneficiary and not replacing other personnel. - costs for innovation advisory and support services, including those services provided by research and knowledge dissemination organisations, research 	<p>In the particular case of aid for innovation advisory and support services the aid intensity can be increased up to 100% of the eligible costs provided that the total amount of aid for innovation advisory and support services does not exceed 220,000 euros per undertaking within any three year period.</p>

total aid amount does not exceed 200.000 per undertaking over a three-year period.	infrastructures, testing and experimentation infrastructures or innovation clusters.	
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4.3.2.11.***Support for process and organisation innovation***

Article 29 GBER provides that EU Member States may grant State aid without notification to and approval by the Commission to support for process and organisation innovation when this aid meets the following criteria:

Aid threshold and maximum aid intensity(s)	Eligible costs	Specific criteria
<p><u>Aid threshold</u></p> <p>12,5 million euro per undertaking, per project.</p> <p><u>Aid intensity</u></p> <p>Aid to large enterprises is only compatible with the internal market if they effectively collaborate with SMEs in the supported activity and the collaborating SMEs bear at least 30% of the total eligible costs.</p> <p>15% for large undertakings 50% for SMEs</p>	<ul style="list-style-type: none"> - Personnel costs - Costs of instruments, equipment, buildings, and land to the extent and for the period used for the project - Costs of contractual research, knowledge and patents bought or licensed from outside sources at arm's length conditions - Additional overheads and other operating costs, including costs of materials, supplies and similar products, incurred directly as a result of the project. 	

4.3.2.12.***Aid for research and development in the fisheries and aquaculture sector***

Article 30 GBER provides that EU Member States may grant State aid for support for process and organisation innovation without notification to and approval by the Commission when the aid meets the following criteria:

Aid threshold and maximum aid intensity(s)	Eligible costs	Specific criteria
<p><u>Aid threshold</u></p> <p>No</p> <p><u>Aid intensity</u></p> <p>100%.</p>	<p>See under 'Aid for research and development projects'.</p>	<ul style="list-style-type: none"> - The supported project is of interest to all operators in the sector or sub-sector concerned. - Before the start date of the supported project, the following information shall be published on the internet: (i) that the project will be implemented; (ii) the objectives of the project. (iii) the likely date of publication of the results expected from the project and where they will be published on the internet. (iv) an indication that the results will be available free of charge to all companies operating in the sector or sub-sector concerned. - The results of the project will be made available on the internet from the end date of the project or from the date on which information on those results is given to members of specific organisations, whichever comes first. The results will remain available on the internet for at least five years from the end date of the project. - Aid must be granted directly to the research and knowledge dissemination organisation and may not consist of direct non-research related support to an undertaking producing, processing, or marketing fishery or aquaculture products.

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5. State aid compatible with the internal market

5.1. Introduction

The 'EU State aid ban' is not absolute nor unconditional. Indeed, State aid is deemed to be compatible with the internal market if it fulfils the conditions that are laid down in Article 107(2) and (3) TFEU, Article 43 TFEU, Article 93 TFEU or Article 106(2) TFEU. These provisions clarify which aid is compatible or can be declared compatible with the internal market. Aid for R&D is in principle exempted based on Article 107(3)(c) TFEU, which stipulates that State aid is compatible with the internal market when it facilitates "*the development of certain economic activities or of certain economic areas, where such aid does not adversely affect trading conditions to an extent contrary to the common interest*". Since these 'exemption categories' constitute a derogation from the principle of State aid prohibition, they are interpreted strictly.

When examining the compatibility of a State aid measure with the internal market, the Commission will first check whether the measure is compatible with the internal market on the basis of a policy document (if available). The Commission has indeed adopted various frameworks, guidelines, and notices to clarify some of these exceptions.¹²⁰ If this investigation does not result in a favourable decision or if there is no relevant policy document available, the Commission will check whether the measure concerned does not fall under the scope of one of said Treaty exemptions.

For example, on 25 November 2021, the Commission adopted a Communication on the Criteria for the analysis of the compatibility with the internal market of State aid to promote the execution of important projects of common European interest ('IPCEI').¹²¹ In this document, the Commission sets out the criteria under which it will approve State aid to supports IPCEI. The Communication is particularly relevant for aid which aims to support 'breakthrough innovative projects'. In the past the Commission already approved State aid measures supporting to major research and innovation projects on the battery value chain for electric vehicles, microelectronics, and the hydrogen technology value chain.

¹²⁰ For applications of these exceptions, please refer to the Commission's *State aid Cases* website (<https://ec.europa.eu/competition/elojade/isef/index.cfm>) (accessed on 1 April 2023).

¹²¹ Commission Communication on the Criteria for the analysis of the compatibility with the internal market of State aid to promote the execution of important projects of common European interest, [https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52021XC1230\(02\)&from=EN](https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52021XC1230(02)&from=EN) (accessed on 25 January 2023).

In general, the IPCEI Framework makes it easier for EU Member States to support large, pan-European projects that support the EU's policies and strategies, such as the EU Strategic Compass. Indeed, with the 2022 IPCEI Framework, the Commission aims to consider recent EU policies and strategies such as the European Green Deal, the Digital Strategy, the New Industrial Strategy for Europe, the European Strategy for Data and Next Generation EU and to allow larger participation of SMEs and start-ups. Importantly for the BEPIDS-project, it specifically refers to major projects pursuing industrial policy objectives to address a strategic dependency.¹²²

Another example are the latest Broadband State Aid Guidelines, which the Commission adopted on 12 December 2022.¹²³ In this policy document, the Commission sets out when EU Member States can support modern infrastructures capable of providing end-users with high quality and affordable connectivity services and reduce the digital divide where commercial operators have no incentive to invest. In addition, the Guidelines aim at protecting private investments by providing that no public intervention can take place where private operators invest and at fostering fair competition through competitive selection procedures, technological neutrality, and open access requirements.

