



New **EU-rules for R&D&I State Aid**

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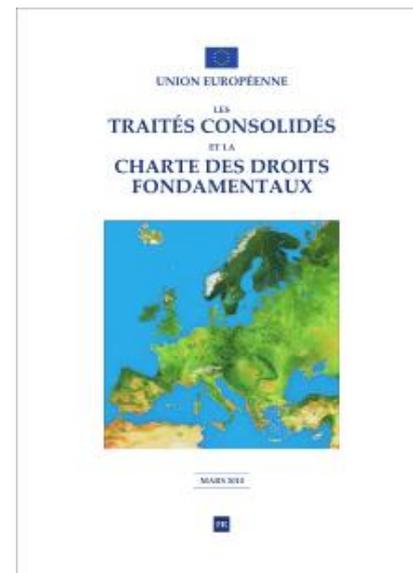
1. Concept of 'State aid' - Art.107 (1) of the Treaty
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4. Presence of State aid in R&D-typical situations – The R&D&I-Framework
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Concept of State aid - Art.107 (1) of the Treaty



Článek 107 (1) Smlouva

"Podpory poskytované v jakékoli formě státem nebo ze státních prostředků, které narušují nebo mohou narušit hospodářskou soutěž tím, že zvýhodňují určité podniky nebo určitá odvětví výroby, jsou, pokud ovlivňují obchod mezi členskými státy, neslučitelné s vnitřním trhem, nestanoví-li Smlouvy jinak."



"Save as otherwise provided in the Treaties, 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 shall, in so far as it affects trade between Member States, be incompatible with the internal market."

Concept of State aid – 5 cumulative criteria

1. Undertaking / economic activity
2. State origin: Imputability & State resources
3. Advantage
4. Selectivity
5. Distortion of competition & effect on trade

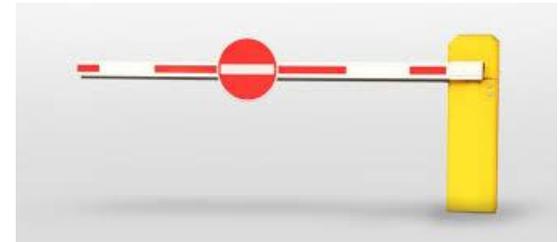
Concept of State aid - an objective legal concept defined in the Treaty

- **Commission has no margin of discretion** as regards the application of this concept!
- **Commission may only explain** how it understands and applies Art 107 (1) TFEU in line with the case-law of the EU Courts.
- ***Commission Notice on the notion of State aid*** (forthcoming) provides such explanations.
- **Very small aid amounts** not considered to be State aid in the sense of Art. 107 (1): *De-minimis Regulation*

'State aid', general prohibition of State aid and exemptions from prohibition - Art.107 of the Treaty

State Aid

- State aid is in principle prohibited as it is '**incompatible**' with the internal market" (Art. 107 (1) TFEU)
- ...but in certain cases "may be considered to be **compatible** with the internal market" (Art. 107 (3) TFEU).
- **Compatibility of State aid** - Commission has a wide margin of discretion to declare State aid as compatible with the internal market.
- Commission adopts **compatibility criteria** in secondary legal acts.





State Aid

- **Member States are in principle obliged to notify** the Commission of new State aid measures, prior to their implementation - Art. 108(3) TFEU
- **“Standstill-principle”**: Member States must not grant any State aid unless it has been notified to, and authorised by, the Commission.
- **Exemption from the notification obligation**: The Council enabled the Commission to exempt from the notification obligation State aid for certain objectives.
- The ***General Block Exemption Regulation (GBER)*** sets forth provisions for certain aid measures that are exempt from the notification obligation – *i.a.* R&D&I-aid.



State Aid

- Aid that is not 'block-exempted' must be notified to the Commission for compatibility assessment and approval.
- Compatibility assessment on the basis of applicable compatibility criteria set out in secondary legal acts (Communications, Guidelines, Frameworks, e.g.: *R&D&I Framework*)
- Such criteria are not binding Member States but are binding the Commission when exercising its margin of discretion = e.g. R&D&I-aid that meets all the criteria of the R&D&I-Framework must be approved.



