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**COMMUNICATION FROM THE COMMISSION**

**Draft Communication from the Commission - 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**

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# **Draft Communication from the Commission - 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**

## **I. INTRODUCTION**

This Communication gives guidance for the assessment under the State aid rules, of public financing of important projects of common European interest (IPCEIs).

IPCEIs may represent a very important contribution to economic growth, jobs and competitiveness for the Union industry and economy in view of their strong spill-over effects on the whole of the internal market and the Union society.

IPCEIs make it possible to bring together knowledge, expertise, financial resources and economic actors throughout the Union, so as to overcome very important market or systemic failures and societal challenges which could not otherwise be addressed. They should bring together public and private sectors on a large scale to undertake highly innovative projects that disseminate important benefits to the Union and its citizens.

IPCEIs can be relevant for all policies and actions that fulfil common European objectives, in particular as regards the Europe 2020 objectives, the Union's flagship initiatives and key areas for economic growth such as the Key Enabling Technologies (KETs) or Strategic European R&D plans, for Energy and Transport.

The State Aid Modernisation initiative (SAM)<sup>1</sup> calls for State aid to be directed towards objectives of common European interests in line with the priorities of the Europe 2020 agenda, so as to address market failures or other important systemic failures that hinder the promotion of growth and jobs and the realisation of an integrated, dynamic and competitive internal market. The deployment of IPCEIs often requires a significant participation from public authorities since the market would not otherwise finance such projects. In case public financing of such projects constitute State aid, this Communication sets out the applicable rules so as to ensure that the level playing field in the internal market is preserved.

Rules on public financing of IPCEIs are already laid down in the Framework for State aid for Research and Development and Innovation<sup>2</sup> and in the Guidelines on State aid for environmental protection<sup>3</sup> which give guidance on the application of Article 107(3)(b) of the Treaty of Functioning of the European Union. The SAM constitutes a good

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<sup>1</sup> Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions - EU State Aid Modernisation (SAM) - COM(2012) 209 final, 8.5.2012.

<sup>2</sup> Community Framework for State aid for Research and Development and Innovation (OJ C 323, 30.12.2006, p. 1).

<sup>3</sup> Community guidelines on state aid for environmental protection (OJ C 82, 01.04.2008, p.1-33).

opportunity to update and consolidate the existing guidance in one single document so as to bring it into line with the Europe 2020 objectives and the SAM goals and to extend it to other fields where such a notion could be of application. This Communication therefore replaces any existing provisions on the IPCEI. In this way, this Communication provides Member States with dedicated and transversal guidance aimed at encouraging the development of important collaborative projects that promote the common European interest.

Article 107(3)(b) of the Treaty provides that "*aid to promote the execution of an important project of common European interest may be considered to be compatible with the internal market*". Accordingly, this Communication sets out guidance as to the criteria the Commission will apply for the assessment of State aid to promote the execution of IPCEIs. It first defines its scope of application and then provides a list of criteria which the Commission will use to appreciate the nature and the importance of such projects for the application of Article 107(3)(b). It then explains how the Commission will assess the compatibility of public financing of IPCEIs under State aid rules. It finally contains provisions for the procedural treatment of such projects.

This Communication does not exclude the possibility that aid to promote the execution of IPCEIs may also be found compatible with the internal market on the basis of other Treaty provisions, notably Article 107(3)(c) and their implementing rules. The State aid framework is currently being modernised with a view to offering Member States greater possibilities to subsidise important projects which remedy market failures and cohesion challenges in different areas in order to promote sustainable growth and jobs. However, those provisions may not fully address the relevance, specificities and features of IPCEIs, which may require dedicated eligibility, compatibility and procedural provisions, which are addressed in the present document.

## **II. SCOPE OF APPLICATION**

- 1) This Communication applies to IPCEIs in all sectors of economic activity.
- 2) This Communication shall not apply to:
  - a) measures involving aid to undertakings in difficulty within the meaning of the Community guidelines on State aid for rescue and restructuring undertakings in difficulty<sup>4</sup> or any successor guidelines;
  - b) measures involving aid to undertakings which are subject to an outstanding recovery order following a previous Commission decision declaring an aid illegal and incompatible with the internal market;

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<sup>4</sup> OJ C 244, 1.10.2004, p.2. As explained in paragraph 20 of those guidelines, given that its very existence is in danger, a firm in difficulty cannot be considered an appropriate vehicle for promoting other public policy objectives until such time as its viability is assured.