In the following Section, however, we will focus on the Framework for State aid for R&D&I, which is the most relevant policy document for the BEPIDS-project.

5.2. Framework for State aid for R&D&I: introduction

5.2.1. Introduction

On 19 October 2022, the Commission adopted a State aid Framework for research, development, and innovation. This Framework replaced a 2014 Commission Framework for R&D from 2014. In this document, the Commission gives guidance on how the Commission applies the EU State aid rules in the context of R&D&I (of course without prejudice to the case law of the EU Courts). Moreover, the Commission provides guidance on the basis of a compatibility assessment conducted by the Commission regarding aid to promote R&D&I under Article 107(3)(c) TFEU. This Article provides that aid may be declared compatible by the Commission with the internal market provided that it meets two important conditions, being:

- a positive condition: the aid must facilitate the development of an economic activity; and

¹²² And also policy adopted after the IPCEI, such as the EU Strategic Compass.

¹²³ Communication from the Commission — EU Guidelines for the application of State aid rules in relation to the rapid deployment of broadband networks, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52013XC0126%2801%29> (accessed on 1 April 2023). The provisions of the Broadband Guidelines are complemented by the GBER (see Articles 52, 52a, 52b, 52c GBER).

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- **a negative condition:** the aid must not adversely affect trading conditions to an extent contrary to the common interest.

The Framework is an important response to the 2020 Commission Communication on a new European Research Area for Research and Innovation, which aims to strengthening R&D&I investments in the EU and to reach a 3% EU GDP R&D investment target.¹²⁴ Moreover, it implements important EU strategies and policies, such as the European Green Deal and the Digital Strategy.¹²⁵

Importantly, EU Member States must notify R&D&I aid pursuant to Article 108(3) of the Treaty, even if this aid may be declared compatible with the internal market, with the exception of measures that fulfil the conditions laid down in a block exemption Regulation.

5.2.2. Scope of the Framework

The Framework applies in principle to all technologies, industries, and sectors (thus including the defence and security sector). However, aid for firms in difficulty¹²⁶, as defined by EU law, is excluded from the scope of the Framework.¹²⁷

In the Framework for State aid for R&D&I the Commission lists a series of measures which are compatible with the internal market when they meet certain criteria. These measures are:

- **aid for R&D projects** where the aided part of this projects fall within the categories of fundamental research and applied research, of which the latter can be divided into industrial research and experimental development;
- **aid for feasibility studies** related to R&D projects, which helps overcoming a market failure primarily related to imperfect and asymmetric information;
- **aid for the construction and upgrade of research infrastructures**, which mainly addresses the market failure stemming from coordination difficulties but also from imperfect and asymmetric information;
- **aid for the construction and upgrade of testing and experimentation infrastructures**, mainly addresses the market failure stemming from imperfect and asymmetric information or a coordination failure;

¹²⁴ Framework for State aid for R&D&I, para 6.

¹²⁵ Framework for State aid for R&D&I, para 5.

¹²⁶ See para 9 of the Commission guidelines on State aid for rescuing and restructuring firms in difficulty (<https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A52004XC1001%2801%29> (accessed on 1 April 2023): "(...) the Commission regards a firm as being in difficulty where it is unable, whether through its own resources or with the funds it is able to obtain from its owner/shareholders or creditors, to stem losses which, without outside intervention by the public authorities, will almost certainly condemn it to going out of business in the short or medium term."

¹²⁷ Framework for State aid for R&D&I, para 11.

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- **aid for innovation activities**, which is mainly targeted at market failures related to positive externalities (knowledge spill overs), coordination difficulties and, to a lesser extent, asymmetric information;
 - **aid for process and organisational innovation**, which is mainly targeted at market failures related to positive externalities (knowledge spill overs), coordination difficulties and, to a lesser extent, asymmetric information; or
 - **aid for innovation clusters**, which aims at tackling market failures linked with coordination problems hampering the development of clusters, limiting the interactions and knowledge flows within and between clusters.¹²⁸

All list of relevant definitions can be found in paragraph 16 of the Framework for State aid for State aid.

5.2.3. Compatibility criteria

As already mentioned, in order for an R&D&I measure to be compatible with the internal market, the following two conditions must be met:

First condition: R&D&I facilitates the development of an economic activity.

Incentive effect of state aid

The State aid must change the behaviour of the beneficiary in such a way that it engages in additional activities which would not be conducted without the aid, or to a lesser extent or in a different way or location.¹²⁹

No violation of EU law

The State aid may not violate relevant provisions and principles of EU law.¹³⁰

Second condition: R&D&I aid does not unduly affect trading conditions to an extent contrary to the common interest

Need for the aid measure

¹²⁸ Framework for State aid for R&D&I, para 13.

¹²⁹ Sections 3.1.1. and 3.1.2 Framework for State aid for R&D&I.

¹³⁰ Section 3.1.3. Framework for State aid for R&D&I.

The EU Member State must demonstrate that the aid can bring about a substantial improvement that the market itself cannot achieve.¹³¹

Appropriateness of the aid measure

The State aid measures must be an appropriate policy instrument to help achieve the objective of common interest; no other less disruptive tools should be available that could achieve the same results.¹³²

Proportionality of the aid measure

The aid amount must be limited to the minimum necessary to encourage the beneficiary to make additional investments or activities in the area concerned. To ensure this, the Framework contains maximum aid intensities.¹³³

Transparency of aid

All stakeholders must have easy access to all relevant acts and to pertinent information about the aid awarded.¹³⁴

Avoiding undesired negative effects on competition and trade between EU Member States

The negative effects of the state aid must be sufficiently limited so that the measure is positive on balance. In other words, the positive effects of aid for achieving an objective of common interest must outweigh its possible negative effects on competition in the internal market and trade between EU Member States.¹³⁵

In addition to these conditions, the Framework establishes specific conditions per category of aid, which we will summarise in the next Section. In addition, it is important to emphasise that Framework provides for several formal requirements with regard to the evaluation of, reporting about and monitoring of R&D&I State aid, such as:

- an ex-post evaluation for schemes with large aid budgets or containing novel characteristics, or when significant market, technology or regulatory changes are foreseen

¹³¹ Section 3.2.1. Framework for State aid for R&D&I.

