

STATE AID GUIDELINES FOR THE LARGE INFRASTRUCTURE PROJECTS OF THE ESTONIA- RUSSIA CROSS BORDER COOPERATION PROGRAMME 2014-2020

1. LEGAL FRAMEWORK

1.1 According to Article 107 (ex Article 87 TEC) of the Treaty on the Functioning of the European Union (TFEU), state aid is 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 in so far as it **affects trade between Member States**^{1,2}. Additional clarifications about abovementioned State Aid criteria can be found in the Notice on the notion of State Aid.

1.2 Article 12 of the Commission Implementing Regulation (EU) No 897/2014³ states that aid granted under the programme shall comply with the applicable Union rules on State aid within the meaning of Article 107 of the Treaty on the Functioning of the European Union.

2. ECONOMIC ACTIVITY

2.1 Based on Article 107(1) TFEU, the State aid rules only apply where the recipient of an aid is an “undertaking”. The Court of Justice has consistently defined **undertakings as entities engaged in an economic activity, regardless of their legal status and the way in which they are financed**. The classification of a particular entity as an undertaking thus depends entirely on the nature of its activities. This general principle has three important consequences⁴:

First, the status of the entity under national law is not decisive. For example, an entity that is classified as an association or a sports club under national law may nevertheless have to be regarded as an undertaking within the meaning of Article 107(1) TFEU. The same applies to an entity that is formally part of the public administration. The only relevant criterion in this respect is whether it carries out an economic activity.

Second, the application of the State aid rules as such does not depend on whether the entity is set up to generate profits. Based on the case-law of the Court of Justice and the General Court, non-profit entities can offer goods and services on a market too. Where this is not the case, non-profit providers remain outside of State aid control.

Third, the classification of an entity as an undertaking is always relative to a specific activity. An entity that carries out both economic and non-economic activities is to be regarded as an undertaking only with regard to the former.

2.2 To clarify the distinction between economic and non-economic activities, the Court of Justice has consistently held that any **activity consisting in offering goods and services on a market is an economic activity**. The decision of a public authority not to allow third parties to provide a certain service (for example, because it wishes to provide the service in-house) does not rule out the existence of an economic activity. In spite of such market closure, an economic activity can exist where other operators would be willing and able to provide the service in the market concerned. More generally, the fact that a particular service is provided in-house has no relevance for the economic nature of the activity⁵.

¹ European Commission (2016). Commission Notice on the notion of State aid as referred to in Article 107(1) TFEU, see [http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52016XC0719\(05\)&from=EN](http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52016XC0719(05)&from=EN)

² Consolidated version of the Treaty on the Functioning of the European Union, <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:12012E/TXT&from=EN>

³ Commission Implementing Regulation (EU) No 897/2014 of 18 August 2014 laying down specific provisions for the implementation of cross-border cooperation programmes financed under Regulation (EU) No 232/2014 of the European Parliament and the Council establishing a European Neighbourhood Instrument, <http://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1456583580038&uri=CELEX:32014R0897>

⁴ Commission Notice on the notion of State aid as referred to in Article 107(1) TFEU (2016).

⁵ Ibid

2.3 If an infrastructure is used for both economic and non-economic activities, public funding will fall under the State aid rules only insofar as it covers the costs linked to the economic activities. If an entity is engaged in economic and non-economic activities, Member States have to ensure that the public funding provided for the non-economic activities cannot be used to cross-subsidize the economic activities. This can notably be ensured by limiting the public funding to the net cost (including the cost of capital) of the non-economic activities, to be identified on the basis of a clear separation of accounts.⁶

If the beneficiary is engaged in an economic activity the following five elements of the State aid criteria (points 3-7) should be analyzed. All of these criteria must be fulfilled for the project to constitute State aid.

3. STATE RESOURCES

3.1 Only advantages granted **directly or indirectly through State resources** can constitute State aid within the meaning of Article 107(1) TFEU. State resources **include all resources of the public sector**, including resources of intra-State entities (decentralised, federated, regional or other) and, **under certain circumstances, resources of private bodies**. Resources of public undertakings also constitute State resources within the meaning of Article 107(1) TFEU because the State is capable of directing the use of these resources. The fact that a measure granting an advantage is not financed directly by the State, but by a public or private body established or appointed by the State to administer the aid, does not exclude that that measure is financed through State resources⁷.