- c) aid measures which entail, by themselves, by the conditions attached to them or by their financing method a non-severable violation of Union law<sup>5</sup>, in particular:
- aid measures where the grant of aid is subject to the obligation for the beneficiary to have its headquarters in the relevant Member State or to be predominantly established in that Member State;
  - aid measures where the grant of aid is subject to the obligation for the beneficiary to use nationally produced goods or national services;
  - aid measures restricting the possibility for the beneficiaries to exploit the research, development and innovation results in other Member States.

### **III. ELIGIBILITY CRITERIA**

Article 107(3)(b) of the Treaty refers to aid to promote the execution of projects that are of common European interest and are important. The following criteria apply:

#### **i. Definition of project**

- 1) The aid proposal concerns a project which is clearly defined in respect of its objectives as well as the terms of its implementation, including its participants and its funding<sup>6</sup>.
- 2) The Commission may also consider eligible an "integrated project", that is to say, a group of individual projects inserted in a common structure, roadmap or programme aiming at the same objective and based on a coherent systemic approach. The individual components of the integrated project have to be complementary and necessary for the realization of the important European objective<sup>7</sup>.

#### **ii. Common European interest**

##### ***General criteria***

- 1) The project must contribute in a concrete, clear and identifiable manner to one or more Union objectives and must have a significant impact on EU

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<sup>5</sup> See for instance Case C-156/98 *Germany v Commission* [2000] ECR I-6857, paragraph 78 and Case C-333/07 *Régie Networks v Rhone Alpes Bourgogne* [2008] ECR I-10807, paragraphs 94-116.

<sup>6</sup> In the case of research and development, when two or more projects are not clearly separable from each other and, in particular when they do not have independent probabilities of technological success, they must be considered as a single project. The relocation of an existing activity from another area in the EEA cannot be considered as a project.

<sup>7</sup> Hereafter single project and integrated project are referred to as "project".

competitiveness, sustainable growth, addressing societal challenges or value creation across the Union.

- 2) The project must present a substantive leap towards the Union's objectives, for instance by being of pivotal importance for the European Research Area, the Energy Strategy for Europe, the Electronics Strategy for Europe, the Trans-European Transport and Energy networks, the Union's Flagship Initiatives such as the Innovation Union<sup>8</sup>, Digital Agenda for Europe<sup>9</sup>, the Resource Efficient Europe<sup>10</sup>, or the Industrial Policy for the Globalisation Era<sup>11</sup>.
- 3) The project must involve more than one Member State<sup>12</sup> and its benefits must not be confined to the financing Member States, but extend to a substantial part of the Union. The benefits of the project must be clearly defined in a concrete and identifiable manner<sup>13</sup>.
- 4) The benefits of the project must not be limited to the undertakings or to the sector concerned but should be of wider relevance and application to the European economy or society through positive spill-over effects (such as having systemic effects on multiple levels of the value chain, or up- or downstream markets, or having alternative uses in other sectors or modal shift) which are clearly defined in a concrete and identifiable manner.
- 5) In addition to the above-mentioned cumulative criteria, the following elements will be considered as positive indicators:
  - the project has been designed so as to make it possible for all interested Member States to participate, having regard to the type of project, the objective pursued and its financing needs;
  - the design of the project involves the Commission or any legal body to which the Commission has delegated its powers, like for example the European Investment Bank;
  - the selection of the project involves the Commission or any legal body to which the Commission has delegated its power, providing this body is only acting in that purpose as an implementing structure;

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<sup>8</sup> COM(2010) 546 final, 6.10.2010.

<sup>9</sup> COM(2010) 245 final/2, 26.8.2010

<sup>10</sup> COM(2011) 21, 26.1.2011

<sup>11</sup> COM(2010) 614 final, 28.10.2010

<sup>12</sup> With the exception of transnational corridors' projects which are part of the TEN-T.

<sup>13</sup> The mere fact that the project is carried out by undertakings in different countries is not sufficient for a project to qualify as an IPCEI. The Court has upheld the Commission's policy to consider that a project may be described as being of common European interest for the purposes of Article 107 (3) (b) when it forms part of a transnational European programme supported jointly by a number of governments of the Member States, or arises from concerted action by a number of Member States to combat a common threat. Joined Cases C-62/87 and 72/87 *Exécutif régional wallon and SA Glaverbel v Commission* [1988] ECR 1573, paragraph 22.

- the governance structure of the project involves the Commission – or any legal body to which the Commission has delegated its powers – and several Member States;
- the project involves important collaborative interactions (number of partners/ organisations of different sectors involved/ enterprises of different sizes);
- the project requires significant co-financing by Union funds.

