STATE AID RULES IN RESEARCH, DEVELOPMENT & INNOVATION

Addressing Knowledge and Awareness Gaps among Research and Knowledge Dissemination Organisations
State Aid Rules in Research, Development & Innovation

Addressing Knowledge and Awareness Gaps among Research and Knowledge Dissemination Organisations

Decision Tree

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Disclaimer
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FOREWORD

The global economy is becoming more and more innovation-driven. Therefore, Research and Knowledge Dissemination Organisations (RDOs) need to take an ever more active role in translating knowledge into innovation, to fuel economic growth, jobs and competitiveness. This not only necessitates that RDOs collaborate more closely with a broad range of partners, including industry, but also that they embrace new innovative models through science parks, shared research infrastructures, innovation clusters or similar catalysts.

Such activities often involve intensive interaction between publicly funded RDOs and industry – e.g. in the form of R&D-collaboration, the outsourcing of R&D-services to RDOs, knowledge transfer or the sharing of RDO-infrastructure. While these activities are desirable from an innovation and industrial-policy point of view, they may involve an element of public support. Such public support could constitute ‘State aid’ to one or more of the parties involved – the RDO and/or the undertakings, depending on the circumstances.

The present work is the result of over one year of discussions among experts and European Commission (EC) staff from the different relevant services in order to provide guidelines in the form of a decision tree for research organisations when dealing with the current EC rules and regulations on State Aid in Research and Innovation. The document is intended to provide technical clarification and should not be interpreted as a piece of legislation.

The EU Treaties establish a system of State aid control in the EU. Article 107 (1) of the Treaty on the Functioning of the EU (TFEU) defines the concept of ‘State Aid’. In essence, this concept comprises measures implemented by a governmental authority or using governmental resources in any form whatsoever, e.g. monetary transfers, tax relief, allocation of property and resources, or other contributions of financial worth, which give the recipient a selective advantage over other operators in the market, thereby affecting fair competition.

Pursuant to Article 107 (1) TFEU prohibits aid that threatens to distort competition in the internal market and affects trade between Member States. Nevertheless, the TFEU allows exemptions from this principle in certain situations, e.g. where State aid is necessary to facilitate the development of certain economic activities or of certain economic areas, pursuant to an exemption set out in Article 107 (3) lit. c TFEU.

Article 108 (3) TFEU requires Member States to notify their state aid measures to
the European Commission for prior authorisation before they implement them.

Based on Article 107 TFEU, the EU has developed a body of State aid rules to ensure that the general prohibition of State aid and the exemptions from that prohibition are applied uniformly across the European Union:

- The General Block Exemption Regulation sets out conditions and limits for aid measures that Member States can implement without prior formal Commission approval – including for R&D&I-aid;

- Other secondary legal texts set out assessment criteria for the aid measures that exceed the limits set out in the General Block Exemption Regulation and therefore require prior Commission approval. In the area of R&D&I, such assessment criteria are specified in the R&D&I-Framework.

Moreover, and very relevant for this publication, the European Commission has issued guidance as to whether a public measure involves State aid:

- A Commission Notice comprehensively explains the many facets of the notion of State aid;

- The R&D&I-Framework explains the presence of State aid in certain R&D&I-typical situations.

From this guidance, it emerges that an RDO can have three different scenarios under EU State aid rules:

1. **outside** the scope of EU State aid control – the publicly funded activity concerned is of a non-economic character;

2. **recipient** of State Aid – your organisation qualifies as an ‘undertaking’ in relation to the publicly funded activity concerned;

3. **grantor** of State Aid – your organisation provides an advantage to an undertaking.

The scenario must be defined in relation to your organisation’s activities. It depends on a number of legal and economic concepts under the general principles of EU State aid rules:

- **The concept of ‘Research and knowledge dissemination organisation’** (RDO) as legally defined under EU State aid rules: In essence that broad legal definition encompasses entities pursuing predominantly non-commercial education and
knowledge dissemination objectives. In order to find out if the decision tree is useful for you, you first need to establish whether your organisation is an RDO (→ Section A1 of the Decision Tree).

- **The concept of 'Economic activity':** Public funding for an RDO can constitute State aid to the RDO if that funding is for an 'economic activity'. This is the case if the RDO provides goods or services on the market, for example by carrying out research services on behalf of undertakings. If so, then your organisation qualifies as 'undertaking' in the context of the activity concerned, and public funding for that activity can fall under State aid rules. Understanding the concept of 'economic activity' and assessing the economic or non-economic character of your organisation's various activities is therefore vital (→ Sections A2–A4 of the Decision Tree).

- **The presence of aid at the level of undertakings involved** in the activities of your organisation: RDOs could be in the position of a grantor of State aid if the conditions of the interaction concerned, e.g. a research service or a transfer of knowledge, constitute an advantage the undertaking could not have obtained on normal market conditions. If you aim to avoid the granting of such advantage, you need to determine whether the conditions of your interactions with industry are in line with the market condition presumptions under EU State aid rules, e.g. the notion of ‘adequate remuneration’ paid for your services ( → Section B of the Decision Tree). You have to be careful that such services remain below the relevant thresholds and are ancillary, otherwise your organisation risks becoming an undertaking itself.

- **Basic rules for the compatibility of State aid with the internal market:** If public funding involved in your activities indeed involves State aid at the level of your organisation or the undertakings involved in your activities, then knowing how to keep this aid within the legal limits of State aid rules is key (→ Section A.5 of the Decision Tree).

Practitioners in RDOs are encountering difficulties interpreting these concepts. It appears that these difficulties are due to certain knowledge and awareness gaps that result partly from a lack of detailed understanding of the applicable legal framework, and partly from various cultural and administrative differences across Member States.

