

## **ANNEX 10 - STATE AID**

**Attention!** *State aid incidence is analyzed at the activity level, in case of projects submitted under the following Specific Objectives (SOs): RSO2.2, RSO4.5, RSO4.6, ISO6.2 and ISO 6.3. However, monitoring of State aid incidence might be performed for all projects implemented under the Programme.*

**Important:** under GBER Art. 20, the maximum intensity of the public funding, i.e. **ERDF + national public contribution, shall not exceed 80%** of the total eligible costs of the project. Also, the amount of the aid awarded under Art. 53 must not exceed the difference between the eligible costs and the operating profit (investment aid)/operating losses and a reasonable profit (operating aid).

### **➔ What is State Aid?**

According to the provision of Article 107(1) of the TFEU, State aid is defined as “...any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods” and that “affects trade between Member State”.

This means that a measure is considered State aid if it meets, on a cumulative basis, all the following criteria:

1. the applicant is an undertaking (is engaged in economic activity, irrespective of the legal form of the organisation);
2. the measure is financed from the State budget or is imputable to the state (always for VI-A RO-HU Programme);
3. the measure confers an advantage (benefit) that an undertaking would not have obtained under normal market conditions;
4. the measure is selective, favouring certain undertakings or the production of certain goods (always for VI-A RO-HU Programme);
5. the measure distorts or threatens to distort competition and trade within the European Union.

Thus, in case condition 1., 3. **OR** 5. is not met, the project activity is State aid-free.

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This means that:

- The applicant is not an undertaking based on:
  - ✓ the absence of any economic activity, or
  - ✓ The supported intervention enters the sphere of the State's prerogatives<sup>1</sup>, or
  - ✓ the economic activity is only ancillary.
- The project does not create economic advantage:
  - ✓ a service that is reimbursed at market price does not convey an advantage to an economic operator/undertaking.
  - ✓ any purchase of goods services or works/ other comparable transactions will be carried out through an open (to allow all interested and qualified bidders to participate in the process), transparent, sufficiently well-publicized, non-discriminatory and unconditional procedure.

Note! Regardless of the procurement procedure, in case only one bid is submitted, this will not normally be sufficient to prove the market price, will apply the specific national law provisions. However, a proper justification of the market price shall be provided in any circumstance. Besides that, stricter national rules shall apply if the case.

- ✓ The project results do not create an economic advantage to a certain undertaking/activity/the production of certain goods.
- There are also situations in which the support is **not suitable to affect trade between the Member States**, as the activity supported has a **purely local impact**.<sup>2</sup> In this case, applicants shall submit, along with the application, a local impact study that, based on recent, official, and verifiable data, demonstrates the local impact of the activity.

#### ▪ Indirect State Aid

It may also happen that, during project implementation or operation, the project partners grant State aid to undertakings (i.e. entities engaged in economic activities, irrespective of the legal form of these organisations) not included in the project partnership (e.g., target groups, etc.). Such entities could receive an advantage through the project's activities that they would not have received under normal market conditions (e.g. the outputs of the projects are put at their disposal at advantageous conditions; they get an economic advantage as a direct consequence of the project implementation, etc.), becoming thus recipients of State aid. Such a case may occur even when the project partner does not perform State aid-relevant activities in the project (so, no State aid incidence at the project partner level).

**Indirect aid shall always be regulated by a state aid awarding contract/decision, signed between the project partner and aid recipient(s), and will be further included, through an Addendum, in the relevant section (art. 7, letter C) of the Subsidy/co-financing contracts.**

<sup>1</sup> Activities reserved to the public authority by national law

<sup>2</sup> See paragraphs 196 and 197 of [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 \(2016/C 262/01\)](#);

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## ➔ Guidelines to avoid State Aid incidence (Annex C to Applicant's Guide)

Examples of activities	Recommendations to avoid State Aid incidence
Organizing events	<p>NO participation fees for participants;  NO sale of products is allowed<sup>3</sup>;  NO commercial activities are to be supported by the project;  The event will be widely promoted;  Public access will be free of charge;  NO commercial purpose/activity within the event;  If economic operators are foreseen among participants, the event must be promoted to all interested operators;  The event shall not be dedicated to meet the specific economic interest of a single economic operator.</p>
Creating a brand/platform/network	<p>Non-discriminating access to the cross-border platform/network will be provided;  In case a fee is foreseen for network maintenance and operation, it must be transparent, moderate (preferably covering only the real costs of operation and maintenance) one and unique for all users;  The intention to create the cross-border platform/network will be largely disseminated, on the applicant's and Programme sites  If the brand/platform is addressed to enterprises, those should be:</p> <ul style="list-style-type: none"> <li>- of small/very small dimension;</li> <li>- active mainly at a local level (the area should be well defined);</li> <li>- active in economic sectors where the cross-border commercial flows are marginal.</li> </ul>
Organizing training	<p>Ensuring a non-discriminatory participation of all interested stakeholders/persons;  Wide dissemination;  Free access, opened to the general public;  The participants (others than the staff of a public institution) must attend the training as natural person;  The objective of the training shall be the social promotion or employability of the natural persons, and they shall not serve the direct economic interest of a specific employer;  Training support materials will have to be published on the Programme's website, either entirely, or at least in the format of a coherent summary;  It is recommended to adopt a selection procedure ensuring that:</p> <ul style="list-style-type: none"> <li>a) the participants to a training initiative are not the employees of the</li> </ul>