3.2 The transfer of State resources may take many forms, such as direct grants, loans, guarantees, direct investment in the capital of enterprises and benefits in kind. If public authorities or public undertakings provide goods or services at a price below market rates, this implies forgoing State resources (as well as the granting of an advantage). Granting access to public domain or natural resources or granting special or exclusive rights without adequate remuneration in line with market rates can constitute foregoing State revenues (as well as the granting of an advantage).⁸

4. ADVANTAGE

An advantage, within the meaning of Article 107(1) of the Treaty, **is any economic benefit which an undertaking could not have obtained under normal market conditions**, that is to say in the absence of State intervention. Only the effect of the measure on the undertaking is relevant, and not the cause or the objective of the State intervention. Whenever the financial situation of an undertaking is improved as a result of State intervention¹⁰ on terms differing from normal market conditions, an advantage is present⁹.

5. SELECTIVITY

To fall within the scope of Article 107(1) TFEU, a State measure must favour “certain undertakings or the production of certain goods”. Hence, not all measures which favour economic operators fall under the notion of aid, but only those which grant an advantage in a selective way to certain undertakings or categories of undertakings or to certain economic sectors¹⁰. In principle, only measures that apply within the entire territory of the Member State escape the regional selectivity criterion laid down in Article 107(1) of the Treaty.

6. DISTORTION OF COMPETITION

A measure granted by the State is considered to distort or threaten to distort competition when it is liable to improve the competitive position of the recipient compared to other undertakings with which it competes. For all practical purposes, a distortion of competition within the meaning of Article 107(1) of the Treaty is generally found to exist when the State grants a financial advantage to an undertaking in a liberalised sector where there is, or could be, competition. Public support is liable to distort competition even if does not help the recipient undertaking to expand and gain market shares. It is enough that the aid allows it to maintain a stronger competitive position than it would have had if the aid had not been provided. In this context, for aid to be

⁶ Ibid

⁷ Ibid

⁸ Ibid

⁹ Ibid

¹⁰ Ibid

considered to distort competition, it is normally sufficient that the aid gives the beneficiary an advantage by relieving it of expenses it would otherwise have had to bear in the course of its day-to-day business operations¹¹.

7. EFFECT ON TRADE

Public support to undertakings only constitutes State aid under Article 107(1) of the Treaty insofar as it “affects trade between Member States”. In that respect, it is not necessary to establish that the aid has an actual effect on trade between Member States but only whether the aid is liable to affect such trade. In particular, the Union Courts have ruled that “where State financial aid strengthens the position of an undertaking as compared with other undertakings competing in intra-[Union] trade, the latter must be regarded as affected by the aid.”

The rationale underlying the cases in which the Commission considered that certain measures were not capable of affecting trade between Member States as set out in paragraphs 196 and 197 (in the Notice) can also be relevant for certain public funding of infrastructure, particularly local or municipal infrastructure, even if it is commercially exploited¹².

8. LARGE INFRASTRUCTURE PROJECTS AGREED IN THE ESTONIA-RUSSIA CROSS BORDER COOPERATION PROGRAMME 2014-2020¹³

The following large infrastructure projects have been selected by the Joint Monitoring Committee (JMC):

8.1 Development of historical riverside protection area in Narva/Estonia and Ivangorod/Russia (III stage/ River Promenades III)

8.2 Development of the unique Narva-Ivangorod fortresses ensemble as a single cultural and tourist object (2nd stage)

8.3 Economically and Environmentally Sustainable Lake Peipsi area 2

8.4 Improvement of the accessibility of the remote areas in South-East Estonia and Pskov region for traditional entrepreneurship and sustainable development / SME ACCESS

8.5 Reconstruction of border crossing points¹⁴: 1.Shumilkino (RU) – Luhamaa (EE); 2.Kunichina Gora (RU) – Koidula (EE); 3. Ivangorod (RU)-Luhamaa/Koidula
Concrete border crossing points will be chosen based on summary and full applications

9. AID INTENSITY AND ELIGIBLE COSTS

9.1 The aid intensity for LIP projects can be up to 90% of the eligible costs. Possible distinctions are stipulated in the relevant State aid provisions.

9.2 The eligible costs are stipulated in the guidelines for large infrastructure projects and are based on Article 48 of the Implementing Rules. The eligible costs of the projects have to meet the eligibility cost criteria set out in State aid rules.

10. PROJECT COMPLIANCE WITH STATE AID REGULATIONS

10.1 Considering the nature of the projects mentioned in points **8.1, 8.4 and 8.5** it can be concluded that they are most probably no State aid relevant because of the following reasons:

10.1.1 Development of historical riverside protection area in Narva/Estonia and Ivangorod/Russia (III stage/ River Promenades III)

¹¹ Ibid

¹² Ibid

¹³ The detailed description of the projects, their beneficiaries and indicative budgets can be found in the adopted programme (http://www.estlatrus.eu/uploaded_files/EST-RUS/Adopted%20JOP_EE-RU_2014-2020.PDF)

¹⁴ Concrete border crossing points will be chosen based on summary and full applications

No economic activity

If the culture infrastructure or historic monuments are not used to carry out an economic activity, State aid is not involved. Activities through which the State fulfils a genuine public task and responsibility (in the educational, cultural and social areas) are not of an economic nature and in general fall outside the scope of State aid rules. In this case the usage of public money improves the accessibility of an infrastructure that can be visited free of charge without any limitation and the beneficiary is not engaged in an economic activity. So the public funding did not support the conduct of any economic activity and therefore did not benefit any undertaking within the meaning of EU competition law¹⁵.