¹³² Section 3.2.2. Framework for State aid for R&D&I.

¹³³ Section 3.2.3. Framework for State aid for R&D&I.

¹³⁴ Section 3.2.4. Framework for State aid for R&D&I.

¹³⁵ Section 3.2.5. Framework for State aid for R&D&I.

- an ex-post evaluation for schemes with a State aid budget or accounted expenditure over 150 million euros in any given year or 750 million euros over their total duration.
- The maintenance of detailed records regarding all aid measures. Such records must contain all information necessary to establish that the conditions regarding eligible costs and maximum aid intensities have been fulfilled. Those records must be maintained for ten years from the date of award of the aid and must be provided to the Commission upon request. Moreover, EU Member States must submit annual reports to the Commission.¹³⁶

5.2.4. Eligible costs and aid intensities

The Commission has listed the eligible costs and aid intensities of R&D&I aid that may be declared compatible with the internal market. This information can be summarised as follows:

Eligible costs¹³⁷

<p>Aid for R&D projects</p>	<p><u>Personnel costs</u>: researchers, technicians and other supporting staff to the extent employed on the project.</p> <p><u>Costs of instruments and equipment</u> to the extent and for the period used for the project. If such instruments and equipment are not used for their full life for the project, only the depreciation costs corresponding to the life of the project, as calculated based on good accounting practice, are considered as eligible.</p> <p><u>Costs of buildings and land</u>, to the extent and for the period used for the project. Regarding buildings, only the depreciation costs corresponding to the life of the project, as calculated based on good accounting practice are considered as eligible. For land, costs of commercial transfer or actually incurred capital costs are eligible.</p> <p><u>Cost of contractual research, knowledge and patents</u> bought or licensed from outside sources at arm's length conditions, as well as costs of consultancy and equivalent services used exclusively for the project.</p> <p><u>Additional overheads</u> incurred directly because of the project.</p> <p><u>Other operating expenses, including costs of materials, supplies and similar products</u> incurred directly because of the project.</p> <p><u>Specifically for health relevant/related R&D projects</u>: all costs necessary for the R&D project during its duration, amongst others, personnel costs, costs for digital and computing</p>
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¹³⁶ See Chapters 4 and 5 of Framework for State aid for R&D&I.

¹³⁷ This overview is based on the Annex I of the 2022 Commission Framework for State aid for R&D&I.

	equipment, for diagnostic tools, for data collection and processing tools, for R&D services, for pre-clinical and clinical trials (trial phases I-IV); phase-IV trials are eligible as long as they allow further scientific or technological advance.
Aid for feasibility studies	<u>Costs of study</u>
Aid for the construction and upgrade of research infrastructures	<u>Investment costs in intangible and tangible assets</u>
Aid for the construction and upgrade of testing and experimentation infrastructure	<u>Investment costs in intangible and tangible assets</u>
Innovation aid for SMEs	<p><u>Costs for obtaining, validating, and defending patents and other intangible assets</u></p> <p><u>Costs for secondment of highly qualified personnel from a research and knowledge dissemination organisation or a large enterprise, working on R&D&I activities in a newly created function within the beneficiary and not replacing other personnel</u></p> <p><u>Costs for innovation advisory and support services.</u></p>
Aid for process and organisational innovation	<p><u>Personnel costs</u> to the extent employed on the project.</p> <p><u>Costs of instruments and equipment to the extent and for the period used for the project.</u> If such instruments and equipment are not used for their full life for the project, only the depreciation costs corresponding to the life of the project, as calculated because of good accounting practice, are considered as eligible.</p> <p><u>Costs of buildings and land, to the extent and for the period used for the project.</u> Regarding buildings, only the depreciation costs corresponding to the life of the project, as calculated based on good accounting practice are considered as eligible. For land, costs of commercial transfer or actually incurred capital costs are eligible.</p> <p><u>Costs of contractual research, knowledge and patents bought or licensed from outside sources at arm's length conditions,</u> as well as costs of consultancy and equivalent services used exclusively for the project.</p> <p><u>Additional overheads</u> incurred directly because of the project.</p>

	Other operating costs, including costs of materials, supplies and similar products, incurred directly because of the project.
Aid for innovation clusters	<p><u>Investment aid</u></p> <p><u>Investment costs in tangible and intangible assets</u></p> <p><u>Operating aid</u></p> <p><u>Personnel and administrative costs (including overhead costs) relating to:</u></p> <ul style="list-style-type: none"> - animation of the cluster to facilitate collaboration, information sharing and the provision or channelling of specialised and customised business support services; - marketing of the cluster to increase participation of new undertakings or organisations and to increase visibility; - management of the cluster's facilities; and - organisation of training programmes, workshops, and conferences to support knowledge sharing and networking and transnational cooperation.

Maximum aid intensities¹³⁸

	Small enterprise¹³⁹	Medium- sized enterprise¹⁴⁰	Large enterprise¹⁴¹
Fundamental research	100%	100%	100%
Industrial research	70%	60%	50%
- subject to effective collaboration between undertakings (for large enterprises, cross-border or with at least one SME) or	80%	75%	65%

¹³⁸ This overview is based on the Annex II of the 2022 Commission Framework for State aid for R&D&I.