As a research organisation with a broad European network, the Joint Research Centre (JRC) has mapped these knowledge and awareness gaps across a wide range of stakeholders. In order to understand better how such knowledge and awareness gaps can be addressed, the JRC’s Competence Centre on Technology Transfer (CCTT) in early 2019 convened a panel of independent experts, composed of esteemed
European legal professionals with hands-on experience in prominent RDOs. At the same time, the CCTT reached out bilaterally to numerous stakeholders and collected information on the challenges and problems they experience regarding State Aid. A dedicated workshop was held in Slovakia hosted by Pavol Jozef Šafárik University in May 2019, and a discussion session took place with the technology transfer offices of major European RDOs at the 12th plenary meeting of the European TTO Circle in Dublin in July 2019, hosted by Teagasc. In addition, in 2019-2020 JRC provided support and guidance to the 14 recently established Centres of Excellence and Centres of Competence in Bulgaria, from where it gathered further questions from stakeholder organisations. In this sense, this publication may be particularly useful for RDOs from the Member States that joined the EU with the 2004 enlargement and thereafter.

This publication is drawing from these sources. It aims to close the knowledge and awareness gaps RDOs are experiencing in the area EU State Aid rules. To help RDO navigate the assessment of the presence of State aid in their R&D-interactions, this publication contains a Decision Tree that walks the reader through the different stages of the assessment. Annex A provides the legal definitions under EU State aid rules, corresponding to the terminology used in this publication. Annex B provides several examples / illustrations that may be useful.
Non-exhaustive list of legislative and other relevant acts and documents

The up-to date acts can be found directly on the following page:

- Articles 107 and 108 of the Treaty on the Functioning of the European Union (TFEU).
Before you begin

The aim of this Decision Tree is to help Research and Knowledge Dissemination Organisations better understand and comply with State Aid rules within the European Union. It should, however, be underlined that the information provided in this document is intended as a simplified introduction. State Aid measures are normally dealt with on a case-by-case basis, as the specific circumstances of each case may differ from one another. As such, the information provided in this document does not replace any formal advice, guidance or assessment your National State Aid Authority, the European Commission or relevant Courts may deliver. The Joint Research Centre, in response to requests to facilitate Research Organisations’ basic understanding of certain rules, has strived to provide this very general outline and cannot be held liable for any decisions you may take pursuant to the information provided in this Decision Tree. In case of any doubts/questions you must always first contact the State Aid authorities of your Member State.

You will find that this document is divided into 6 Sections (Section A1 to A5, and Section B). You are advised to follow it in the given order since each Section leads on to one another to guide you through the relevant considerations accordingly. Please also refer to the Annexes for a list of definitions (Annex A) and for several described examples (Annex B).

It is recommended to print the present Decision Tree document in colour.

Legend

- Question
- Instruction/conclusion
- Positive conclusion
- Negative conclusion
- Attention
- Warning
- Information
SECTION A1

Is this Decision Tree suitable for your organisation?

This Decision Tree has been prepared for the specific context of Research and Knowledge Dissemination Organisations. This Section will assist you in deciding whether this Decision Tree is suitable for the needs of your organisation, before you proceed with other considerations.

A.1.1. Is your organisation an entity, such as a university, research institute, technology transfer agency, innovation intermediary or a similar facility or resource, primarily engaged in independent research, development or the wide dissemination of such results? (see definitions "xix" and "xx" in Annex A for clarification)

A.1.2. Does your organisation carry out any activities within the territory of the European Union or the European Economic Area?

A.1.3. Does your organisation receive (or plan to receive) any public resources from a national authority or a state research fund organisation (local, regional or central), such as financial contributions (block funding, structured or ad hoc budgetary contributions or project-based direct financing, or similar support) or non-monetary contributions (buildings, land, resources or similar in-kind support)?

This decision tree outline may not be suitable for the needs of your organisation.

Continue to section A.2.
SECTION A2

Understanding your organisation’s activities

Under state aid rules, research and knowledge dissemination organisations may be considered both as a recipient of aid but also - under certain circumstances - a provider of indirect aid to other entities engaged in economic activity. This Section will help you understand which activities may relate to situations where your organisation is a recipient of aid, and which activities may result in passing on indirect aid to third-parties (which are then addressed in Section B of the decision tree).

A.2.1. Does your organisation operate a research infrastructure?

A.2.2. Does your organisation host entities engaged in economic activity (such as start-ups, spin-offs or other enterprises) in a facility operated by your organisation (such as an innovation cluster, an incubator, an accelerator or similar facility)?

A.2.3. Does your organisation provide grants or financial support to entities engaged in economic activity (such as start-ups, spin-offs or other enterprises)?

A.2.4. Does your organisation provide access to its intellectual property assets (for example, by granting licence agreements) for entities engaged in an economic activity?

A.2.5. Does your organisation carry out research for or on behalf of other entities (research services, contract research), and/or sell any other services or products?

A.2.6. Does your organisation take part in any collaborative research projects that are not research on behalf of undertakings i.e. in effective collaboration projects of a non-economic nature with entities engaged in an economic activity?

If you have answered “YES” to any of the above six questions proceed to Section A.3. below AND also consult Section B. Proceed to Section A.3.

Section A.3 continues to the next page
SECTION A3

Understanding which activities are economic or non-economic

Under State Aid rules, the distinction between economic and non-economic activities is crucial. Generally primary activities of research and knowledge dissemination organisations have a non-economic character. These activities are namely education, independent research (including "effective collaboration" between independent parties), wide dissemination of research results (where this is non-exclusive and non-discriminatory) for example through teaching or publications. These may also include knowledge transfer activities (such as, protection and licensing of intellectual property, mobility of researchers, knowledge management, contributing to standardisation, and similar activities). Other activities, such as contract research or selling of products and services, are considered as economic activities which may have state aid consequences. This Section will help you understand how to distinguish your economic activities from your non-economic activities.