State Aid

- State aid granted in the absence of Commission approval or outside the scope of the General Block Exemption Regulation is **unlawful**.
- Unlawful aid can either be found compatible or incompatible with the internal market.
- Commission orders the **recovery** from the beneficiaries of any aid that is incompatible.

Modernised R&D&I State-aid rules – objectives, architecture

! Entry into force on 1 July 2014 !

Modernised R&D&I State-aid rules

➤ Objective - Competitiveness and growth:

- ✓ State aid for more and better R&D&I in the common interest.
- ✓ Mobilise private R&D&I-investment.
- ✓ Limit any negative effects of R&D&I State aid.
- ✓ Clearer and simpler rules

➤ Achieving the objective – modernised rules

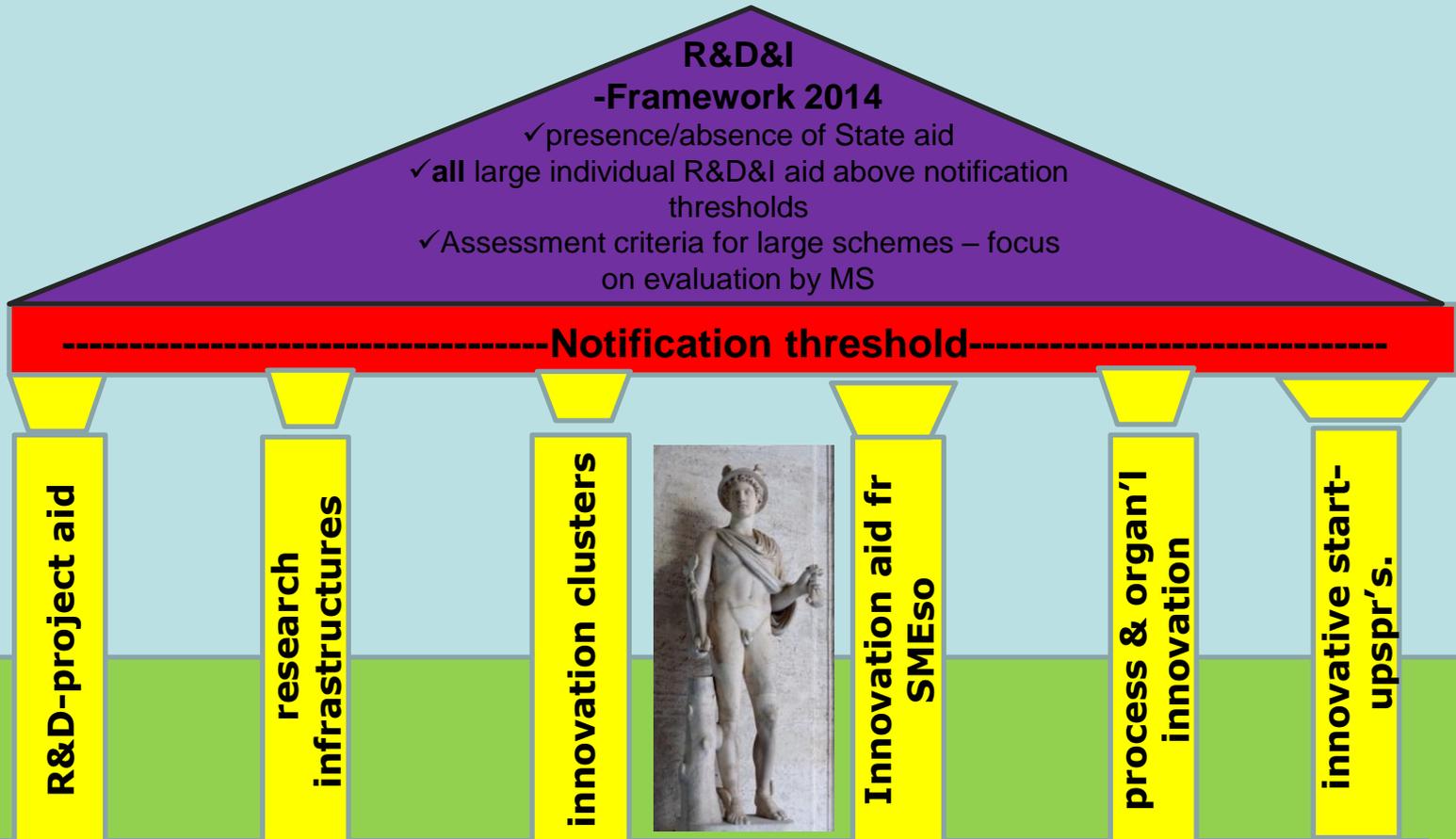
- ✓ **More scope** for the automatic approval of R&D&I aid – the ***General Block Exemption Regulation***
- ✓ **New aid objective ‘Research Infrastructure’**; innovation aid simplified and more generous rules - the ***General Block Exemption Regulation***
- ✓ **More flexible aid ceilings** for large individual aid measures – the ***R&D&I-Framework***
- ✓ **Greater legal certainty** for public-private R&D-collaboration and for demand-side measures (pre-commercial public procurement) that foster innovation – the ***R&D&I-Framework***
- ✓ **More precise criteria** for the detailed economic assessment of R&D&I-aid – faster assessment procedure - the ***R&D&I-Framework***