10.1.2 Improvement of the accessibility of the remote areas in South-East Estonia and Pskov region for traditional entrepreneurship and sustainable development / SME ACCESS

No economic activity

The construction or renovation of roads is a general service or an activity fulfilling a public task not causing any economic activity.

10.1.3 Reconstruction of border crossing points

No economic activity

The reconstruction or renovation of roads is a general service or an activity fulfilling a public task not causing any economic activity.

10.2 Despite the abovementioned analysis, as no final project descriptions have been presented, **all the LIP projects should be carefully examined against State aid principles** in order to find out whether they are State aid relevant.

11. POSSIBLE STATE AID AND DE MINIMIS AID REGULATIONS TO APPLY

The following main regulations should be considered when planning the project activities:

11.1 COMMISSION REGULATION (EU) No 651/2014 (GENERAL BLOCK EXEMPTION REGULATION, GBER)¹⁶

Scope, Article 1

This Regulation shall not apply to:

- (a) aid to export-related activities towards third countries or Member States, namely aid directly linked to the quantities exported, to the establishment and operation of a distribution network or to other current costs linked to the export activity;
- (b) aid contingent upon the use of domestic over imported goods;
- (c) aid granted in the fishery and aquaculture sector;
- (d) aid granted in the primary agricultural production sector;
- (e) aid to undertakings in difficulty, with the exception of aid schemes to make good the damage caused by certain natural disasters;
- (f) aid measures where the grant of aid is subject to the obligation for the beneficiary to use nationally produced goods or national services.

State aid can not be granted to an undertakings which is subject to an outstanding recovery order following a previous Commission decision declaring an aid granted by the same Member State illegal and incompatible with the internal market.

Incentive effect, Article 6

(a) Aid shall be considered to have an incentive effect if the beneficiary has submitted a written application for the aid to the Member State concerned before **work on the project or activity starts**.

¹⁵ Analytical Grids on the application of State aid rules to the financing of infrastructure projects (version: 2016), http://ec.europa.eu/competition/state_aid/modernisation/notice_aid_en.html

¹⁶ 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 Text with EEA relevance, amended by Commission Regulation (EU) 2017/1084 (L 156, 20.06.2017, p 1-18), <http://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1456583782515&uri=CELEX:32014R0651>

(b) Ad hoc aid granted to large enterprises shall be considered to have an incentive effect if, in addition to ensuring that the condition laid down in previous paragraph is fulfilled, the Member State has verified, before granting the aid concerned, that documentation prepared by the beneficiary establishes that the aid will result in one or more of the following:

- 1) in the case of regional investment aid: that a project is carried out, which would not have been carried out in the area concerned or would not have been sufficiently profitable for the beneficiary in the area concerned in the absence of the aid.
- 2) in all other cases, that there is:
 - a material increase in the scope of the project/activity due to the aid, or
 - a material increase in the total amount spent by the beneficiary on the project/activity due to the aid, or
 - a material increase in the speed of completion of the project/activity concerned;

(c) By way of derogation from paragraphs (a) and (b), the following category of aid is not required to have or shall be deemed to have an incentive effect:

- 1) aid for culture and heritage conservation, if the conditions laid down in Article 53 are fulfilled.

‘Start of works’ means the earlier of either the start of construction works relating to the investment, or the first legally binding commitment to order equipment or any other commitment that makes the investment irreversible. Buying land and preparatory works such as obtaining permits and conducting feasibility studies are not considered start of works. For take-overs, ‘start of works’ means the moment of acquiring the assets directly linked to the acquired establishment;

Cumulation, Article 8

(a) Aid with identifiable eligible costs given under Regulation 651/2014 may be cumulated with:

- 1) any other State aid, as long as those measures concern different identifiable eligible costs,
- 2) 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 aid amount applicable to this aid under Regulation 651/2014.

(b) State aid under Regulation (EU) No 651/2014 shall not be cumulated with any de minimis aid in respect of the same eligible costs if such cumulation would result in an aid intensity exceeding those laid down in relevant Articles of Regulation (EU) No 651/2014.

Regional investment aid, Article 14

(a) The eligible costs shall be investment costs in **tangible and intangible assets**.

(b) Aid may be granted regardless of the size of the beneficiary.