In this context, 'independent parties' include entities engaged in primarily economic activities (such as companies or industrial partners whatever their legal form).

Look at your organisation’s joint activities, projects or partnerships with other independent parties. Is there a joint activity, where (…)

A.3.1. (…) there is a common objective established between the parties (i.e. mutually agreed intended research outcomes)

AND

A.3.2. (…) the scope is jointly defined (i.e. the work programme or technical specifications are designed jointly and iteratively between the parties taking into account their respective interests), instead of being prescribed or imposed unilaterally by the other party.

A.3.3. (…) parties contribute to the joint activity’s implementation (i.e. contributing by way of devoting resources, equipment, capacity, knowhow, background IP or similar elements necessary for the effective implementation of the project).

One or several parties may bear the full costs of the project and thus relieve other parties of its financial risks.

Yes  No

Continue to the next page  Continue to the next page
A research organisation may transfer or license its IPR to the project partner, while retaining its access rights to the results.

A research organisation is susceptible to passing on undue advantages (i.e. indirect aid) to other parties in the course of a joint activity, regardless of whether that activity is economic or non-economic.

A.3.4. (...) parties share their respective risks (i.e. the risks associated with the project regardless of research outcomes, for example any losses, liabilities, uncertainties or potential negative effects in the event the joint activity results in failure).

A.3.5. (...) parties have effective access to each other’s results and share the IPR in a manner that adequately reflects their work packages, contributions and respective interests in the joint activity.

A.3.6. (...) the other party cannot unreasonably prohibit your organisation from publishing or otherwise disseminating your research results (unless there are overriding IPR considerations, such as patentability, exploitation rights over IPR-protected creations etc).

A.3.7. Does your organisation sell or supply products or services to other entities that qualify as undertakings?

No → Continue to Section A.4.

Yes → A.3.8. Is your organisation obliged or mandated by public policy to provide services or supply products to other entities that qualify as undertakings?

No → The corresponding activities qualify as economic activity under State Aid rules. Refer to Section A.4. to understand if these economic activities are ancillary. Also go to Section B.5. for possible indirect state aid.

Yes → An activity is “economic” only when there is a market for it, which may depend on the regulatory situation in a Member State. Please note that the Commission notice on the notion of state aid provides further guidance on determining whether a market exists in the given sector.

If you answered YES to 3.1 and at least 3 of the 5 remaining questions, this activity is likely to be ‘effective collaboration’ which, under the conditions above, is non-economic in nature. Proceed to Section B to determine whether it may involve indirect state aid to the collaborating undertaking. Continue on to understand if you have other economic activities.

If this is NOT the case, then this activity is likely ‘research on behalf of an undertaking’, which is economic. Continue on to understand if you have other economic activities.

A.3.8. Is your organisation obliged or mandated by public policy to provide services or supply products to other entities that qualify as undertakings?

Yes → An activity is “economic” only when there is a market for it, which may depend on the regulatory situation in a Member State. Please note that the Commission notice on the notion of state aid provides further guidance on determining whether a market exists in the given sector.

No → The corresponding activities qualify as economic activity under State Aid rules. Refer to Section A.4. to understand if these economic activities are ancillary. Also go to Section B.5. for possible indirect state aid.
Understanding which economic activities are subject to state rules

Once economic activities are properly identified, they are in principle subject to state aid rules. Nevertheless, economic activities which are purely “ancillary” to the non-economic activities of your organisation may fall out of the scope of state aid rules. For this, certain additional requirements (concerning, for examples, accounting practices, re-investment of revenues, and other modalities) must be fulfilled. Otherwise, state aid rules would apply to the public funding of these activities. In that case, a further evaluation may be necessary under applicable block exemptions. This Section will help you understand whether your organisation’s economic activities are ancillary and if other additional requirements are fulfilled.

A.4.1. Does your organisation separate in its accounts its economic and non-economic activities (that is to say the use of human and non-human resources, costs, funding, revenues are accounted for separately from non-economic activities in a clear and distinct manner in the organisation’s balance sheet and income statements in line with your national or international accounting standards)?

Yes

No

Where a research organisation or research infrastructure is used for both economic and non-economic activities, public funding falls under State aid rules only insofar as it covers costs linked to the economic activities. Where a research organisation or research infrastructure is both publicly and privately funded, and the public funding exceeds the costs for the non-economic activities, then the excess funding is considered to subsidise the economic activities. The presumption applies to the relevant entity for the specific accounting period concerned. Therefore, State aid rules require separate accounting for economic and non-economic activities. Failure to do so would make all public funding subject to state aid. You are advised to adjust your monitoring practices accordingly.

A.4.2. Does your organisation monitor its annual capacity of those inputs which are used for both non-economic and economic activities AND calculate the percentage of economic activities as opposed to non-economic (depending on the nature of activity and the type of resources required, capacity can be calculated on the basis of time accounting [human resource capacity measured in employee working hours], inputs [such as material, equipment and fixed capital] and other elements relevant to the specific activity of your entity)?

Yes

No

Monitoring of annual capacity is necessary if the research organisation or research infrastructure needs to demonstrate that economic activities are of an ancillary character. Failure to do so would make all public funding for the economic activities subject to state aid rules. You are advised to adjust your capacity monitoring practices accordingly.

Continue to the next page
A.4.3. In light of the previous steps in this decision tree, and considering your organisation’s economic activities, would you confirm that the capacity your organisation allocates to economic activities is equal to or less than 20% of your organisation’s overall annual capacity at the level of your organisation’s relevant entity that actually carries out the economic activity in question? Usually research organisations have several departments, sections, so it should be at the level of the relevant department or section.