R&D&I State-aid rules 2014
Entry into force on 1 July 2014

- **General Block Exemption Regulation 2014-2020 (GBER)**
- **Framework for State Aid for Research, Development and Innovation 2014 (R&D&I-Framework)**

R&D&I State aid rules - architecture



General BlockExemption Regulation (GBER) 2014

! Notification thresholds higher than under GBER 2008 !

Allows ad-hoc aid for large enterprises. Large aid schemes not eligible. Only transparent aid instruments. All eligible R&D&I-aid objectives.

Presence of State aid in R&D&I- typical situations - R&D&I-Framework

(Chap. 2 R&D&I-Framework)

State aid and R&D&I-typical situations (Chap. 2 R&D&I-Framework)

- ✓ State aid and public funding for economic activities of research organisations and research infrastructure
- ✓ Indirect State aid to industry through R&D-services carried out by publicly financed research organisations
- ✓ Indirect State aid to industry in R&D-collaboration with publicly financed research organisations
- ✓ State aid and public R&D-procurement

➤ **The *Framework's* R&D&I-specific explanations are complementary to, and more detailed than, those given in the forthcoming *Communication on the Notion of Aid*.**

State aid

- **and public funding for economic activities of research organisations and research infrastructure (Section 2.1)**



Public funding for research organisations/ infrastructure - R&D&I-Framework 2014

**'Research and knowledge dissemination organisation'
in the sense of the new R&D&I-Framework (point 15 ee)**

« 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. »

- Focus on wide knowledge dissemination**
- Separation of economic/non-economic activities**
- Independent from industry**



Public funding for research organisations/ infrastructure - R&D&I-Framework 2014

'Research infrastructure' in the sense of the new R&D&I-Framework (point 15 ff)

« 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) »

➤ Definition in essence taken from Art. 2(a) of Council Regulation (EC) No 723/2009 of 25 June 2009 on the Community legal framework for a European Research Infrastructure Consortium (ERIC).



Public funding for research organisations/ infrastructure R&D&I-Framework 2014

- **Non-economic activities (point 19):**
 - ✓ **Primary activities:** Public education organised within the national educational system; independent R&D; wide dissemination of research results on a non-exclusive and non-discriminatory basis;
 - ✓ **Knowledge transfer** conducted by the research organisation/infrastructure or jointly with/on behalf of other such entities; all profits reinvested in primary activities.
- **Economic activities:** e.g. renting out equipment or laboratories to undertakings, R&D services, contract research for industry.
- **Cross-subsidisation of economic activities is avoided** by separating the costs, revenues and financing of economic from non-economic activities –
- **Lack of clear separation** → Entire research organisation and its funding are subject to State aid rules!
- Separation e.g. demonstrable in annual financial statements