<sup>3</sup> Exceptions are possible, if the economic activity in the context of the organized event remains purely ancillary, i.e. within the limit of 20% both in surface and time.

For example:

- surface area allocated for selling products is ≤ 20% of the public event area;
- opening hours of selling products is ≤ 20% of the festival/event's total opening time.

If both percentages are below 20% (evidence-based), the festival/event remains a non-economic outreach activity.

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	<p>same employer and/or</p> <p>b) the majority (in terms of percentages) of the employees of the same employer take part to a training initiative</p> <p>In case of training related to the use of purchased equipment: the price of training will be included in the equipment price and can be done only for staff operating the equipment.</p>
Strategies, studies, plans	<p>The content of the strategy/study/plan <b>shall not be</b> customized for the needs of one/few specific company(ies);</p> <p>The studies, strategies, plans will have to be published on the Programme's website, either entirely, or at least in the format of a coherent summary.</p>
Investment in equipment/ infrastructure	<p><b>HEALTH (RSO4.5):</b></p> <p>a) The activities are <b>State's prerogative</b> (e.g.: activities exclusively related to emergency, development of telemedical and e-health infrastructure for diagnosis and treatment)</p> <p>b) The funding of the activities is based on the principle of solidarity (according to paragraphs 23-24 of NoA<sup>4</sup> and State Aid Monitoring Office letter, on 24 March 2017).</p> <p><b>OR if either a) or b) are not fulfilled, then</b></p> <p>c) There is no potential effect on trade between Member States, due to <b>local impact</b><sup>5</sup>:</p> <p>The applicant shall submit a local impact study addressing, in a non-cumulative/exhaustive manner, indicative aspects such as:</p> <ul style="list-style-type: none"> <li>i) the aid does not lead to demand or investments being attracted to the region concerned and does not create obstacles to the establishment of undertakings from other Member States;</li> <li>ii) the healthcare services offered by the beneficiary, or the operator of the infrastructure/equipment are purely local or have a geographically limited attraction zone;</li> <li>iii) There is at most a marginal effect on the markets and on consumers in the neighbouring Member States.</li> </ul>
	<p><b>CULTURE (RSO4.6):</b></p> <p>The cultural activities are</p> <p>a) organized in a <b>non-commercial way</b>:</p> <ul style="list-style-type: none"> <li>✓ Absence/marginal presence of economic activities OR</li> <li>✓ There are both economic/non-economic activities but there is a clear separation of accounts OR</li> <li>✓ The activities are objectively <b>non substitutable</b>, thus excluding the existence of a genuine market.</li> </ul>

<sup>4</sup>See paragraphs 23-24 of [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 \(2016/C 262/01\)](#)

<sup>5</sup> See paragraphs 196 and 197 of [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 \(2016/C 262/01\)](#);