(c) The investment shall be maintained in the recipient area **for at least five years, or at least three years in the case of SMEs**, after completion of the investment. This shall not prevent the replacement of plant or equipment that has become outdated or broken within this period, provided that the economic activity is retained in the area concerned for the relevant minimum period.

(d) The assets acquired shall be new except for SMEs and for the acquisition of an establishment.

(e) Aid may be granted for an initial investment.

(f) The beneficiary shall confirm that it has not carried out a relocation to the establishment in which the initial investment for which aid is requested is to take place, in the two years preceding the application for aid and give a commitment that it will not do so up to a period of two years after the initial investment for which aid is requested is completed.

“Relocation” means a transfer of the same or similar activity or part thereof from an establishment in one contracting party to the EEA Agreement (initial establishment) to the establishment in which the aided investment takes place in another contracting party to the EEA Agreement (aided establishment). There is a transfer if the product or service in the initial and in the aided establishments serves at least partly the same

purposes and meets the demands or needs of the same type of customers and jobs are lost in the same or similar activity in one of the initial establishments of the beneficiary in the EEA.

'The same or a similar activity' means an activity falling under the same class (four-digit numerical code) of the NACE Rev. 2 statistical classification of economic activities as laid down in Regulation (EC) No 1893/2006 of the European Parliament and of the Council of 20 December 2006 establishing the statistical classification of economic activities NACE Revision 2 and amending Council Regulation (EEC) No 3037/90 as well as certain EC Regulations on specific statistical domains.

'Tangible assets' means assets consisting of land, buildings and plant, machinery and equipment.

'Intangible assets' means assets that do not have a physical or financial embodiment such as patents, licences, know-how or other intellectual property.

'Initial investment' means:

- 1) an investment in tangible and intangible assets related to the setting-up of a new establishment, extension of the capacity of an existing establishment, diversification of the output of an establishment into products not previously produced in the establishment or a fundamental change in the overall production process of an existing establishment; or
- 2) an acquisition of assets belonging to an establishment that has closed or would have closed had it not been purchased, and is bought by an investor unrelated to the seller and excludes sole acquisition of the shares of an undertaking.

According to Estonian Regional aid map for 2014-2020 the **entire territory of Estonia** is fulfilling the conditions of **Article 107(3)(a)** which means that the maximum intensity of aid for large enterprises is 25% but it can be increased by 10 percentage points for medium-sized enterprises and by 20 percentage points for small enterprises.

Medium-sized enterprises and small enterprises are defined in Annex 1 of the Commission Regulation (EU) No 651/2014.

Aid for culture and heritage conservation, Article 53

(a) Aid is not exempted from the notification and Regulation (EU) No 651/2014 does not apply to aid which exceeds for investment aid for culture and heritage conservation EUR 150 million per project; operating aid for culture and heritage conservation EUR 75 million per undertaking per year.

(b) The aid shall be granted for the following cultural purposes and activities:

- 1) museums, archives, libraries, artistic and cultural centres or spaces, theatres, cinemas, opera houses, concert halls, other live performance organisations, film heritage institutions and other similar artistic and cultural infrastructures, organisations and institutions;
- 2) tangible heritage including all forms of movable or immovable cultural heritage and archaeological sites, monuments, historical sites and buildings; natural heritage linked to cultural heritage or if formally recognized as cultural or natural heritage by the competent public authorities of a Member State;
- 3) intangible heritage in any form, including folklorist customs and crafts;
- 4) art or cultural events and performances, festivals, exhibitions and other similar cultural activities;
- 5) cultural and artistic education activities as well as promotion of the understanding of the importance of protection and promotion of the diversity of cultural expressions through educational and greater public awareness programs, including with the use of new technologies;
- 6) writing, editing, production, distribution, digitisation and publishing of music and literature, including translations.

(c) The aid may take the form of investment aid (including aid for the construction or upgrade of culture infrastructure) and operating aid.

(d) For investment aid, **the aid amount shall not exceed the difference between the eligible costs and the operating profit of the investment and the aid intensity can be up to 90 %**. The operating profit shall be deducted from the eligible costs ex ante, on the basis of reasonable projections, or through a claw-back mechanism. The operator of the infrastructure is allowed to keep a reasonable profit over the relevant period. For operating aid, the aid intensity can be up to 90 % and the aid amount shall not exceed what is necessary to cover the operating losses and a reasonable profit over the relevant period. This shall be ensured ex ante, on the basis of reasonable projections, or through a clawback mechanism.

(e) For aid not exceeding EUR 2 million, the maximum amount of aid may be set at 80% of eligible costs, as an alternative to application of the method referred to in paragraph (d).