### *Specific criteria*

- 1) R&D&I projects must be of a major innovative nature or constitute an important added value in terms of R&D&I.
- 2) Projects comprising productive investment must allow for the development of a new product or service with high research content or the deployment of a fundamentally innovative production process. Regular upgrades without an innovative dimension of existing facilities and the development of newer versions of existing products do not qualify as IPCEI.
- 3) Environmental or energy projects must be of great importance for either the environmental or energy strategy of the European Union or to contribute significantly to the internal market.

### **iii. Importance of the project**

- 1) In order to qualify as IPCEI, a project has to be important quantitatively and qualitatively. It should either be particularly large in size or scope and/or imply a very considerable level of risk or financial engagement.

## **IV. COMPATIBILITY CRITERIA**

When assessing the compatibility with the internal market of aid to promote the execution of an IPCEI on the basis of Article 107(3)(b) of the Treaty, the Commission will take into account the following criteria<sup>14</sup>.

When performing its balancing test, the Commission will assess whether the expected positive effects outweigh its possible negative effects as set out below.

In view of the nature of the projects, the Commission may consider that the presence of a market failure or other important systemic failures, as well as the contribution to a

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<sup>14</sup> According to the Court of Justice, the Commission enjoys a discretion as regards the assessment of the compatibility of IPCEIs. Joined Cases C-62/87 and 72/87 *Exécutif régional wallon and SA Glaverbel v Commission* [1988] ECR 1573, paragraph 21.

common European interest, is presumed where the project fulfils the indicated eligibility criteria.

**i. Necessity and proportionality of the aid**

- 1) The aid shall not subsidise the costs of a project that an undertaking would anyhow incur and must not compensate for the normal business risk of an economic activity. In this particular case, without the aid the project's realisation should be impossible, or it should be realised in a smaller size or scope or in a different manner that would significantly restrict its expected benefits<sup>15</sup>.
- 2) To allow for a proper assessment, the Member State shall provide the Commission with adequate information concerning the aided project as well as a comprehensive description of the counterfactual scenario, in which no aid is awarded to the beneficiary by any Member State or which relates to an alternative project that is wholly or partly carried out outside the Union. In its analysis, the Commission will take into consideration the following elements:
  - **specification of intended change:** the change in behaviour which is expected to result from the State aid, that is to say whether a new project is triggered, or the size, scope or speed of a project is enhanced, has to be well specified;
  - **counterfactual analysis:** the change of behaviour has to be identified by comparing what would the expected outcome and level of intended activity with and without aid. The difference between the two scenarios shows the impact of the aid measure and its incentive effect;
  - **level of profitability:** where a project would not, in itself, be sufficiently profitable for a private undertaking to undertake, but would generate important benefits for society, it is more likely that the aid has an incentive effect;
- 3) The project shall include a contribution by the beneficiaries and/or other private investors to the financing of the project. The Commission will consider more favourably projects that include a significant own contribution by the beneficiaries.
- 4) The selection of beneficiaries through a competitive, transparent and non-discriminatory tender will be considered as a positive indicator.
- 5) The choice of the aid instrument should be made with a view to the market failure or other important systemic failures which it seeks to address. For instance, where the underlying problem is lack of access to finance, Member States should normally resort to aid in the form of liquidity support, such as a loan or guarantee. Where it is also necessary to provide the firm with a certain degree of risk sharing, a repayable advance should normally be the aid instrument of choice.

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<sup>15</sup> The aid application must precede the starts of the works. This does not exclude that the potential beneficiary would have already carried out feasibility studies which are not covered by the request for aid.

- 6) The maximum aid level will be determined with regard to the identified funding gap<sup>16</sup> in relation to its eligible costs. If justified, the aid intensity could reach up to 100% of the funding gap in relation to eligible costs.
- 7) The eligible costs are those laid down in Annex I.<sup>17</sup>

## **ii. Prevention of undue distortions of competition and balancing test**

- 1) The Member State should provide evidence that the proposed aid measure constitutes the appropriate policy instrument to address the objective of the project. An aid measure will not be considered appropriate if other less distortive policy instruments or other less distortive types of aid instruments make it possible to achieve the same result.
- 2) For the aid to be compatible, the negative effects of the aid measure in terms of distortions of competition and impact on trade between Member States must be limited and outweighed by the positive effects in terms of contribution to the objective of the common European interest.
- 3) In assessing the negative effects of the aid measure, the Commission will focus its analysis of the distortions of competition on the foreseeable impact the aid has on competition between undertakings in the product markets concerned and on the risk of overcapacity.
- 4) The Commission will assess the risk of market foreclosure and dominance, in particular in case of absence of, or limited dissemination of research results. Projects involving the construction of infrastructure must ensure open and non-discriminatory access to the infrastructure<sup>18</sup>.
- 5) The Commission will assess the potential negative effects on trade including the risk of a subsidy race between Member States that may arise in particular with respect to the choice of a location. Aid for a project that merely leads to a change in the location of the project within the Union without changing the nature, size or scope of the project will not be considered compatible.