	<p><i>(Such activities are not economic in nature<sup>6</sup> and thus the funding of such infrastructure will not be considered as State aid);</i></p> <p>Verifying absence//marginal presence of economic activities:</p> <ul style="list-style-type: none"> <li>✓ The visitors' fees cover only a fraction of real running costs;</li> <li>✓ The commercial-oriented use of the infrastructure is NOT overpassing 20% of its overall use (Both the surface and the periods of use of the infrastructure for economic purposes should be considered to calculate the real proportion, which should never overpass 20%).</li> </ul> <p>Clear separation of accounts:</p> <ul style="list-style-type: none"> <li>✓ the existence of a system of separation of accounts that guarantees that the public aid covers only the part of the infrastructures having non-economic purposes;</li> <li>✓ All expenditures reported to the Programme are exclusively recorded in the non-commercial sections of the accounts, as all related running costs.</li> <li>✓ No significant incomes appear in the recordings related to the “non-commercial” part of the accounts.</li> </ul> <p><b>b) there is no potential effect on trade between Member States, due to local impact<sup>7</sup>:</b></p> <ul style="list-style-type: none"> <li>✓ the cultural infrastructure is unlikely to attract users or visitors from similar offers in other Member States, thus not affecting the trade between Member States</li> <li>✓ the cultural activities/the cultural infrastructure is not promoted to potential visitors from abroad, and the statistics do not show a strong increase of visitors from abroad.</li> </ul> <p><b>RENEWABLE ENERGY (RSO2.2):</b></p> <p><b>No aid in case of absence of economic activity</b></p> <ul style="list-style-type: none"> <li>• Economic activity: entities engaged in an economic activity are ‘undertakings’, regardless of their legal form and the way in which they are financed. ‘Economic activity’ is any activity consisting in offering goods and services on a market.</li> </ul> <p>In case of construction, replacement or upgrade, as well as the operation and use of energy infrastructure (excluding energy production units and the construction or operation of district heating and cooling):</p> <ol style="list-style-type: none"> <li>1. No potential distortion of competition for the construction and/or management and operation of energy infrastructure: legal/natural monopoly</li> </ol>
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<sup>6</sup> See paragraphs 33, 34, 36, and 37 of [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 \(2016/C 262/01\)](#);

<sup>7</sup> See paragraphs 196 and 197 of [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 \(2016/C 262/01\)](#);

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	<ul style="list-style-type: none"> <li>a. legal monopoly: infrastructure investments which are made within the framework of a legal monopoly are not subject to State aid rules.</li> <li>b. natural monopoly: comprehensive network infrastructures in the area of electricity or gas for which a replication by market players would be uneconomical, an effect on trade between Member States or a distortion of competition may be excluded as regards the construction, upgrading or maintenance of the electricity and gas networks</li> <li>c. points 1 and 2 of <i>INFRASTRUCTURE ANALYTICAL GRID FOR ENERGY INFRASTRUCTURE</i><sup>8</sup></li> </ul> <p>2. No economic advantage at the level of the owner/developer of the infrastructure</p> <ul style="list-style-type: none"> <li>a. If it is proven that the State acted under the same terms and conditions as a private investor in a comparable situation when providing the necessary funding for the development of energy infrastructure, then State aid is not involved.</li> <li>b. point 4 of <i>INFRASTRUCTURE ANALYTICAL GRID FOR ENERGY INFRASTRUCTURE</i></li> </ul> <p>3. No economic advantage at the level of the operator/concessionaire</p> <ul style="list-style-type: none"> <li>a. If the operator/concessionaire is selected through a tender or fees that are otherwise in compliance with the Market Economy Operator Principle</li> <li>b. If the operation of the infrastructure is entrusted as a service of general economic interest (SGEI) in line with the Altmark criteria<sup>9</sup></li> <li>c. point 5 of <i>INFRASTRUCTURE ANALYTICAL GRID FOR ENERGY INFRASTRUCTURE</i></li> </ul> <p>4. No economic advantage at the level of the user (when the operator of an energy infrastructure has received State aid or if its resources constitute State resources)</p> <ul style="list-style-type: none"> <li>a. If fees paid by users are set through a tender</li> <li>b. If user tariffs set in line with EU legislation</li> <li>c. point 6 of <i>INFRASTRUCTURE ANALYTICAL GRID FOR ENERGY INFRASTRUCTURE</i></li> </ul>
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<sup>8</sup> [grid\\_energy\\_en.pdf \(europa.eu\)](#)

<sup>9</sup> (1) there must be an entrustment act clearly defining the public service obligation; (2) the parameters for calculating the compensation must be established in advance in an objective and transparent manner; (3) the compensation cannot exceed the relevant costs and a reasonable profit (i.e. there is no overcompensation); (4) the provider is either chosen through a public procurement procedure or the level of compensation is determined based on an analysis of the costs of an average "well-run" undertaking in the sector concerned.

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## ➔ State Aid relevance

In case State Aid incidence cannot be avoided, the Programme will handle such cases either under the de minimis Regulation<sup>10</sup>, the General Block Exemption Regulation - GBER<sup>11</sup> and/or as Services of General Economic Interest - SGEI<sup>12</sup>.