¹³⁹ See the criteria laid down in the Commission recommendation on the definition of small enterprises.

¹⁴⁰ See the criteria laid down in the Commission recommendation on the definition of medium-sized enterprises.

¹⁴¹ Large undertakings are undertakings which do not fall within the definition of small and medium-sized enterprises.

<ul style="list-style-type: none"> - between an undertaking and a research organisation; or - subject to wide dissemination of results, or 			
<ul style="list-style-type: none"> - subject to the R&D project being carried out in assisted regions fulfilling the conditions of Article 107(3)(c) TFEU; - subject to the R&D project being carried out in assisted regions fulfilling the conditions of Article 107(3)(a) TFEU. 	<p style="text-align: center;">75% or 80%</p>	<p style="text-align: center;">65% or 75%</p>	<p style="text-align: center;">55% or 65%</p>
Experimental development	45%	35%	40%
<ul style="list-style-type: none"> - subject to effective collaboration between undertakings (for large enterprises, cross-border or with at least one SME) or between an undertaking and a research organisation; or - subject to wide dissemination of results, or 	60%	50%	40%
<ul style="list-style-type: none"> - subject to the R&D project being carried out in assisted regions fulfilling the conditions of Article 107(3)(c) TFEU, or - subject to the R&D project being carried out in assisted regions fulfilling the conditions of Article 107(3)(a) TFEU. 	<p style="text-align: center;">50% or 60%</p>	<p style="text-align: center;">40% or 50%</p>	<p style="text-align: center;">30% or 40%</p>
Aid for feasibility studies	70%	60%	50%
<ul style="list-style-type: none"> - in assisted regions fulfilling the conditions of Article 107(3)(c) TFEU, or - in assisted regions fulfilling the conditions of Article 107(3)(a) TFEU. 	<p style="text-align: center;">75% or 80%</p>	<p style="text-align: center;">65% or 75%</p>	<p style="text-align: center;">55% or 65%</p>
Aid for the construction and upgrade of research infrastructures	50%	50%	50%
<ul style="list-style-type: none"> - subject to at least two EU Member States providing the public funding, or 	60%	60%	60%

- for research infrastructures evaluated and selected at EU level.			
Aid for the construction and upgrade of testing and experimentation infrastructures	45%	35%	25%
- subject to at least two EU Member States providing the public funding, or the testing and experimentation infrastructures has been evaluated and selected at EU level, and / or	55%	45%	35%
- subject to the testing and experimentation infrastructure providing services predominantly to SMEs (at least allocating 80% of its capacity for that purpose)	60% (55+5) or 50% (45+5)	50% (45+5) or 40% (35+5)	40% (35+5) or 30% (25+5)
Innovation aid for SMEs	50%	50%	-
Aid for process and organisational Innovation			
- aid for large undertakings is subject to effective collaboration with at least one SME	50%	50%	15%
Aid for innovation clusters			
Investment aid	50%	50%	50%
- in assisted regions fulfilling the conditions of Article 107(3)(c) TFEU, or in assisted regions fulfilling the conditions of Article 107(3)(a) TFEU	55% or 65%	55% or 65%	55% or 65%
Operating aid	50%	50%	50%

5.2.5. An example: Czech State aid to the defence and security industry

The number of R&D&I measures notified to and approved by the Commission remains limited. Indeed, the Commission's State aid scoreboards show that most aid measures are adopted on

the basis of the GBER.¹⁴² However, a 2008 decision regarding State aid granted by the Czech Republic clearly shows that EU State aid law does allow EU member states to grant state aid to support R&D&I in the defence and security industry.¹⁴³ The main characteristics of this Czech measure can be summarised as follows:

- The notified aid scheme aimed at supporting the preparation of the Czech Armed Forces in the R&D domain so that they were able to fulfil their tasks in the conditions of the expected development of the security and operational environment, and the characteristics of future military operations, technological, demographic, economic and resource conditions and the forecasted development of the armed forces of the Czech Republic facilities.
- Aid would be provided in the form of a direct subsidy. The scheme would support R&D projects in fundamental research, industrial research and experimental development.
- The aid budget for the period 2008-2012 was 328,8 million Czech crowns.
- The scheme was targeted at all undertakings, thus large companies as well as SMEs. The Czech authorities estimated the number of beneficiaries between 11 and 50. Aid recipients could not be undertakings in difficulty.
- Public funding would also be provided to public higher education or research establishments. However, they would only receive support under the scheme for their non-economic activities and could not carry out research on behalf or in collaboration with undertakings, under the scheme. There would however be projects involving collaboration between undertakings. The number of such beneficiaries was estimated at 5.
- The Czech authorities had drafted the measure, taking into account the substantive and formal conditions set out in the Commission's framework for State aid for R&D&I applicable at the time.¹⁴⁴

In its decision of 1 July 2008, the Commission first examined whether the measure qualified as State aid. Since the State aid criteria were clearly met, it decided that this was undoubtedly the case. It then noted that the measure met the conditions (aid intensities, aid thresholds, evaluation and monitoring requirements, etc.) of its (then) Framework. It therefore decided that the measure was compatible with the internal market and could be implemented.

On 25 November 2021, the Commission adopted a Communication on the Criteria for the analysis of the compatibility with the internal market of State aid to promote the execution of important

¹⁴² https://competition-policy.ec.europa.eu/state-aid/scoreboard_en (accessed on 1 April 2023). More than 95% of aid measures in recent years would have been adopted under the GBER (and thus without notification to and approval by the Commission). This figure does not take into account the (exceptional COVID aid).

¹⁴³ Commission decision 1 July 2008, State aid scheme N 543/2007 – Aid scheme for R&D in the defence sector, https://ec.europa.eu/competition/state_aid/cases/222102/222102_838823_35_1.pdf (accessed on 1 April 2023).