If your organisation’s economic activities exceed 20% of its overall annual capacity, then these activities cannot qualify as “ancillary” and any public support granted for these economic activities has to comply with compatibility conditions defined under State aid rules for RDI. You can contact your national state aid authority for further guidance on how to ensure that the public support for economic activities of your organisation is in line with the general block exemptions or other applicable state aid rules; OR you should ensure to effectively claw back the excess without undue delay.

A.4.4. Follow the below branches to find out if your economic activities are ancillary within the meaning of State Aid rules:

A.4.4.a. Does the economic activity consume exactly the same inputs as those used for non-economic activities?

No

A.4.4.b. Is the economic activity limited in scope, directly related to and necessary for the operation of your organisation?

OR

Yes

A.4.4.c. Is the economic activity limited in scope and intrinsically linked to the main non-economic use of your organisation?

No

Economic activities which do not satisfy the above criteria cannot qualify as “ancillary”. You are advised to adjust your economic activities accordingly or contact your national state aid authority for further guidance and assessment under the general block exemptions or other applicable state aid rules. applicable state aid rules.

A research and dissemination organisation should have a primarily non-economic character, and its operations should pursue a non-economic objective.

It should be noted that the evidentiary threshold may be higher for 4.4.b and 4.4.c if 4.4.a cannot be readily satisfied.

Even if ancillary, your organisation needs to conduct its economic activities under market conditions i.e. in a way that avoids passing on undue advantage to third parties.

If you answered YES to ALL of these questions, it appears your organisation’s economic activities are ancillary and thus not subject to state aid rules. Go to Section B for further considerations.

Section A4 continues to the next page
In the following, continue to look into your organisation’s knowledge transfer activities

If revenues from knowledge transfer activities are re-invested into non-economic activities, then the activity won’t count towards the 20% capacity threshold.

A.4.5. When your organisation receives financial revenues or other forms of compensation of monetary value from knowledge transfer activities offered on the market (see definition xv in Annex A), does your organisation re-invest this revenue into its non-economic activities?

No

All revenues from knowledge transfer activities offered on the market must be re-invested into non-economic activities. If not, then these activities are considered as "economic".

Yes

Although the re-investment requirement only applies to knowledge transfer, it is advisable (not mandatory) to re-invest revenues from other activities into non-economic. Even when revenue from economic activities is re-invested in the primary non-economic activities, the 20% threshold must be respected at all times in order to avoid an unintended cumulative expansion of economic capacity over time, which may jeopardise the underlying premise of 4.4.a.

If you answered NO to ANY of the above questions, the public funding for your organisation is probably subject to state aid rules. Consult your national state aid authority for support.
Understanding block exemptions

State Aid rules allow national authorities (at local, regional or central levels of government) to grant aid for research organisations or research infrastructures under certain conditions. The General Block Exemption Regulation establishes conditions under which such aid can be provided without formally notifying the European Commission. If your organisation has received public funding for its economic activities, this Section will help you understand the different conditions which apply to such aid, and whether public funding received by your organisation could be in line with the applicable block exemptions.

A.5.1. Is your organisation receiving (or expecting to receive) public contributions for a specific research and development project that is economic in nature?

Yes → A.5.1.a. Please identify if your project completely falls within one or more of the following categories: Fundamental Research, Industrial Research, Experimental Development, Feasibility Studies (Please refer to the detailed descriptions for each category, as provided in Annex A)

No → Skip to A5.2.

Fundamental Research
You may receive up to 100% of the following eligible costs.

Feasibility Studies
You may receive up to 50% of the costs of the study.

Industrial Research
You may receive up to 50% of the following eligible costs.

Experimental Development
You may receive up to 25% of the following eligible costs.

Continue to the next page
(i) Personnel costs: researchers, technicians and other supporting staff to the extent employed by the project.

(ii) Costs of instruments and equipment to the extent and for the period used for the project (or depreciation costs corresponding to the life of the project).

(iii) Costs for buildings and land, to the extent and for the period used for the project (for buildings, depreciation costs corresponding to the life of the project; for land, costs of commercial transfer or actually incurred capital costs).

(iv) Costs of contractual research, knowledge and patents bought or licensed from outside sources at arm's length conditions, consultancy and equivalent services used exclusively for the project.

(v) Additional overheads and other operating expenses, including costs of materials, supplies and similar products, incurred directly as a result of the project. For example, other operating expenses also include extra costs from cross-border collaboration such as telecoms, translation as well as the participation in scientific conferences for peer validation of research results.

Although small and medium sized enterprises are accorded more favourable aid thresholds (additional 10% to 20%), it should be noted that a state-owned research and knowledge dissemination organisation, regardless of its size, cannot be considered as an SME for the purposes of benefiting from these privileges under the block exemptions.

A research and knowledge dissemination organisation (RDO, also abbreviated as RO) which carries out both economic and non-economic activities is regarded as an 'undertaking' under State Aid rules only with regard to its economic activities, provided it maintains account separation. The same rules apply to a RO conducting an economic activity, for which activity the RO receives public funding, as for 'regular' undertakings.

The negotiations appear not to be conducted at arm's length and, therefore, the costs to which they relate are not eligible.

The negotiations appear to be conducted at arm's length.

A.5.1.b. Arm's length:

A.5.1.b.i. Are the negotiating parties independent from one another?

Yes

A.5.1.b.ii. Is there any element of collusion or conflict of interest between the two sides or an ulterior motive which may influence the deal under negotiation?

No

A.5.1.b.iii. Is there an open, transparent and non-discriminatory procedure which governs the negotiation?

No

A.5.1.b.iv. Can you demonstrate that the price was negotiated in a manner as close to market conditions as possible to extract maximum achievable economic benefits from the transaction?

No

Does the project involve at least 1 SME or take place in at least 2 EU/EEA countries, and no single entity bears more than 70% of eligible costs?

