Incentive effect:
proposal for a special clause

DG REGIO Peer2Peer Community on State aid

12 December 2023

Contents

Disclaimer

The REGIO Peer2Peer Community of State aid practitioners

is a group of civil servants from programme authorities who are cooperating to learn from each other's experience and co-design tools to facilitate their daily work on State aid.

Participants are mainly from national or regional ERDF programme authorities and in many cases are the legal services or State aid experts in Managing Authorities. Participation is voluntary, as DG REGIO Communities are open spaces that respect the principle of inclusiveness.

The State aid Community was created in 2016 as a response to the needs of practitioners in different Member States to exchange State aid knowledge and procedures established in their national environment.

In 2019 the Community created 'State aid maps' for the R&D, energy, transport sectors. The Community was particularly solicited during the recent health and war crises in Europe (2020-22), with important sharing of knowledge on State aid temporary frameworks. Recent reflections focus on State aid in the context of ESIF simplification rules, the application of incentives, and aspects of the General Block Exemption Regulation (GBER).

1. The incentive effect

Most, although not all, categories of aid may only be granted if aid has an incentive effect. For example, the General Block Exemption Regulation (GBER), as a matter of principle, only applies to aid which has an incentive effect. According to the GBER, aid has an incentive effect if the beneficiary has applied for the aid to the granting authority before work on the project or activity has started. The written aid application must contain basic information, such as

- the name and size of the undertaking;
- a description of the project, including its start and end dates;
- the location of the project;
- a list of project costs;
- the type of aid (grant, loan, guarantee, equity, other); and
- the amount of public funding needed for the project.

Ad hoc aid granted to large enterprises is subject to additional requirements. In this case, the granting authority must confirm before granting the aid that the aid will have one or more of the following effects:

- a material increase in the scope of the project/activity due to the aid;
- a material increase in the total amount spent by the beneficiary on the project/activity due to the aid;
- a material increase in the speed of completion of the project/activity concerned.

In the case of ad hoc regional investment aid for large undertakings, national authorities should confirm that a supported project would not be carried out or would not be sufficiently profitable for the beneficiary in the absence of the aid. In both cases, the relevant checks should be based on the documentation prepared by the beneficiary.

Some categories of aid do not need to have an incentive effect or are considered to have this effect. For example, most cultural projects would not be carried out without public support. Therefore, according to Article 6(5)(h) of the GBER, aid for culture and heritage conservation is not required to have or is deemed to have an incentive effect.

2. Possibility of increasing the amount of aid

An increase in the aid amount after application and after the start of work on the project is generally prohibited. Such an increase would constitute new aid without an incentive effect, and this would mean illegal aid, i.e. aid that is not compatible with the rules of the EU internal market.

As explained by the European Commission, for aid to have an incentive effect under Article 6 of the GBER, it is a mandatory condition that the amount of aid was specified in the aid application, which has to be submitted to the Member State before works on the project started. This means that this amount cannot be increased after the aid is granted.

However, there are situations in which the project cannot be implemented without an increase in the amount of aid. It has become evident recently: the outbreak of the COVID-19 pandemic and the Russian invasion of Ukraine resulted in an unprecedented rise in the prices of energy and raw materials. These events resulted in an unpredictable increase in implementation costs of many projects co-financed by public authorities. This resulted in the risk of abandoning many socially essential projects. Luckily, the European Commission explained that an increase in aid is sometimes possible: namely, if the aid application (and the aid granting act) already contains a clause regarding an increase in costs, which must be based on objective criteria. The purpose of this document is to create a template for such a clause.

DG Comp replies to questions posted by Hungary and Poland on E-State Aid Wiki, 21.01.2021

”For aid to have an incentive effect under Article 6 GBER, it is a mandatory condition that the amount of aid was specified in the aid application, which has to be submitted to the Member State before works on the project started. This means that this amount must not be increased anymore after the aid was granted. **Such a situation can be avoided if already the aid application (and the aid granting act) contains a clause regarding an increase in costs, which must be based on objective criteria”.**

3. Clause requirements

In 2023, the State aid Community worked on the clause requirements and invited EC officers in meetings to discuss and validate them[1]. According to the meeting discussions and conclusions, the clause should meet the following requirements:

- It must be incorporated into the application for aid;
- It must be incorporated into the original aid granting act (co-financing agreement);
- It must be based on objective criteria and be applied "almost automatically";
- An increase in the aid must be based on specific figures, e.g. inflation figures;
- Criteria for revision should be identified – it should be explained what elements would be taken into account during possible future modification;
- The aid still must have an incentive effect – an increase of cost in the economy must be linked with the rise of the costs of the particular project, and lead to the possible cancelation of project implementation.

[1] The Community meetings were held in Sofia on 26-27 April and in Brussels on 16-17 November, 2023

4. Clause proposal

The clause proposal from the REGIO Peer2Peer Community is therefore the following:

--- --- ---

Increase of the amount of co-financing after the start of works on the project implementation:

1. The granting authority may allow an increase of the project co-financing if it is a result of the unpredictable increase of the eligible costs of the project that the exercise of prudence, diligence and care could not have prevented;
2. The unpredictable increase in eligible costs referred to in the first paragraph is understood as an increase in project implementation costs caused by the rise in inflation by …% [2] more than the planned average annual inflation rate; [another indicator than annual inflation rate might be used; however, it must be equally objective as the annual inflation rate]
3. Appropriate calculations are made based on data on the planned average annual inflation rate published by the National Statistical Office; [same applies to other indicators, if the case]
4. The granting authority may allow an increase of the project co-financing if an unforeseeable rise in eligible costs referred to in the first paragraph results in the project being abandoned.
5. The condition referred to in the fourth paragraph is met if the project cannot be implemented without an increase in the amount of the co-financing;
6. The condition mentioned in the fifth paragraph is met if, without an increase in the amount of the co-financing, the project cannot be further implemented at all or to the same extent or under the same conditions as was initially planned and expected by the granting authority;
7. An increase in the project co-financing cannot alter the nature or objectives of the supported measure;
8. The aid intensity of the project must remain unchanged;
9. The co-financing level may not be increased by more than …%.[3] The total amount of aid may not exceed … . [Indicating a specific aid value above which the co-financing cannot be increased will meet the GBER condition that the aid application should specify the total amount of aid.]

--- --- ---

It is necessary to pay attention to fulfilling all GBER terms and conditions. The above clause cannot be applied if the GBER limits the maximum amount of aid, not only its intensity.

The clause must be incorporated into the application for aid and into the original aid granting act (co-financing agreement). It cannot be subsequently added to the agreement by an annex.

5. Contacts

Contact person in the REGIO Peer2Peer Community on State aid:

dr hab. Stefan Akira Jarecki (stefan.jarecki@mfipr.gov.pl; s.jarecki@wit.edu.pl)

[2] This figure is to be agreed and included in the clause

[3] As above