Priority	Specific Objective	Applicable type of Aid
Priority 1 Cooperation for a green and more resilient cross-border area	RSO 2.2 Renewable energy	GBER Art. 20*, 20a** De minimis***
	RSO 2.4 Risk management	N/A
	RSO 2.7 Biodiversity	N/A
Priority 2 Cooperation for a more social and cohesive PA	RSO 4.5 Healthcare	GBER Art. 20*, 20a** SGEI <sup>13</sup> De minimis***
	RSO 4.6 Culture and tourism	GBER Art. 53****, 20*, 20a** De minimis***
Priority 3 A more sustainable, community-based and effective cross-border cooperation	ISO 6.1 Governance in public authorities	N/A
	ISO 6.2 Efficient public administration	SGEI under <u>EU Reg 1370/2007</u> De minimis***
	ISO 6.3 People-to-people	GBER Art. 20a** De minimis***

<sup>10</sup> [Commission Regulation \(EU\) No 2831/2023 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.](#)

<sup>11</sup> [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, as amended](#)

<sup>12</sup> [SGEI package](#)

<sup>13</sup> Official Journal L 7 of 11.01.2012, p. 3-10 and Official Journal L 114 of 26.4.2012, p. 8

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\* The **total amount of aid** under GBER Art. 20, which can be granted to an undertaking (beneficiary) per project, shall not exceed EUR 2,200,000 and represents maximum 80% public support (i.e ERDF + state budget)

\*\* The total amount of aid under GBER Art. 20a, which can be granted to an undertaking (applicant) per project shall not exceed EUR 22,000.

\*\*\* The *de minimis* Regulation allows de minimis aid to be granted up to a threshold of EUR 300,000 per undertaking and per Member State over a period of 3 years. As the MA of the Programme is located in Romania, the ERDF part of the de minimis aid granted to a partner under the Programme would be granted by Romania. The related national public contribution of the de minimis aid will be granted by the Managing Authority for RO partners, respectively by the National Authority for HU partners.

\*\*\*\* In the case of investment aid, the amount of the aid must not exceed the difference between the eligible costs and the operating profit related to the investment. In the case of operating aid, the amount of the aid must not exceed what is necessary to cover operating losses and a reasonable profit during the relevant period.

**Note!** According to Art. 8 of Reg (EU) 651/2014, *aid with identifiable eligible costs may be cumulated with any other State aid, in relation to the same eligible costs, partly or fully overlapping, only if such cumulation does not result in exceeding the highest aid intensity or applicable aid amount. Thus, the aid intensity under Art. 20 cannot exceed 80% intensity, even if combined with de minimis.*

### Application of State Aid instruments

#### ➔ Entrustment of a Service of General Economic Interest (SGEI)

*SGEIs are economic activities which deliver outcomes in the overall public good that would not be supplied (or would be supplied under different conditions in terms of objective quality, safety, affordability, equal treatment or universal access) by the market without public intervention.*

The entrustment of a **SGEI in case of RSO4.5** occurs at the operating stage when the service is to be entrusted to a relevant entity. It is the responsibility of the SGEI entrusting entity to keep with the legal requirements, according to relevant community/national legislation. In case of RO partners, the service has to be defined through means of a normative act, endorsed by the Romanian Competition Council (law, ordinance, emergency ordinance, Government Decision, Decision of the local authority), and shall include, according to Article 4 of the Commission Decision of 20.12.2011, in particular:

- (a) the content and duration of the public service obligations;
- (b) the undertaking and, where applicable, the territory concerned;
- (c) the nature of any exclusive or special rights assigned to the undertaking by the granting authority;
- (d) a description of the compensation mechanism and the parameters for calculating,



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- controlling and reviewing the compensation;
- (e) the arrangements for avoiding and recovering any overcompensation; and (f) a reference to the Commission Decision of 20.12.2011.
- The compensation cannot exceed what is necessary to cover all or part of the costs incurred in the discharge of the public service obligations, taking into account the relevant receipts and a reasonable profit.

**Attention!** *The entrustment act regarding the SGEI has to be provided until the end of the project implementation period and before the start of the operating phase.*

➔ **SGEI under EU Regulation 1370/2007**

As already mentioned, Services of General Economic Interest (SGEI) is a specific section of State aid legislation covering the situation in which *an undertaking receives a compensation to perform a service delegated by a public authority.*

In the framework of ROHU VI-A, as no transport-related activities are envisaged, SGEI under Regulation No 1370/2007<sup>14</sup> ONLY concerns the Operation of Strategic Importance (OSI) listed in Appendix 3 to the Programme, addressing ISO6.2. No investment in infrastructure is envisaged within the project, thus the entrustment of the public service will occur at a later stage, outside the ROHU VI-A Programme context.

**Note:** *Projects including activities that are declared SGEI may be without State aid incidence subject to fulfilling all 4 Altmark criteria (please see the SGEI package adopted by the European Commission).*

➔ **De minimis Regulation**

State aid relevant projects/project activities supported under the **de minimis Scheme** (see Annex F. to AG) shall comply with all the conditions therein established regarding the aid beneficiary, de minimis threshold (i.e. 300,000 Eur per single undertaking/three years), type of activity, costs categories, reporting obligations, recovery of unlawful/misused aid, preservation of documents, etc.