¹⁴⁴ Commission decision 1 July 2008, State aid scheme N 543/2007 – Aid scheme for R&D in the defence sector

projects of common European interest ('IPCEI').¹⁴⁵ In this document, the Commission sets out the criteria under which it will approve State aid to support IPCEI. The Communication is particularly relevant for aid which aims to support 'breakthrough innovative projects'. In the past the Commission already approved State aid measures supporting major research and innovation projects on the battery value chain for electric vehicles, microelectronics, and the hydrogen technology value chain.

In general, the IPCEI Framework makes it easier for EU Member States to support large, pan-European projects that support the EU's policies and strategies. Indeed, with the 2022 IPCEI Framework, the Commission aims to consider recent EU policies and strategies such as the European Green Deal, the Digital Strategy, the New Industrial Strategy for Europe, the European Strategy for Data and Next Generation EU and to allow larger participation of SMEs and start-ups. Importantly for the BEPIDS-project, it specifically refers to major projects pursuing industrial policy objectives to address a strategic dependency.

5.3. General derogations from the ban on State aid

The EU State aid ban ex Article 107(1) TFEU is neither absolute nor unconditional and has exceptions. Indeed, there are at least two reasons why State aid can be advisable. First, it is well-established that the market does not always function perfectly or efficiently and that it may be necessary to grant State aid to remedy a market failure or, even more, to enhance competition. Second, by exempting certain types of State aid from the principle of incompatibility of State aid with the internal market, the TFEU implicitly recognises that the benefits of pursuing legitimate policy objectives outweigh the costs caused by the distortion of the internal market.

On the one hand, there are categories of aid that the Commission *must* approve upon notification (Article 107(2) TFEU).¹⁴⁶ On the other hand, there are categories of State aid that the Commission

¹⁴⁵ Commission Communication on the Criteria for the analysis of the compatibility with the internal market of State aid to promote the execution of important projects of common European interest, [https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52021XC1230\(02\)&from=EN](https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52021XC1230(02)&from=EN) (accessed on 25 January 2023).

¹⁴⁶ "2. *The following shall be compatible with the internal market: (a) aid having a social character, granted to individual consumers, provided that such aid is granted without discrimination related to the origin of the products concerned; (b) aid to make good the damage caused by natural disasters or exceptional occurrences; (c) aid granted to the economy of certain areas of the Federal Republic of Germany affected by the division of Germany, in so far as such aid is required in order to compensate for the economic disadvantages caused by that division. Five years after the entry into force of the Treaty of Lisbon, the Council, acting on a proposal from the Commission, may adopt a decision repealing this point.*"

may approve upon notification (Article 107(3) TFEU).¹⁴⁷ These exceptions are interpreted very strictly because they constitute a derogation from the general prohibition of State aid. Only the Commission can determine whether a measure is compatible with the single market on the basis of one of these conditions. Measures must therefore be notified to the Commission for approval.

As said, the Commission has adopted several frameworks, guidelines and communications to clarify some of these exceptions. However, in the absence of such a document, the Commission will consider whether or not the proposal falls directly under a Treaty exception, as interpreted by the EU Courts. For the BEPIDS project, Article 107(3)(c) TFEU is particularly relevant. This provision states that “*aid to facilitate the development of certain economic activities or of certain economic areas*” may be declared compatible with the internal market “*where such aid does not adversely affect trading conditions to an extent contrary to the common interest*”.

In *Hinkley Point*, the ECJ clarified that “*in order to be capable of being considered compatible with the internal market under that provision, State aid must meet two conditions, the first being that it must be intended to facilitate the development of certain economic activities or of certain economic areas and the second, expressed in negative terms, being that it must not adversely affect trading conditions to an extent contrary to the common interest.*”¹⁴⁸

¹⁴⁷ “3. The following may be considered to be compatible with the internal market: (a) aid to promote the economic development of areas where the standard of living is abnormally low or where there is serious underemployment, and of the regions referred to in Article 349, in view of their structural, economic and social situation; (b) aid to promote the execution of an important project of common European interest or to remedy a serious disturbance in the economy of a Member State; (c) aid to facilitate the development of certain economic activities or of certain economic areas, where such aid does not adversely affect trading conditions to an extent contrary to the common interest; (d) aid to promote culture and heritage conservation where such aid does not affect trading conditions and competition in the Union to an extent that is contrary to the common interest; (e) such other categories of aid as may be specified by decision of the Council on a proposal from the Commission.”

¹⁴⁸ ECJ 22 September 2020, C-594/18 P, *Austria v Commission*, ECLI:EU:C:2020:742, para 19.

6. The EU State aid rules and SGEIs

Article 106(1) TFEU provides that regarding public undertakings and the undertakings to which they grant special or exclusive rights, EU Member States may not take any measure contrary to the EU Treaties. However, Article 106(2) TFEU makes it clear that undertakings entrusted with the operation of a service of general economic interest “*shall be subject to the rules contained in the Treaties insofar as the application of such rules does not obstruct the performance, in law or in fact, of the particular tasks assigned to them*”. It can be inferred from the combination of the two said Treaty provisions that EU Member States must take EU State aid rules into account when compensating an undertaking for providing a service of general economic interest (‘SGEI’). In other words, they may not grant State aid to one or more undertakings, even if those undertakings perform an SGEI. Yet even this prohibition is not absolute, and there are certain circumstances that justify an EU Member State granting State aid to an undertaking for the performance of an SGEI.