(f) For investment aid, the eligible costs shall be the investment costs in tangible and intangible assets, including:

- 1) costs for the construction, upgrade, acquisition, conservation or improvement of infrastructure, if at least 80 % of either the time or the space capacity per year is used for cultural purposes;
- 2) costs for the acquisition, including leasing, transfer of possession or physical relocation of cultural heritage;
- 3) costs for safeguarding, preservation, restoration and rehabilitation of tangible and intangible cultural heritage, including extra costs for storage under appropriate conditions, special tools, materials and costs for documentation, research, digitalisation and publication;
- 4) costs for improving the accessibility of cultural heritage to the public, including costs for digitisation and other new technologies, costs to improve accessibility for persons with special needs (in particular, ramps and lifts for disabled persons, braille indications and hands-on exhibits in museums) and for promoting cultural diversity with respect to presentations, programmes and visitors;
- 5) costs for cultural projects and activities, cooperation and exchange programmes and grants including costs for selection procedures, costs for promotion and costs incurred directly as a result of the project.

(g) For operating aid, the eligible costs shall be the following:

- 1) the cultural institution's or heritage site's costs linked to continuous or periodic activities including exhibitions, performances and events and similar cultural activities that occur in the ordinary course of business;
- 2) costs of cultural and artistic education activities as well as promotion of the understanding of the importance of protection and promotion of the diversity of cultural expressions through educational and greater public awareness programs, including with the use of new technologies;
- 3) costs of the improvement of public access to the cultural institution or heritage sites and activities including costs of digitisation and of use of new technologies as well as costs of improving accessibility for persons with disabilities;
- 4) operating costs directly relating to the cultural project or activity, such as rent or lease of real estate and cultural venues, travel expenses, materials and supplies directly related to the cultural project or activity, architectural structures for exhibitions and stage sets, loan, lease and depreciation of tools, software and equipment, costs for access rights to copyright works and other related intellectual property rights protected contents, costs for promotion and costs incurred directly as a result of the project or activity; depreciation charges and the costs of financing are only eligible if they have not been covered by investment aid;
- 5) costs for personnel working for the cultural institution or heritage site or for a project;
- 6) costs for advisory and support services provided by outside consultants and service providers, incurred directly as a result of the project.

“Operating profit” means the difference between the discounted revenues and the discounted operating costs over the economic lifetime of the investment, where this difference is positive. The operating costs include costs such as personnel costs, materials, contracted services, communications, energy, maintenance, rent, administration, but exclude depreciation charges and the costs of financing if these have been covered by investment aid. Discounting revenues and operating costs using an appropriate discount rate allows a reasonable profit to be made.

The principles and explanations of how the operating profit is calculated can be found in the GBER “Frequently Asked Questions” document¹⁷.

¹⁷ General Block Exemption Regulation (GBER). Frequently Asked Questions, http://ec.europa.eu/competition/state_aid/legislation/practical_guide_gber_en.pdf

Aid for sport and multifunctional recreational infrastructures, Article 55

(a) Aid is not exempted from the notification and Regulation 651/2014 does not apply to aid which exceeds for investment aid for sports and multifunctional infrastructures EUR 30 million or the total costs exceeding EUR 100 million per project; operating aid for sport infrastructure EUR 2 million per infrastructure per year.

(b) Sport infrastructure shall not be used exclusively by a single professional sport user. Use of the sport infrastructure by other professional or non-professional sport users shall annually account for at least 20 % of time capacity. If the infrastructure is used by several users simultaneously, corresponding fractions of time capacity usage shall be calculated.

(c) Multifunctional recreational infrastructure shall consist of recreational facilities with a multi-functional character offering, in particular, cultural and recreational services with the exception of leisure parks and hotel facilities.

(d) Access to the sport or multifunctional recreational infrastructures shall be open to several users and be granted on a transparent and non-discriminatory basis. Undertakings which have financed at least 30 % of the investment costs of the infrastructure may be granted preferential access under more favourable conditions, provided those conditions are made publicly available.

(e) For investment aid for sport and multifunctional recreational infrastructure the eligible costs shall be the investment costs in tangible and intangible assets.

For operating aid for sport infrastructure the eligible costs shall be the operating costs of the provision of services by the infrastructure. Those operating costs include costs such as personnel costs, materials, contracted services, communications, energy, maintenance, rent, administration, etc., but exclude depreciation charges and the costs of financing if these have been covered by investment aid.

(f) For investment aid for sport and multifunctional recreational infrastructure, **the aid amount shall not exceed the difference between the eligible costs and the operating profit of the investment and the aid intensity can be up to 90 %**. The operating profit shall be deducted from the eligible costs *ex ante*, on the basis of reasonable projections, or through a claw-back mechanism.