➔ **General Block Exemption Regulation (GBER)**

The MA has developed a specific **GBER scheme** (see Annex G. to AG), according to Commission Regulation No 651/2014, defining conditions in terms of activities, costs and aid beneficiaries eligibility, thresholds, operation conditions, reporting obligations, recovery of unlawful/misused aid, preservation of documents, etc., in relation to project activities falling under State aid incidence.

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<sup>14</sup> [REGULATION \(EC\) No 1370/2007 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 23 October 2007 on public passenger transport services by rail and by road and repealing Council Regulations \(EEC\) Nos 1191/69 and 1107/70.](#)

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➔ **State Aid awarding contract/decision**

In case a **transfer** of aid/advantage to an undertaking outside the project partnership occurs, it shall be made in full compliance with de minimis/GBER scheme provisions and shall be regulated by the **State aid awarding contract/Decision** (comprising compulsory clauses provided by the Programme), to be signed between the Lead/Project partner and the beneficiary of State aid. The fulfillment of the conditions for granting the aid is ensured by the Lead/Project Partner (beneficiary of the non-refundable financing) who will be responsible for quantifying the economic advantage awarded and gathering relevant declarations (Annex 3 and Annex 4 to the AG/ 1.A and 1.B to the present Manual) from the aid recipient(s). Regarding the quantification of the economic advantage, i.e. the aid amount, it must be calculated as the difference between the financial conditions agreed between LP/PP and the final beneficiary and the related market prices, and not based on the respective eligible costs of the LP/PP.

Further, the Joint Secretariat (as schemes administrator), upon request, will verify compliance with the conditions for granting *de minimis* state aid, before such awarding contract/decision is concluded.

The signing of the state aid awarding contract/decision for indirect aid(s) and the rightful implementation thereof are monitored during the implementation and sustainability period of the related project(s). Moreover, in case of an irregularity at indirect aid beneficiary level, such irregularity will be handled the same way as an irregularity within the related project (i.e. the project generating the indirect aid) and recovered as if the Lead/Project Partner transferring the aid/advantage has misused the aid.

**Attention!** *Each state aid awarding contract/decision, concluded between the Lead/Project Partner and the beneficiary of indirect aid, has to be notified to the JS in maximum 5 calendar days from the date of being signed.*

**5.4. Main State Aid reporting and monitoring obligations**

For projects that, according to their subsidy contract, contain activities that have State aid relevance, the main **reporting obligations** are (not exhaustive list):

- communicating any important modification that may be relevant as regards schemes' provisions (e.g. modification in the content or the budget of the respective activities, modifications in the operation setup of the infrastructure created etc.);
- reporting key information and data about the implementation of de minimis/State aid related activities, based on the specific obligations foreseen in the Subsidy Contract and its annexes;
- adequately reporting, in detail, the implementation of all situations of indirect aid foreseen in the subsidy contract under the responsibility of the LP or other Project Partner during the project implementation, providing information about the number of aid beneficiaries, their identification, the amount of the aid awarded (i.e. the equivalent value of the advantage granted), the kind of expenditure covered, and all additional information needed to verify the compliance of the indirect aid with the scheme under which it was foreseen to be awarded.

### Verification of State Aid

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Observing the State aid legislation during the implementation period of the project is subject to MA, JS, IP and RO NCB, which will ensure a sound verification on State aid-related cost, based on Declarations on own responsibility, relevant for each SO under State aid incidence, uploaded in Jems by the partner. Templates of such Declarations are uploaded to the Programme's site in the NCB packages.

#### For RO Partners

Based on the declaration, the relevant section of the Control checklist will be filled in during the verification of expenditures. In case inconsistencies with the AG/Application Form/SA Grids are identified, RO NCB will notify JS, for further action.

#### For HU Partners

The declaration will be checked by the JS/IP. In case inconsistencies with the AG/Application Form/SA Grids are identified, JS/IP will notify HU NCB to revise the NCB Certificate accordingly.

For all Partners, the awarded SA, as well as the fulfilment of the conditions / recommendations included in the SA Grids (if any), will be further monitored by MA/JS.

If the case, the recovery of unlawful/misused direct or indirect state aid will be based on the relevant community and national legal provisions, the specific provisions of Subsidy /Co-financing contracts and Partnership Agreement, aid awarding contracts/decisions, as well as the procedures<sup>15</sup> agreed between the 2 Member States.

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<sup>15</sup> E.g. Memorandum of Implementation.