There is no EU definition of services of general interest (‘SGIs’) and services of general economic interest (‘SGEIs’). It is, however, understood that SGIs are services not provided by the market, whereas SGEIs denote services of economic nature which can be provided by the market. TFEU applies to services of economic nature and lays down rules only for services of general economic interest. Indeed, Article 2 of Protocol 26 attached to TFEU states that “*the provisions of the Treaties do not affect in any way the competence of Member States to provide, commission and organise non-economic services of general interest*”. It follows from these provisions that SGIs are not subject to EU State aid law and that EU Member States are free to subsidise them as they wish. An example of an SGI is the army.

Because the TFEU does not contain a definition of SGEI, the EU Courts held that EU Member States are free to define what they consider as SGEI.¹⁴⁹ However, at the same time the Courts have ruled that SGEIs are services which have ‘special characteristics’ in relation to other services provided by the market and that their purpose is to meet the everyday needs of citizens.¹⁵⁰

Article 106(2) TFEU allows EU Member States to subsidise SGEIs only to the extent that is necessary. The Commission has set out in its 2012 SGEI package which aid can be granted based on this Treaty provision. For example, the Commission’s 2012 SGEI package requires EU Member States to identify a market failure before imposing a public service obligation.

¹⁴⁹ ECJ 26 April 2018, C-91/17 P and C-92/17 P, *Cellnex Telecom SA and Telecom Castilla-La Mancha SA v Commission and SES Astra SA*, ECLI:EU:C:2018:284, paras 42-44.

¹⁵⁰ E.g. postal services.

We consider it to be very unlikely that services provided by the Belgian defence and security sector can be successfully classified as an SGEI. Either they are not necessary to meet the everyday needs of citizens or are they provided to undertakings.

If the compensation of an undertaking for providing an SGEI qualifies as State aid, it must in principle be notified to the Commission. The latter will then examine whether this compensation is compatible with the internal market (see also Article 106(2) TFEU).¹⁵¹ However, in *Altmark*, the ECJ held that a compensation to undertakings that provide an SGEI does not constitute State aid when four cumulative criteria are met.¹⁵² Nevertheless, it is very rare for a measure to fulfil the four *Altmark* conditions.

Over the years, the EU Courts and the Commission have developed a comprehensive and complex regulatory framework for the application of EU state aid rules to compensation for SGEIs. For example, the Commission adopted an exemption decision ('SGEI decision 2012/12')¹⁵³ a de

¹⁵¹ See further, Commission Communication on the application of the European Union State aid rules to compensation granted for the provision of services of general economic interest, <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A52012XC0111%2802%29> (accessed on 1 April 2023); Commission Framework for State aid in the form of public service compensation, [https://eur-lex.europa.eu/legal-content/EL/TXT/PDF/?uri=CELEX:52012XC0111\(03\)&from=EN](https://eur-lex.europa.eu/legal-content/EL/TXT/PDF/?uri=CELEX:52012XC0111(03)&from=EN) (accessed on 1 April 2023).

¹⁵² ECJ 24 July 2003, C-280/00, *Altmark Trans GmbH and Regierungspräsidium Magdeburg v Nahverkehrsgesellschaft Altmark GmbH*, ECLI:EU:C:2003:415, paras 89-93. The *Altmark*-criteria are as follows: the recipient undertaking must be entrusted with providing an SGEI that is clearly defined. The parameters based on which the compensation for the performance of the SGEI is calculated have been established beforehand in an objective and transparent manner; the compensation shall not exceed what is necessary to cover all or part of the costs incurred in the discharge of the SGEI, considering the relevant receipts as well as a reasonable profit for discharging it. Where the undertaking which is to be entrusted with providing the SGEI is not chosen pursuant to a public procurement procedure, the level of compensation needed must be determined on the basis of an analysis of the costs which a typical undertaking, well run and adequately equipped so as to be able to meet the necessary public service requirements, would have incurred in discharging those obligations, taking into account the relevant receipts and a reasonable profit for discharging the obligations.

¹⁵³ Commission Decision of 20 December 2011 on the application of Article 106(2) of the Treaty on the Functioning of the European Union to State aid in the form of public service compensation granted to certain undertakings entrusted with the operation of services of general economic interest, <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A32012D0021> (accessed on 1 April 2023).

minimis regulation for SGEIs ('SGEI de minimis regulation', updated in 2023)¹⁵⁴, and two policy documents on SGEI compensation¹⁵⁵.

¹⁵⁴ Commission Regulation (EU) No 2023/2832 of 13 December 2023 on the application of Articles 107 and 108 of the Treaty on the Functioning of the European Union to de minimis aid granted to undertakings providing services of general economic interest, <https://eur-lex.europa.eu/eli/reg/2023/2832/oj> (accessed on 8 October 2024). Under this Regulation, public service compensations measures of up to 70,000 euros for SGEI providers over a three-year period do not qualify as State aid within the meaning of Article 107(1) TFEU because they are considered too small to affect competition or trade between EU Member States.

¹⁵⁵ Communication from the Commission — European Union framework for State aid in the form of public service compensation, <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A52012XC0111%2803%29> (accessed on 1 April 2023). Communication from the Commission on the application of the European Union State aid rules to compensation granted for the provision of services of general economic interest, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52012XC0111%2802%29> (accessed on 1 April 2023).

7. Glossary

Aid intensity

The gross aid amount expressed as a percentage of eligible costs, before deduction of taxes or other charges.

Commission

The European Commission.

Conditional decision

A decision in which the Commission finds, at the end of a formal investigation procedure, that State aid is compatible with the internal market under certain conditions.

Decision not to raise objections

A decision in which the Commission finds, at the end of a preliminary investigation, that State aid is compatible with the internal market.

De minimis aid

Aid that remains below a de minimis threshold and therefore does not qualify as State aid

Economic activities

All activities that consist of offering goods or services on the market.

General Block Exemption Regulation - 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, (last version is available on the following link: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A02014R0651-20210801> (accessed on 1 April 2023)).