For operating aid for sport infrastructure, the aid intensity can be up to 90 % and the aid amount shall not exceed the operating losses over the relevant period. This shall be ensured *ex ante*, on the basis of reasonable projections, or through a claw-back mechanism.

(g) For aid not exceeding EUR 2 million, the maximum amount of aid may be set at 80 % of eligible costs, as an alternative to application of the method referred to in paragraph (f).

“Operating profit” means the difference between the discounted revenues and the discounted operating costs over the economic lifetime of the investment, where this difference is positive. The operating costs include costs such as personnel costs, materials, contracted services, communications, energy, maintenance, rent, administration, but exclude depreciation charges and the costs of financing if these have been covered by investment aid. Discounting revenues and operating costs using an appropriate discount rate allows a reasonable profit to be made.

The principles and explanations of how the operating profit is calculated can be found in the GBER “Frequently Asked Questions” document¹⁸.

Investment aid for local infrastructures, Article 56

(a) Aid is not exempted from the notification and Regulation (EU) No 651/2014 does not apply to aid which exceeds EUR 10 million or the total costs exceeding EUR 20 million for the same infrastructure.

¹⁸ General Block Exemption Regulation (GBER). Frequently Asked Questions, http://ec.europa.eu/competition/state_aid/legislation/practical_guide_gber_en.pdf

(b) This Article shall not apply to aid for infrastructures that is covered by other sections of Chapter III of this Regulation with the exception of Section 1 — Regional aid. This Article shall also not apply to airport infrastructure and port infrastructure.

(c) The infrastructure shall be made available to interested users on an open, transparent and non-discriminatory basis. The price charged for the use or the sale of the infrastructure shall correspond to market price.

(d) Any concession or other entrustment to a third party to operate the infrastructure shall be assigned on an open, transparent and non-discriminatory basis, having due regard to the applicable procurement rules.

(e) The eligible costs shall be the investment costs in tangible and intangible assets.

(f) The aid amount **shall not exceed the difference between the eligible costs and the operating profit of the investment and the aid intensity can be up to 90 %**. The operating profit shall be deducted from the eligible costs ex ante, on the basis of reasonable projections, or through a claw-back mechanism.

(g) Dedicated infrastructure shall not be exempted under this Article.

“Operating profit” means the difference between the discounted revenues and the discounted operating costs over the economic lifetime of the investment, where this difference is positive. The operating costs include costs such as personnel costs, materials, contracted services, communications, energy, maintenance, rent, administration, but exclude depreciation charges and the costs of financing if these have been covered by investment aid. Discounting revenues and operating costs using an appropriate discount rate allows a reasonable profit to be made.

‘Dedicated infrastructure’ means infrastructure that is built for ex-ante identifiable undertaking(s) and tailored to their needs.

The principles and explanations of how the operating profit is calculated can be found in the GBER “Frequently Asked Questions” document¹⁹.

Aid for inland ports, Article 56c

(a) Aid is not exempted from the notification and Regulation 651/2014 does not apply to aid which exceeds for aid for inland ports with eligible costs of EUR 40 million per project (or EUR 50 million per project in an inland port included in the work plan of a Core Network Corridor as referred to in Article 47 of Regulation (EU) No 1315/2013); as regards dredging a project is defined as all dredging carried out within one calendar year.

(b) The eligible costs shall be the costs, including planning costs, of:

- 1) investments for the construction, replacement or upgrade of port infrastructures;
- 2) investments for the construction, replacement or upgrade of access infrastructure;
- 3) dredging.

(c) Costs relating to non-transport related activities, including industrial production facilities active in a port, offices or shops, as well as for port superstructures shall not be eligible costs.

(d) The aid amount shall not exceed the difference between the eligible costs and the operating profit of the investment or dredging and the aid intensity can be up to 90 %. The operating profit shall be deducted from the eligible costs ex ante, on the basis of reasonable projections, or through a claw-back mechanism.

¹⁹ General Block Exemption Regulation (GBER). Frequently Asked Questions, http://ec.europa.eu/competition/state_aid/legislation/practical_guide_gber_en.pdf

(e) Any concession or other entrustment to a third party to construct, upgrade, operate or rent aided port infrastructure shall be assigned on a competitive, transparent, non-discriminatory and unconditional basis. The aided port infrastructure shall be made available to interested users on an equal and non-discriminatory basis on market terms.

(f) For aid not exceeding EUR 2 million, the maximum amount of aid may be set at 80 % of eligible costs, as an alternative to application of the method referred to in paragraph (d).

“Port” means an area of land and water made up of such infrastructure and equipment, so as to permit the reception of waterborne vessels, their loading and unloading, the storage of goods, the receipt and delivery of those goods and the embarkation and disembarkation of passengers, crew and other persons and any other infrastructure necessary for transport operators in the port.