Public funding for research organisations/ infrastructure - R&D&I-Framework 2014

Activities at the borderline of R&D&I: e.g. canteens, student halls of residence

- Not directly linked to primary goals; usually economic by nature
- Financing, revenues and costs of such activities must be clearly separate from the university's primary activities.
- Possible - Service of General Economic Interest (SGEI):
 - ✓ Special characteristics as compared to other economic activities
 - ✓ Member States have wide margin of discretion for definition of SGEI
 - ✓ If services are not and cannot be satisfactorily provided by the market "under conditions such as price, objective quality characteristics, continuity and access to the service, consistent with the public interest, as defined by the State" (e.g. social housing)
 - ✓ Addressed to citizens or in the interest of society as a whole
- Applicable EU-rules: *SGEI-Communication*, *SGEI-Decision*, *SGEI-Framework*

Public funding for research organisations/ infrastructure - R&D&I-Framework 2014

If RO/RI is both publicly and privately funded → State aid is present if

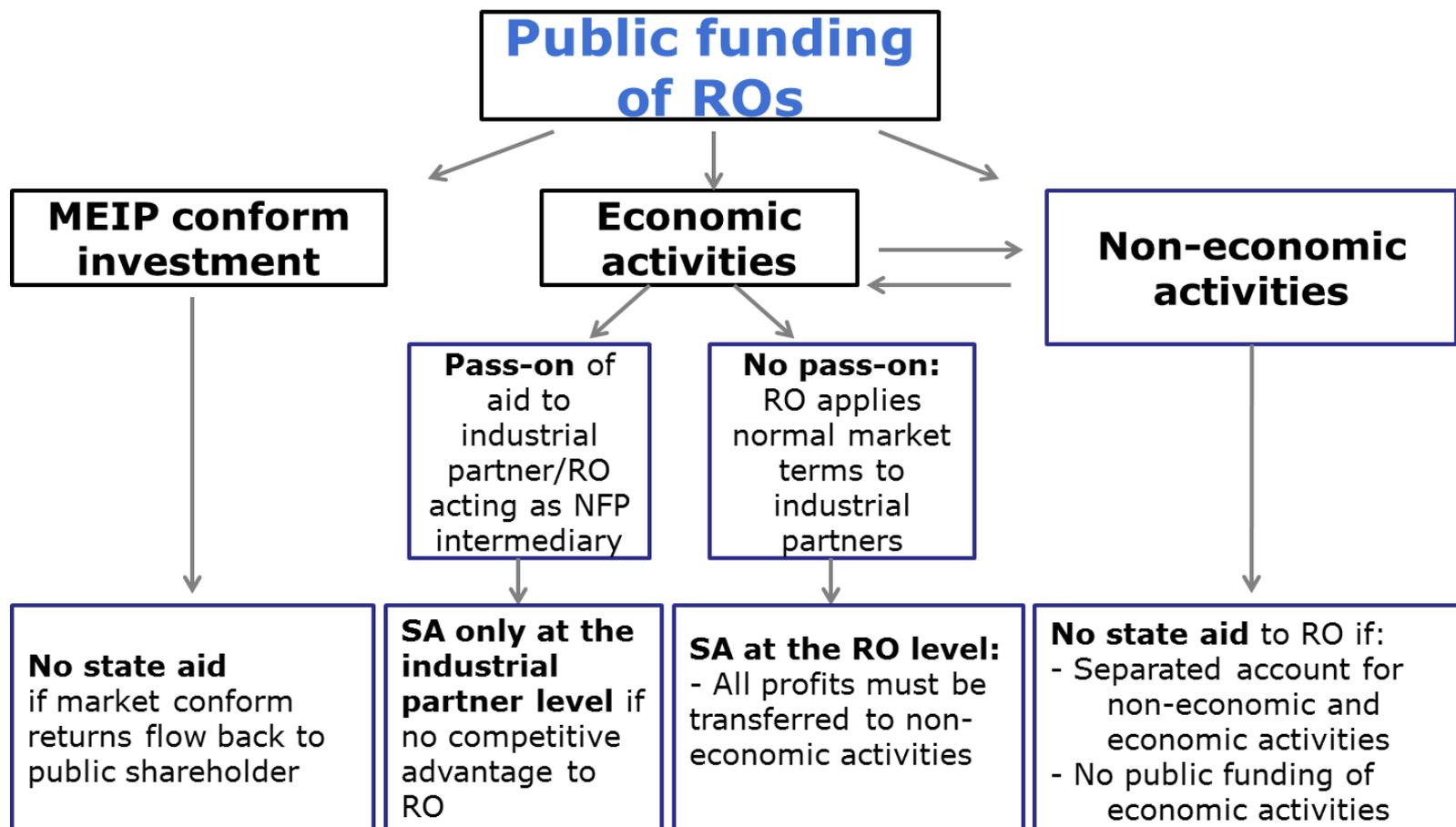
- public funding allocated to the relevant entity for a specific accounting period exceeds the costs of non-economic activities incurred in that period (point 20 – footnote 22).
- Example:
 - Public funding = EUR 160 million (80% of the total costs) allocated to non-economic activities → no State aid
 - Remaining EUR 40 million are financed through means that do not include State resources → no State aid
 - **If the public funding of the research infrastructure exceeds EUR 160 million (80% of the total costs) – presumed State aid (spill-over of public funding of economic activities)**