Yes

OR

Is the project between undertakings and at least one research or knowledge dissemination organisation where the latter bears at least 10% of eligible costs and can publish own research results?

No

OR

Continue to the next page
Are results of the project widely disseminated through conferences, publications, open access repositories or free or open source software?

Please note that if the economic activities are kept below 20% of your organisation’s annual capacity and otherwise fulfil the requirements for being ancillary (see Section A.4.4. above), your organisation does not lose its classification as a non-undertaking. To keep this status and avoid being qualified as a ‘beneficiary’ of State Aid while still carrying out economic activities, your organisation should continuously maintain separate accounting, abide to the abovementioned capacity usage threshold and make sure the economic activities remain ancillary.

Additional 15% of eligible costs (up to a maximum of 80% total when other percentages are included)

Section A5 continues to the next page
A.5.2. Is your organisation receiving (or expecting to receive) public contributions for the construction or upgrade of research infrastructures that perform economic activities (i.e. for investment aid in tangible and intangible assets, excluding operating costs)?

Yes

A.5.2.a. Does the price charged for the operation or use of the infrastructure correspond to a market price?

Price must correspond to a market price or equivalent (go to A.5.2.a.i below).

No

An appropriate profit margin would be the average profit margin in the sector (if it can be identified) or the cost of capital or the cost of borrowing or the cost of bank overdraft facilities.

No

Yes

5.2.a.i. Market price:

Is there an established market price for the services available at the infrastructure?

No

‘Market price’ means a price that is free of subsidies and therefore it may be difficult to identify it.

Yes

Does the price cover the full cost (excluding State aid) of the activities carried out by the users of the infrastructure?

Yes

Does the price contain a net surplus (in other words, a profit margin) commonly applied in the sector for similar services?

No

An appropriate profit margin would be the average profit margin in the sector (if it can be identified) or the cost of capital or the cost of borrowing or the cost of bank overdraft facilities.

No

Yes

Use the price corresponding to same or similar services available on the market, charged by similar research infrastructures.

Use this composite price if no market price is available for same or similar services.

Yes

Is access to the infrastructure granted on a transparent and non-discriminatory basis?

No

Infrastructure must be open to users on transparent and non-discriminatory basis for the aid measure to be compatible.

Yes

A.5.2.b. Is access to the infrastructure open to several users?

AND

A.5.2.c. Does the infrastructure also pursue non-economic activities?

Yes

Undertakings which financed at least 10% of the investment costs of the infrastructure may be granted preferential access under more favourable conditions, proportional to their contribution. This must be publicly available. See also Annex B (2).

No

Eg. Transparent and non-discriminatory means that the criteria, pricing and schedules for access to the infrastructure are pre-established, applied consistently and made publicly available in advance.

Continue to the next page
If there is an effective separation of accounts between economic and non-economic activities, then the amount clawed back is proportional to the public funding received that corresponds to the overall percentage of the economic activities. For examples / illustrations on the application of the claw-back mechanism - see Annex B (1).

If there is no effective separation of accounts, then the public funding received for both economic AND non-economic activities must be clawed back to the maximum amount of aid intensity under State Aid rules.

Section A5 continues to the next page
A.5.3. Is your organisation receiving (or expecting to receive) public contributions for the construction, upgrade or operation of an innovation cluster?

No → This is the end of Section A.5.

Yes →

A.5.3.a. Is your organisation the legal entity operating the innovation cluster?

Yes → Aid for innovation clusters can only be provided to the cluster operator which can itself also be, under certain conditions, established as a consortium of entities.

No →

A.5.3.b. Is access to the cluster open to several users?

Yes →

A.5.3.c. Do the fees charged for using the cluster's facilities and participating in its activities correspond to the market price or reflect the full costs?

Yes → Cluster must be open to users on transparent and non-discriminatory basis.

No →

Is access to the cluster granted on a transparent and non-discriminatory basis?

Yes → Fees must correspond to a market price or otherwise at least reflect costs.

No →

You may receive up to 50% for construction and upgrade costs of the cluster, in tangible and intangible assets.

You may receive up to 50% for operating costs up to 10 years.

The aid intensity may be increased by an additional 5 or 15 percentage points if the cluster is located in assisted areas fulfilling legal requirements, as defined in the relevant "Regional Aid Map". (The Regional Aid Map for each Member State can be found on the European Commission’s website [DG Competition]).
Understanding indirect State Aid

If the Decision Tree advised you at any point to also consult Section B, then please proceed with this Section. As mentioned in Section A.2., research and knowledge dissemination organisations may be considered both as a recipient of aid but also - under certain specific circumstances - a provider of aid to other entities engaged in economic activity. This Section will help you understand whether your organisation may be providing or passign on such indirect aid to third parties.

B.1. Does your organisation operate a publicly funded research infrastructure, equipment or facilities used also for economic activities?

- No → Skip to B.2.

- Yes

  B.1.a. Does the research infrastructure have several users (i.e. entities which have access to the services, equipment and facilities offered by the research infrastructure)?

- Yes

  Research infrastructures receiving aid must be open to several users.

- No

B.1.b. Do the prices charged by the research infrastructure correspond to a market price (or equivalent, as explained in Section A.5.2.a.i)?

- No → By charging sub-market prices, you may be passing on indirect aid to users engaged in economic activities.

- Yes

B.1.c. Does your organisation offer more favourable conditions to one or more users than for others, for accessing the same services, equipment or facilities?

- No → It appears likely you are not passing on indirect aid to users through your pricing or access policy. See also Annex B (2).

- Yes

  B.1.d. Did this user (or users) invest at least 10% of the investment costs of the infrastructure?

- No

  By granting preferential conditions, you may be passing on indirect aid to users engaged in economic activities.