Incompatible state aid

State aid incompatible with the single market.

Negative decision

A decision in which the Commission finds, at the end of a formal investigation procedure, that State aid is incompatible with the internal market.

Notification obligation

The obligation of EU Member States to notify any new state aid measure to the European Commission.

Positive decision

A decision in which the Commission finds, at the end of a formal investigation procedure, that a measure qualifies as State aid compatible with the internal market.

R&D&I

Research, development, and innovation.

State aid

Any measure that meets the following cumulative State aid criteria:

- The measure is taken by the State through state resources and is imputable to that State.
- The measure confers a selective economic advantage to one or more undertakings.
- The measure distorts or threatens to distort competition in the EU internal market.
- The measure affects or threatens to affect trade between EU Member States.

Standstill obligation

EU Member States' obligation not to grant state aid until it has been approved by the Commission.

Services of General Economic Interest – SGEI

Economic activities that serve the public interest and that the market, without government intervention, does not perform or does not perform under the same conditions regarding objective quality, safety, affordability, equal treatment, or general access.

Undertaking

Any entity engaged in an economic activity, regardless of its legal form and how it is financed.

Unlawful State aid

New State aid granted in violation with the standstill obligation ex Article 108(3) TFEU. A synonym is *illegal* State aid.

8. The most relevant legal sources

8.1. Notion of 'State aid'

Article 107(1) TFEU.

Commission Notice on the notion of State aid as referred to in Article 107(1) of the Treaty on the Functioning of the European Union, [https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52016XC0719\(05\)](https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52016XC0719(05)) (accessed on 1 April 2023).

8.2. EU-procedural State aid

Article 108 TFEU.

Council Regulation (EU) No 2015/1589 of 13 July 2015 laying down detailed rules for the application of Article 108 of the Treaty on the Functioning of the European Union, <http://eur-lex.europa.eu/legal-content/NL/TXT/PDF/?uri=CELEX:02015R1589-20150924&from=NL> (accessed on 1 April 2023).

Commission Regulation (EC) No 794/2004 of 21 April 2004 implementing Council Regulation (EU) 2015/1589 laying down detailed rules for the application of Article 108 of the Treaty on the Functioning of the European Union, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A02004R0794-20160317> (accessed on 1 April 2023).

The forms for notification and reporting can be accessed here: https://competition-policy.ec.europa.eu/state-aid/legislation/forms-notifications-and-reporting_en (accessed on 11 May 2023).

8.3. General de minimis Regulation

Commission Regulation (EU) 2023/2831 of 13 December 2023 on the application of Articles 107 and 108 of the Treaty on the Functioning of the European Union to de minimis aid, https://eur-lex.europa.eu/eli/reg/2023/2831/oj#ntc21-L_202302831EN.000101-E0021 (accessed on 8 October 2024).

8.4. General Block Exemption Regulation

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, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A02014R0651-20210801> (accessed on 1 April 2023).

8.5. Research, Development & Innovation

Articles 25-30 of the General Block Exemption Regulation.

Commission Communication, Framework for State aid for research and development and innovation, [https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52022XC1028\(03\)&from=EN](https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52022XC1028(03)&from=EN) (accessed on 1 April 2023).

8.6. Compatibility policy documents

Commission Communication on the Criteria for the analysis of the compatibility with the internal market of State aid to promote the execution of important projects of common European interest, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv%3AOJ.C_.2021.528.01.0010.01.ENG&toc=OJ%3AC%3A2021%3A528%3ATOC (accessed on 1 April 2023).

Communication from the Commission - EU Guidelines for the application of State aid rules in relation to the rapid deployment of broadband networks, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52013XC0126%2801%29> (accessed on 1 April 2023).

8.7. Services of General Economic Interest

Commission Decision of 20 December 2011 on the application of Article 106(2) of the Treaty on the Functioning of the European Union to State aid in the form of public service compensation granted to certain undertakings entrusted with the operation of services of general economic interest, <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A32012D0021> (accessed on 1 April 2023).

Communication from the Commission - European Union framework for State aid in the form of public service compensation (2011), <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52012XC0111%2803%29> (accessed on 1 April 2023).

Communication from the Commission on the application of the European Union State aid rules to compensation granted for the provision of services of general economic interest, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52012XC0111%2802%29> (accessed on 25 January 2023).

Commission Regulation (EU) 2023/2832 of 13 December 2023 on the application of Articles 107 and 108 of the Treaty on the Functioning of the European Union to de minimis aid granted to undertakings providing services of general economic interest, <https://eur-lex.europa.eu/eli/reg/2023/2832/oj> (accessed on 8 October 2024).

8.8. Enforcement of EU State aid law

Council Regulation (EU) No 2015/1589 of 13 July 2015 laying down detailed rules for the application of Article 108 of the Treaty on the Functioning of the European Union, <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=celex:32015R1589> (accessed on 1 April 2023).

Commission Notice on the recovery of unlawful and incompatible State aid, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52019XC0723%2801%29> (accessed on 1 April 2023).

Commission Notice on the enforcement of State aid law by national courts, <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A52009XC0409%2801%29> (accessed on 1 April 2023).