Public funding for research organisations/ infrastructure - R&D&I-Framework 2014

- **Ancillary economic activities** not subject to State-aid rules (point 20):
 - ✓ directly related to and necessary for the operation of the RO/RI
 - ✓ **or** intrinsically linked to RO/RI main non-economic use.
 - ✓ Must be limited in scope - consumes exactly the same inputs as non-economic activities and allocated capacity is $\leq 20\%$ of relevant entity's overall annual capacity
- **!** Claw-back of excessive aid resulting from a higher proportion of economic activities in comparison with *ex-ante* estimations!
- **No State aid** to RO/RI if entity acts as an 'intermediary':
 - ✓ Any advantage through public funding is quantifiable and demonstrable,
 - ✓ **and** is fully passed on to the final recipients (e.g. price-reduction)
 - State aid compatibility/de-minimis conditions at customer level,
 - ✓ **and** no further advantage for intermediary - selected with open tender procedure, or customers are entitled to acquire services from any intermediary.

Public funding for ROs/RIs - How to deal with State aid



Indirect State aid (Section 2.2)

- **to industry through R&D-services carried out by publicly financed research organisations (Point 2.2.1)**

Indirect aid to industry - R&D&I-Framework 2014

Contract research or research services

- How to avoid indirect State aid to undertakings?

- ✓ Research service or contract research at market price, **or** where there is no market price:
 - ✓ full costs of the service + margin commonly applied in the sector of the service concerned, **or**
 - ✓ arm's length negotiations where research organisation/ infrastructure negotiates to obtain maximum economic benefit at the moment when the contract is concluded and covers at least its marginal costs.
- ✓ Market value of IP-ownership or IP access may be deducted from the price if these remain with the research organisation/ infrastructure.
- ✓ Specific research service/contract research for the first time on behalf of a given undertaking, on a trial basis and during a clearly limited period of time → Price charged is considered as market price if service/contract research is unique and no market for it.

Indirect State aid (Chap. 2.2)

- **to industry in R&D-collaboration with publicly financed research organisations (Point 2.2.2)**

Indirect aid to industry - R&D&I-Framework 2014

R&D-collaboration with publicly financed research organisations

– How to avoid indirect State aid to undertakings?

- ✓ the participating undertakings bear the full cost of the project, **or**
- ✓ Resulting Non-IPR may be widely disseminated and any IPR generated by research organisations/ infrastructures are fully allocated to those entities, **or**
- ✓ any resulting IPR resulting as well as related access rights are allocated to collaboration partners in a manner which adequately reflects work packages, contributions and respective interests, **or**
- ✓ 'compensation equivalent to market price' for transfer of/access to IPR generated by RO/RI. Financial and non-financial contributions of undertakings to the costs of the research organisations/infrastructures' activities that resulted in the IPR concerned may be deducted from that compensation.

Indirect aid to industry - R&D&I-Framework 2014

IPR-transfer in R&D-collaboration with publicly financed research organisations

– What is ‘compensation equivalent to the market price’?