- Yes

  Is the preferential access proportional to the user’s contribution to investment costs, and this information is made publicly available?

- No

  Different combinations are possible that can fulfil the proportionality requirement. See Annex B (2) for illustrations.

- Yes

Section B continues to the next page
B.2. Does your organisation host start-ups, spin offs, SMEs or other entities engaged in an economic activity in a facility operated by your organisation (such as an innovation cluster, an incubator, an accelerator or similar facility)?

No \[\rightarrow\] Skip to B.3.

Yes \[\rightarrow\]

B.2.a. Does your organisation have transparent and non-discriminatory criteria which it applies uniformly and consistently for selecting which entities are to be hosted by your organisation?

Yes \[\rightarrow\]

There needs to be transparent criteria applied to each prospective entity in a uniform manner.

B.2.b. Does your organisation charge the hosted entities a price in order to access the facilities and benefit from the services your organisation provides?

No \[\rightarrow\] You may be passing on indirect aid to the users by not charging a price for access and services.

Yes \[\rightarrow\]

B.2.c. Does the price charged to hosted entities correspond to a market price, or in the absence of a market price, full cost and margin or a price resulting from arm’s length negotiations? (See Section A.5.1.b. and A.5.2.a.i.)

No \[\rightarrow\] You may be passing on indirect aid to the users by charging prices lower than the market price.

Yes \[\rightarrow\]

It appears likely you are not passing on indirect aid through your selection and pricing policies.

You may pass on up to €200k per single undertaking within a 3 year period subject to a de minimis declaration by that undertaking.

’self-declaration’ is a practical and quick verification method as not all Member States do have a central registry.
B.3. Does your organisation provide grants, other financial support or services to start-ups, spin offs, SMEs or other entities engaged in an economic activity?

No → Skip to B.4.

Yes →

B.3.a. Are these grants or services the result of a financial support scheme designed or approved by your national state aid authorities?

No →

B.3.b. Does your organisation apply the terms determined by national authorities for selecting which final recipients are to receive grants or financial support?

Yes →

B.3.c. Do the grants or financial support your organisation gives to final recipients quantifiably and demonstrably correspond to the full public funding received by your organisation?

Yes →

B.3.d. Do you have an appropriate mechanism in place to quantify and monitor the amount of aid (corresponding to the gross grant equivalent of the aid, for the purposes of State aid rules) that is being passed on to the final recipient, either in the form of a grant or free/cheaper services?

Yes →

B.3.e. Is the total amount of aid that is being passed on to the final recipient (from all public resources by your country) less than €200k for the current fiscal year and the past two fiscal years (as evidenced by a de minimis declaration from the recipient or your national authority’s de minimis register, if it exists)?

No →

Yes →

B.3.f. Do you have an appropriate mechanism in place to report to the relevant state aid authority the amount and objective of the state aid and identity of final recipients?

Yes →

It appears likely you are not passing on any undue direct or indirect aid or advantage.

No →

You may be passing on excessive aid to the final recipient. Consult your national state aid authority.

Section B continues to the next page
B.4. Does your organisation conclude licence or assignment agreements for patents, technologies or other intellectual property assets to entities engaged in an economic activity (such as start-ups, SMEs, large enterprises, technology brokers), for which it receives royalties, payments or other economic benefits (such as shares, deferred payment options, or benefits in kind)?

Yes

B.4.a. When negotiating the terms (royalties, payments or other economic benefits) of this transaction, does your organisation use a price corresponding to a market price?

No

Yes

B.4.b. When negotiating the terms of this transaction, does your organisation use a price corresponding to full cost plus a margin or a price resulting from profit-oriented arm’s length negotiations leading to an arrangement allowing the extraction of maximum economic benefit from the transaction?

No

Your transaction may be passing on undue advantage to the recipient.

Yes

Your transaction likely does not pass on undue advantage to the recipient.

Licensing, under certain conditions, can be considered a non-economic activity under State Aid rules (see Section A.4.5.). Public financing of such licensing activities won’t constitute State Aid at the level of your organisation.

However, if your organisation undervalues its intellectual property in a royalty-bearing transaction, this would grant undue advantage to the recipient and distort legitimate competition in the market, thereby passing on State Aid to the level of the recipient.

Section B continues to the next page
B.5. Does your organisation carry out research for or on behalf of other entities (research services, contract research), and/or sell any other services or products?

- **No** → Skip to B.6.

- **Yes** →
  
  **B.5.a.** When your organisation performs research services, contract research or sells other services or products, does it charge a market price?
  
  - **No** → The price charged likely does not pass on undue advantage.
  
  - **Yes** →
    
    **B.5.b.** If there is no established market price, then does the price charged correspond to full cost plus a margin?
    
    - **No** → You may be passing on undue advantage by charging sub-market prices.
    
    - **Yes** →
      
      **B.5.c.** Is the activity a research service on behalf of a new client for the first time, on a trial basis and for a limited time, for a unique research activity for which there is not yet a market?
      
      - **No** → Sales contracts for services or products should not undervalue the price of the respective service or product to the benefit of the buyer and the detriment of your organisation. Such practices would distort legitimate competition in the market.
      
      - **Yes** → Note that arm’s length negotiations carry a higher degree of burden of proof to demonstrate the transaction indeed was on market terms.

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Even if your organisation’s economic activities are ancillary and below 20% of overall annual capacity, it needs to still conduct its activities in a way that avoids passing on undue advantage to third parties.
B.6. Does your organisation take part in any collaborative research projects (not research on behalf of undertakings)?

No

This is the end of Section B.

Yes

Your collaboration likely does not pass on undue advantage to the partner entity.

B.6.a. Does the partner entity bear the full cost of the project?

Yes

This conclusion stems from the obvious fact that the IPR and other research results created in the collaboration cannot simply disappear, unless the parties jointly waive all their rights and dedicate all results to the public domain.