8.9. Recommended literature on the EU State aid rules

K. Bacon, *European Union Law of State Aid*, Oxford, Oxford University Press, 2017, 588p.

T. Bruyninckx, *Materieel EU-Staatssteunrecht*, Brussels, Larcier, 2015, 268p.

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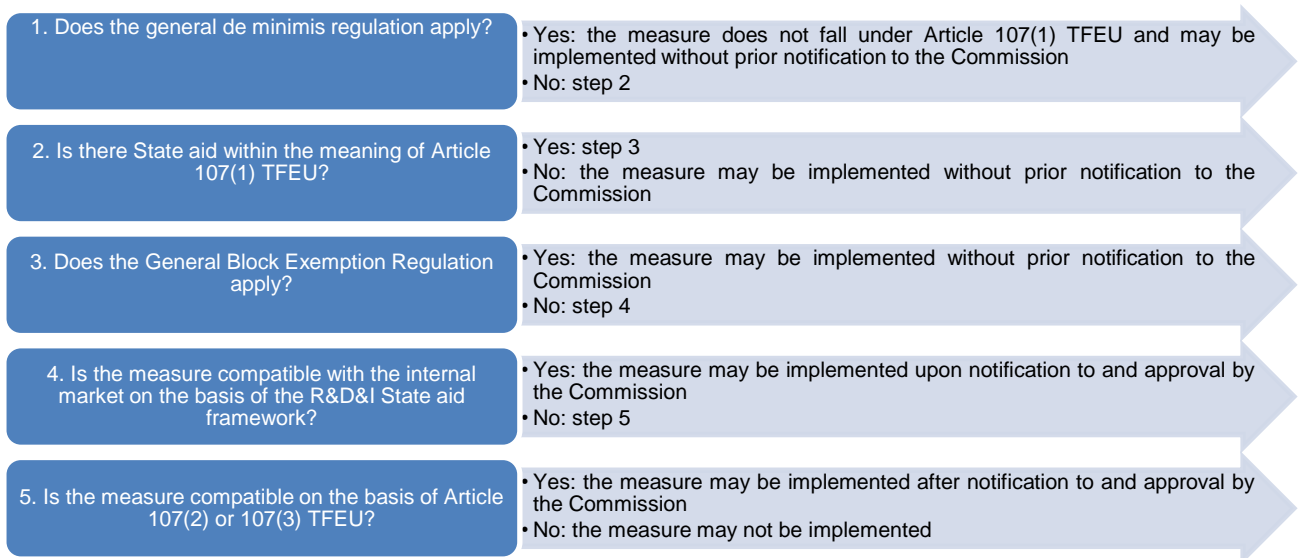
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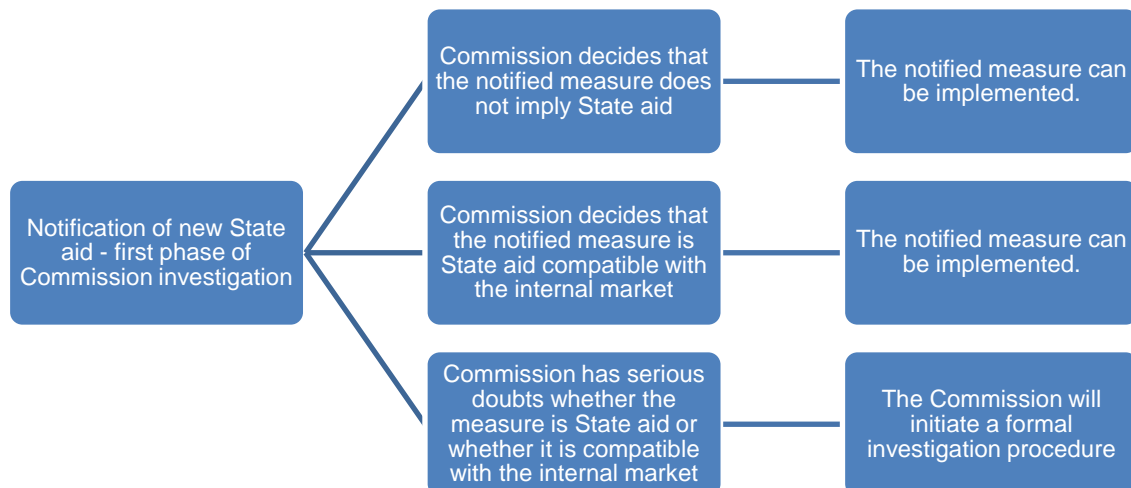
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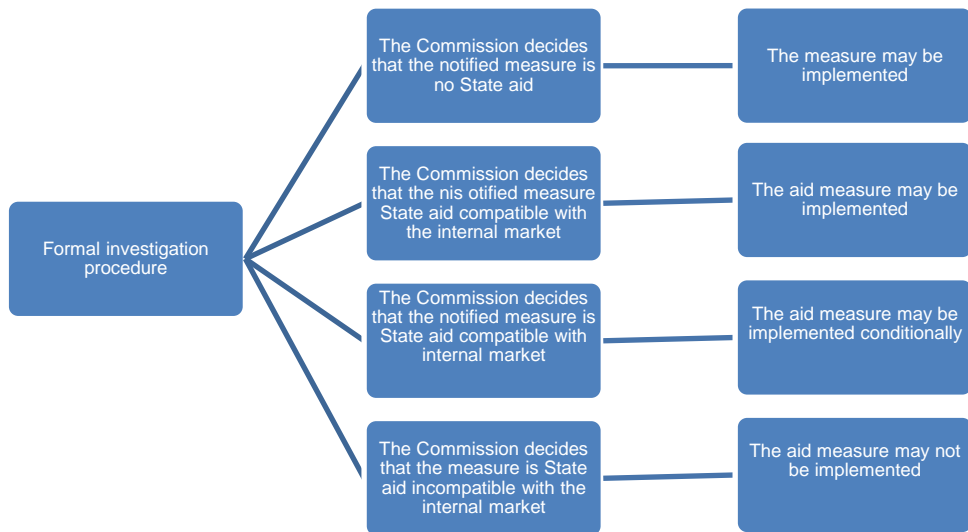
9. Schemes

9.1. Brief overview of a State aid analysis by EU Member States in the context of R&D&I



9.2. Procedure for new State aid





9.3. Timeline for new State aid