## **iii. Transparency**

- 1) Member States shall ensure effective publicity for approved projects. To that effect Member States shall publish the following information on a comprehensive State aid website, at national or regional level:
  - a. the text of the aid measure and its implementing provisions;

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<sup>16</sup> That is the minimum level of funding required to render the project sufficiently profitable, compared with the counterfactual scenario, having regard to the relevant costs and benefits.

<sup>17</sup> In case of an integrated project the eligible costs should be detailed at the level of each individual component.

<sup>18</sup> In the case of energy infrastructure, the projects shall be subject to the tariff and access regulation and to the unbundling requirements according to internal market legislation.

- b. the identity of the granting authority/(ies);
  - c. the total amount of the Member State's participation in the measure;
  - d. the identity of the undertaking supported under the measure, including information about the type of undertaking (SME, or large enterprise); the region/s (at NUTS level II) in which the undertaking is located; the principal economic sector in which the undertaking has its activities at NACE group level; the form and amount of investment<sup>19</sup>.
- 2) Such information must be published after the granting decision to grant aid has been taken, must be kept for at least 10 years and must be available for the general public without restrictions.

## **V. FINAL PROVISIONS**

### **i. Notification obligation**

- 1) According to Article 108(3) of the Treaty, Member States must inform the Commission in advance of any plans to grant or alter State aid including aid for IPCEIs.
- 2) Member States involved in the same IPCEI are invited, whenever possible, to submit to the Commission a common notification.

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<sup>19</sup> With the exception of business secrets and other confidential information in duly justified cases and subject to the Commission agreement (Commission communication of 1 December 2003 – OJ C 297, 9 December 2003 p. 6-9).

**ii. Ex-post evaluation and reporting**

- 1) The execution of the project shall be subject to a regular reporting. Where appropriate, the Commission may ask for an ex-post evaluation to be conducted.

**iii. Entry into force, validity and revision**

- 1) This Communication will be applied from [1 July 2014].
- 2) The Commission will apply the principles set out in this Communication to all notified aid projects in respect of which it is called upon to take a decision after the Communication has been published in the *Official Journal of the European Union*, even where the projects were notified prior to its publication.
- 3) In line with the notice on the determination of the applicable rules for the assessment of unlawful State aid<sup>20</sup>, in the case of non-notified aid, the Commission will apply
  - this Communication if the aid was granted after its entry into force,
  - the applicable framework in force when the aid was granted in all other cases.
- 4) The Commission may decide to amend this Communication at any time if this it should be necessary to do so for reasons associated with competition policy or to take account of other Union policies and international commitments or for any other justified reason.

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<sup>20</sup> Commission notice on the determination of the applicable rules for the assessment of unlawful State aid (OJ C 119, 22.5.2002, p. 22).

**ELIGIBLE COSTS**

- 1) Feasibility studies
- 2) Costs of instruments and equipment (including installations and transport vehicles) 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 on the basis of good accounting practice, are considered as eligible.
- 3) Costs for building (including infrastructure) and land, to the extent and for the 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 good accounting practice are considered as eligible. For land, costs of commercial transfer or actually incurred capital costs are eligible.
- 4) Other costs of materials, supplies and similar products necessary for the project.
- 5) Costs for obtaining, validating and defending patents and other intangible assets.
- 6) Personnel and administrative costs (including overheads) directly incurred for the R&D&I activities, including those R&D&I activities related to first industrial deployment<sup>21</sup>.
- 7) In case of aid to a project of first industrial deployment the capital and operating expenditures (CAPEX and OPEX), as long as the industrial deployment follows on from R&D&I activity of which constitutes an integral and necessary element for its successful implementation and contains itself a very important R&D&I component. The operating expenditures shall be related to such component.

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<sup>21</sup> First industrial deployment refers to the up scaling of pilot facilities, or to the first-in-kind equipment and facilities which cover the steps subsequent to the pilot line but neither mass production nor commercial sales.