No

If you responded NO to all of the above questions, then it appears likely that your organisation is assigning its IPR to the partner entities (whether it is in whole or in part).

B.6.b. Is the IPR resulting from the activities of your organisation fully allocated to you?

Yes

The absolute amount of the value of any contribution, both financial and non-financial, of the partner entity to the costs of your organisation’s activities that resulted in the IPR concerned, may be deducted from that compensation.

No

B.6.c. Is the IPR resulting from the project, as well as related access rights, allocated adequately among the partners, proportional to their work packages, contributions and respective interests?

Yes

OR

No

Your collaboration may be passing on undue advantage to the partner entity.

B.6.d. When assigning your IPR resulting from the collaboration to the partner entity, does your organisation receive compensation equivalent to the market price?

Yes

No

B.6.e. When assigning your IPR resulting from the collaboration to the partner entity, does your organisation receive compensation determined by:

- OR

- B.6.e.i. Open, transparent, non-discriminatory competitive sale procedure

- OR

- B.6.e.ii. Independent expert valuation

- OR

- B.6.e.iii. Arm’s length negotiations (see A.5.1.b)

- OR

- B.6.e.iv. A price at least matching the highest third-party offer (where the partner has a right of first refusal under the collaboration agreement)

No

Yes

This is the end of the Decision Tree.

Please be reminded that this document is intended for general information purposes only, and nothing here may substitute or prejudice any formal decision or authoritative advice competent State Aid authorities may issue.
ANNEX A
DEFINITIONS*

i. ‘aid’ means any measure fulfilling the criteria laid down in Article 107(1) of the Treaty;

ii. ‘aid intensity’ means the gross aid amount expressed as a percentage of the eligible costs, before any deduction of tax or other charge. Where aid is awarded in a form other than a grant, the aid amount is the grant equivalent of the aid. Aid payable in several instalments is discounted to its value at the date of award. The interest rate to be used for this purpose is the discount rate applicable at the date of award. The aid intensity is calculated per beneficiary;

iii. ‘aid scheme’ means any act on the basis of which, without further implementing measures being required, individual aid may be awarded to undertakings defined therein in a general and abstract manner and any act on the basis of which aid which is not linked to a specific project may be awarded to one or several undertakings;

iv. ‘applied research’ means industrial research, experimental development, or any combination of both;

v. ‘arm’s length’ means that the conditions of the transaction between the contracting parties do not differ from those which would be stipulated between independent enterprises and contain no element of collusion. Any transaction that results from an open, transparent and non-discriminatory procedure is considered as meeting the arm’s length principle;

vi. ‘effective collaboration’ means collaboration between at least two independent parties to exchange knowledge or technology, or to achieve a common objective based on the division of labour where the parties jointly define the scope of the collaborative project, contribute to its implementation and share its risks, as well as its results. One or several parties may bear the full costs of the project and thus relieve other parties of its financial risks. Contract research and provision of research services are not considered forms of collaboration.

*This Annex reproduces the standard definitions provided under R&D&I State Aid rules regarding certain concepts and terminologies. These definitions correspond to Section 1.3 of the EU R&D&I State Aid Framework. For the sake of expediency, only the definitions for those concepts and terminologies used in the Decision Tree have been reproduced here. For the complete set of definitions, please refer to the R&D&I Framework.
vii. ‘experimental development’ means acquiring, combining, shaping and using existing scientific, technological, business and other relevant knowledge and skills with the aim of developing new or improved products, processes or services. This may also include, for example, activities aiming at the conceptual definition, planning and documentation of new products, processes or services. Experimental development may comprise prototyping, demonstrating, piloting, testing and validation of new or improved products, processes or services in environments representative of real life operating conditions where the primary objective is to make further technical improvements on products, processes or services that are not substantially set. This may include the development of a commercially usable prototype or pilot which is necessarily the final commercial product and which is too expensive to produce for it to be used only for demonstration and validation purposes. Experimental development does not include routine or periodic changes made to existing products, production lines, manufacturing processes, services and other operations in progress, even if those changes may represent improvements;

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

ix. ‘fundamental research’ means experimental or theoretical work undertaken primarily to acquire new knowledge of the underlying foundations of phenomena and observable facts, without any direct commercial application or use in view;

x. ‘industrial research’ means the planned research or critical investigation aimed at the acquisition of new knowledge and skills for developing new products, processes or services or for bringing about a significant improvement in existing products, processes or services. It comprises the creation of components parts of complex systems, and may include the construction of prototypes in a laboratory environment or in an environment with simulated interfaces to existing systems as well as of pilot lines, when necessary for the industrial research and notably for generic technology validation;

xi. ‘innovation advisory services’ means consultancy, assistance and training in the fields of knowledge transfer, acquisition, protection and exploitation of intangible assets, use of standards and regulations embedding them;

xii. ‘innovation clusters’ means structures or organised groups of independent parties (such as innovative start-ups, small, medium and large enterprises, as
well as research and knowledge dissemination organisations, non-for-profit organisations and other related economic actors) designed to stimulate innovative activity by promoting sharing of facilities and exchange of knowledge and expertise and by contributing effectively to knowledge transfer, networking, information dissemination and collaboration among the undertakings and other organisations in the cluster;

xiii. ‘innovation support services’ means the provision of office space, data banks, libraries, market research, laboratories, quality labelling, testing and certification for the purpose of developing more effective products, processes or services;

xiv. ‘intangible assets’ means assets that do not have a physical or financial embodiment such as patents, licences, know-how or other intellectual property;