“Maritime port” means a port for, principally, the reception of sea-going vessels.

“Inland port” means a port other than a maritime port, for the reception of inland waterway vessels.

“Port infrastructure” means infrastructure and facilities for the provision of transport related port services, for example berths used for the mooring of ships, quay walls, jetties and floating pontoon ramps in tidal areas, internal basins, backfills and land reclamation, alternative fuel infrastructure and infrastructure for the collection of ship-generated waste and cargo residues.

“Access infrastructure” means any type of infrastructure necessary to ensure access and entry from land or sea and river by users to a port, or in a port, such as roads, rail tracks, channels and locks.

“Dredging” means the removal of sediments from the bottom of the waterway access to a port, or in a port.

“Vessels” mean floating structures, whether self-propelled or not, with one or more surface displacement hulls.

“Inland waterway vessels” mean vessels intended solely or mainly for navigation on inland waterways or in waters within, or closely adjacent to, sheltered waters.

11.2 COMMISSION REGULATION (EU) No 1407/2013 (de minimis aid)²⁰

Scope, Article 1

This Regulation applies to aid granted **to undertakings in all sectors**, with the exception of:

(a) aid granted to undertakings active in the fishery and aquaculture sector;

(b) aid granted to undertakings active in the primary production of agricultural products;

(c) aid to export-related activities towards third countries or Member States, namely aid directly linked to the quantities exported, to the establishment and operation of a distribution network or to other current expenditure linked to the export activity;

(d) aid contingent upon the use of domestic over imported goods.

(e) Where an undertaking is active for examples in the sectors referred to in points (a) or (b) and is also active in one or more of the sectors or has other activities falling within the scope of this Regulation, this Regulation shall apply to aid granted in respect of the latter sectors or activities, provided that the Member State concerned ensures, by appropriate means such as separation of activities or distinction of costs, that the activities in the

²⁰ Commission Regulation (EU) No 1407/2013 of 18 December 2013 on the application of Articles 107 and 108 of the Treaty on the Functioning of the European Union to de minimis aid, <http://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1456584567623&uri=CELEX:32013R1407>

sectors excluded from the scope of this Regulation do not benefit from the *de minimis* aid granted in accordance with this Regulation.

De minimis aid, Article 3

(a) The total amount of *de minimis* aid granted per Member State to a **single undertaking** shall not exceed EUR 200 000 over any period of three fiscal years. The total amount of *de minimis* aid granted per Member State to a single undertaking performing road freight transport for hire or reward shall not exceed EUR 100 000 over any period of three fiscal years. This *de minimis* aid shall not be used for the acquisition of road freight transport vehicles.

(b) Single undertaking' includes, for the purposes of granting *de minimis* aid, all enterprises having at least one of the relationships with each other as stipulated in Article 2(2) of Regulation (EU) No 1407/2013

(c) *De minimis* aid shall be deemed granted at the moment the legal right to receive the aid is conferred on the undertaking under the applicable national legal regime irrespective of the date of payment of the *de minimis* aid to the undertaking.

Cumulation, Article 5

(a) *De minimis* aid granted in accordance with Regulation (EU) No **1407/2013** may be cumulated with *de minimis* aid granted in accordance with Commission Regulation (EU) No 360/2012²¹ up to the ceiling laid down in that Regulation. It may be cumulated with *de minimis* aid granted in accordance with *de minimis* Regulation (EU) No 1408/2013 and *de minimis* Regulation (EU) No 717/2014 up to the relevant ceiling laid down in Article 3(2) of Regulation (EU) No 1407/2013.

(b) *De minimis* aid shall not be cumulated with State aid in relation to the same eligible costs if such cumulation would exceed the highest relevant aid intensity or aid amount fixed in the specific circumstances of each case by a block exemption regulation or a decision adopted by the Commission. *De minimis* aid which is not granted for or attributable to specific eligible costs may be cumulated with other State aid granted under a block exemption regulation or a decision adopted by the Commission.

11.3 COMMISSION REGULATION (EU) No 717/2014 (*de minimis* aid in the fishery and aquaculture sector)²²

Scope, Article 1

This Regulation applies to aid granted **to undertakings in the fishery and aquaculture sector**, with the exception of:

(a) aid the amount of which is fixed on the basis of price or quantity of products purchased or put on the market;

(b) aid to export-related activities towards third countries or Member States, namely aid directly linked to the quantities exported, to the establishment and operation of a distribution network or to other current expenditure linked to the export activity;

(c) aid contingent upon the use of domestic over imported goods;

(d) aid for the purchase of fishing vessels.