xv. ‘knowledge transfer’ means any process which has the aim of acquiring, collecting and sharing explicit and tacit knowledge, including skills and competence in both economic and non-economic activities such as research collaborations, consultancy, licensing, spin-off creation, publication and mobility of researchers and other personnel involved in those activities. Besides scientific and technological knowledge, it includes other kinds of knowledge such as knowledge on the use of standards and regulations embedding them and on conditions of real life operating environments and methods for organisational innovation, as well as management of knowledge related to identifying, acquiring, protecting, defending and exploiting intangible assets;

xvi. ‘large enterprises’ means undertakings which do not fall within the definition of small and medium-sized enterprises;

xvii. ‘personnel costs’ means the cost of researchers, technicians and other supporting staff to the extent employed on the relevant project or activity;

xviii. ‘R&D project’ means an operation that includes activities spanning over one or several categories of research and development defined in this framework, and that is intended to accomplish an indivisible task of a precise economic, scientific or technical nature with clearly pre-defined goals. A R&D project may consist of several work packages, activities or services, and includes clear objectives, activities to be carried out to achieve those objectives (including their expected costs), and concrete deliverables to identify the outcomes of those activities and compare them with the relevant objectives. When two or more R&D projects are not clearly separable from each other and in particular when they do not have independent probabilities of technological success, they are considered as a single project.
xix. ‘research and knowledge dissemination organisation’ or ‘research organisation’ means an entity (such as universities or research institutes, technology transfer agencies, innovation intermediaries, research-oriented physical or virtual collaborative entities), irrespective of its legal status (organised under public or private law) or way of financing, whose primary goal is to independently conduct fundamental research, industrial research or experimental development or to widely disseminate the results of such activities by way of teaching, publication or knowledge transfer. Where such entity also pursues economic activities, the financing, the costs and the revenues of those economic activities must be accounted for separately. Undertakings that can exert a decisive influence upon such an entity, for example in the quality of shareholders or members, may not enjoy a preferential access to the results generated by it.

xx. ‘research infrastructure’ means facilities, resources and related services that are used by the scientific community to conduct research in their respective fields and covers scientific equipment or set of instruments, knowledge-based resources such as collections, archives or structured scientific information, enabling information and communication technology-based infrastructures such as grid, computing, software and communication, or any other entity of a unique nature essential to conduct research. Such infrastructures may be ‘single-sited’ or ‘distributed’ (an organised network of resources);

xxi. ‘small and medium-sized enterprises’ or ‘SMEs’, ‘small enterprises’ and ‘medium-sized enterprises’ means undertakings fulfilling the criteria laid down in the Commission recommendation on the definition of micro, small and medium-sized enterprises;

xxii. ‘start of works’ or ‘start of the project’ means either the start of R&D&I activities, or the first agreement between the beneficiary and the contractors to conduct the project, whichever comes first. Preparatory works such as obtaining permits and conducting feasibility studies are not considered as start of works;

xxiii. ‘tangible assets’ means assets consisting of land, buildings and plants, machinery and equipment.
ANNEX B
EXAMPLES / ILLUSTRATIONS

1. Claw-back mechanism (see Section A.5.2.e. of the Decision Tree)

Example 1. A research infrastructure costs EUR 10 million to build and is expected to have ancillary economic activities not exceeding 20% of its overall annual capacity. In this case, the entire public funding of EUR 10 million is not considered state aid. However, if the infrastructure turns out to have 30% of economic activities, and assuming that this equals to 30% of the costs (i.e. EUR 3 million), this will need to be considered as funding of economic activities. Since block exemptions only allow an aid intensity of 50% for research infrastructures, EUR 1.5 million is excessive support for economic activities and has to be clawed-back (notwithstanding any other applicable national rules which may be more restrictive).

If there is no effective separation of accounts, then the public funding received for both economic AND non-economic activities must be clawed back to the maximum amount of aid intensity under State Aid rules (i.e. EUR 5 million, in the above example).

Example 2. A research infrastructure (RI) that is, from the beginning, intended to be used for commercial purposes.

Assume that 40% of a RI is to be used commercially, that the investment cost of the RI is 100 and that the investment is depreciated within one year. State aid may cover 20 of the 40 of the investment costs. The remaining 60 of the investment costs are 100% covered by public money as 60% of the RI is to be used for non-economic purposes.

Now, assume the economic use actually rises to 50% of the capacity of the RI. This means that 10 additional investment costs have been fully funded by the state, as they fall in the 60 that received 100% public funding.

However, only 5 have to be clawed-back because the additional costs of 10 could have benefited from 50% State aid.

Another issue that needs clarification is that the claw-back mechanism has to remain in place during the lifetime of the infrastructure until the investment is fully depreciated.
Operators of RIs should take into account that some RIs may have an expected life of 20-25 years.

Operators of RIs should also take into account situations where the State aid covers investment in both buildings with long life and equipment with a (much) shorter life. The claw-back mechanism may be discontinued only after full depreciation of the investment in assets.

2. Proportionality of investment costs to the more favourable conditions (see Sections A.5.2.b., B.1.c. and B.1.d. of the Decision Tree)

The terms of preferential access to a research infrastructure (RI) under more favourable conditions may vary according to the nature of the RI, the user’s activities and - most importantly - the share of RI-investment costs (at least 10%) the user had financed. When fixing these terms, the RI-operator must ensure proportionality and transparency (i.e. terms publicly available), and must prevent overcompensation.

For example, such preferential access terms may specify a certain percentage of capacity use or user time, or a combination of both. These percentages should be based on the RI’s available total capacity and be proportional to the share of investment costs financing borne by the user. Where a combination of factors applies, e.g. of capacity and time, one factor (e.g. percentage of capacity use) may even exceed the percentage of the investment financing borne by the user, provided that other factors (e.g. user time) are reduced accordingly.

Preferential access should not be granted in the form of reduced prices (below market rates) but rather e.g. in the form of favourable conditions concerning access to the capacity (preferential capacity allocation).
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