²¹ Commission Regulation (EU) No 360/2012 of 25 April 2012 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, <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32012R0360&from=EN>

²² Commission Regulation (EU) No 717/2014 of 27 June 2014 on the application of Articles 107 and 108 of the Treaty on the Functioning of the European Union to *de minimis* aid in the fishery and aquaculture sector, <http://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1456585432986&uri=CELEX:32014R0717>

(e) Where an undertaking is active in the fishery and aquaculture sector and is also active in one or more of the sectors or has other activities falling within the scope of Regulation (EU) No 1407/2013, that Regulation shall apply to aid granted in respect of the latter sectors or activities, provided that the Member State concerned ensures, by appropriate means such as separation of activities or distinction of costs, that the activities in the fishery and aquaculture sector do not benefit from the *de minimis* aid granted in accordance with that Regulation.

(f) Where an undertaking is active in the fishery and aquaculture sector as well as in the primary production of agricultural products falling within the scope of Commission Regulation (EU) No 1408/2013, this Regulation shall apply to aid granted in respect of the former sector provided that the Member State concerned ensures, by appropriate means such as separation of activities or distinction of costs, that the primary production of agricultural products does not benefit from *de minimis* aid granted in accordance with this Regulation.

De minimis aid, Article 3

(a) The total amount of *de minimis* aid granted per Member State to a single undertaking in the fishery and aquaculture sector shall not exceed EUR 30 000 over any period of three fiscal years.

(b) *De minimis* aid shall be deemed granted at the moment the legal right to receive the aid is conferred on the undertaking under the applicable national legal regime irrespective of the date of payment of the *de minimis* aid to the undertaking.

Cumulation, Article 5

(a) Where an undertaking is active in the fishery and aquaculture sector and is also active in one or more of the sectors or has other activities falling within the scope of Regulation (EU) No 1407/2013, *de minimis* aid granted for activities in the fishery and aquaculture sector in accordance with this Regulation may be cumulated with *de minimis* aid granted in respect of the latter sector(s) or activities up to the relevant ceiling laid down in Article 3(2) of Regulation (EU) No 1407/2013, provided that the Member State concerned ensures, by appropriate means such as separation of activities or distinction of costs, that the activities in the fishery and aquaculture sector do not benefit from *de minimis* aid granted in accordance with Regulation (EU) No 1407/2013.

(b) Where an undertaking is active in the fishery and aquaculture sector as well as in the primary production of agricultural products, *de minimis* aid granted in accordance with Regulation (EU) No 1408/2013 may be cumulated with *de minimis* aid in the fishery and aquaculture sector in accordance with this Regulation up to the ceiling laid down in this Regulation, provided that the Member State concerned ensures, by appropriate means such as separation of activities or distinction of costs, that the primary production of agricultural products does not benefit from *de minimis* aid granted in accordance with this Regulation.

(c) *De minimis* aid shall not be cumulated with State aid in relation to the same eligible costs or with State aid for the same risk finance measure, if such cumulation would exceed the highest relevant aid intensity or aid amount fixed in the specific circumstances of each case by a block exemption regulation or a decision adopted by the Commission. *De minimis* aid which is not granted for or attributable to specific eligible costs may be cumulated with other State aid granted under a block exemption regulation or a decision adopted by the Commission.

12. VERIFYING STATE AID AND DE MINIMIS AID IN PROJECT APPLICATIONS

12.1 The decision which of the abovementioned regulations/articles to apply shall be indicated by the applicants and/or partners in full applications. If the supported project activities are related to different regulations/articles the differentiation should be made in order to understand which activity corresponds to which regulation/article. The applicants and/or partners should consider carefully the implications before opting which regulations/articles to use.

The applicants and beneficiaries are invited to contact the Managing Authority (MA) and the Joint Technical Secretariat (JTS) to receive assistance and information about the possible State aid / *de minimis* aid matters related to the project idea.



12.2 Please notice that falling under State aid / *de minimis* rules has an effect on project activities, co-financing rates and amounts, but also on the starting date of project and its activities. It is the responsibility of project partners to contact and continue co-operation with the MA/JTS in order to ensure the eligibility of the activities, taking into account relevant State aid / *de minimis* aid rules, to identify possible incompatibilities of project activities with State aid / *de minimis* aid rules and to get guidance how to implement the project in line with the regulations.

12.3 In addition the overall budget and the eligible costs shall be indicated for every activity. By drawing up the budget and the eligible costs the applicant and/or partner has to follow the provisions of the corresponding State aid / *de minimis* aid regulations and the applicable co-financing rates.

12.4 During the assessment of the full applications the JTS will check if the selected State aid / *de minimis* aid instruments can be applied to the activities for which the support is asked. If no appropriate State aid instruments can be applied, the applicant and/or partner has to remove the ineligible actions or costs from the application