- ✓ Research organisations/infrastructures enjoy the full economic benefit of IPR/access rights, **and** one of the following conditions is fulfilled:
 - ✓ compensation established by means of an open, transparent and non-discriminatory competitive sale procedure, **or**
 - ✓ an independent expert valuation confirms that compensation is at least equal to the market price, **or**
 - ✓ research organisation/ infrastructure as seller demonstrably negotiates compensation, at arm's length conditions, **or**
 - ✓ where undertakings have a right of first refusal: research organisations/infrastructures solicits offers from third parties so that the collaborating undertaking has to match its offer accordingly.
- **If none of above conditions is met** → full value of the contribution of the research organisations/infrastructures is considered as an advantage for the collaborating undertakings → State aid rules apply at their level.

State aid

➤ **and public
(Section 2.3)**

R&D-procurement

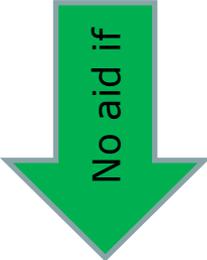


Public procurement of R&D-services

'exclusive development'

- Public purchaser reserves all results and benefits exclusively for itself for conduct of its own affairs

Public-procurement Directives apply



Open tender/restricted procedure pursuant Directives

'pre-commercial' procurement

- Public purchaser does not reserve all results and benefits exclusively for itself for conduct of its own affairs
- Excludes purchase of commercial volumes of final product/service

Public-procurement Directives do not apply



open, transparent non-discriminatory procedure; clear ex-ante arrangements; no preferential treatment in supply of final products; wide dissemination of non-IP; all IPR allocated to public purchaser, **or** full free IP-access for public purchaser **and** non-exclusive access for third parties at market terms

Modernised R&D&I State-aid rules – eligible R&D&I-aid objectives - GBER Articles 24-29

The GBER 2014-2020 – more scope for granting aid

- The GBER 2014-2020 is a set of 43 exemptions that can be used to provide effective and compliant State aid.
- Includes: R&D&I-aid!
- Aid under GBER can be provided **without prior approval from the Commission.**
- To use the GBER, the granting body must publish a scheme on the internet and complete an online form which goes to the Commission.



Aid for R&D-projects

- **3 research categories:**
 - ✓ fundamental research
 - ✓ industrial research
 - ✓ experimental development
- **New: Industrial research: now including laboratory-scale prototypes and small scale pilot lines.** Reason: High technological risk – no commercial use – allow higher aid intensity than for 'experimental development.
- **New: *ex-post* deduction of commercial revenues generated by prototypes and pilots from eligible costs no longer applicable.**

Supporting the transition from development to production - fast-moving technology markets!

Interplay between the new GBER and the new R&D&I-Framework. R&D-project aid intensities (incl. top-ups)

	Large enterprise	Medium- sized	Small
R&D projects			
- Fundamental research	100%	100%	100%
- Industrial research -'GBER'	50-65%	60-75%	70-80%
- Industrial research – 'detailed assessment'	60-70%	70-80%	80-90%
- Experimental development - 'GBER'	25-40%	35-50%	45-60%
- Experimental development - 'detailed assement'	60-70%	70-80%	80-90%
- Feasibility studies	50%	60%	70%

Aid for research infrastructure

Previous GBER and R&D&I-Framework - regulatory gap as regards aid for the construction or upgrade of research infrastructure!

Research Infrastructures (RI) are an essential element of the EU's growth strategy. Accessible infrastructure - collaborative R&D - breakthroughs in particular in the field of Key-enabling technologies - massive investments



Aid for Research Infrastructure

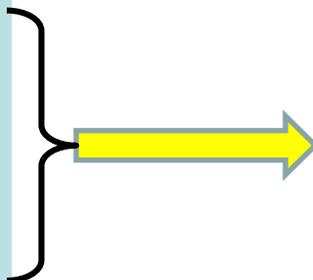
New aid objective (GBER 2014) - Investment aid for the construction and upgrade of research infrastructure

- ✓ Only public financing for **economic activities** taken into account!
- ✓ Open, transparent and non-discriminatory access at market terms; preferential access for large private investors (>10%) is allowed (conditions: proportional, transparent)
- ✓ Eligible costs: investment costs in intangible and tangible assets
- ✓ Aid intensity: up to 50% of eligible costs
- ✓ Notification threshold: 20 million EUR/infrastructure

Innovation aid rules – simpler & streamlined

GBER 2008

- 'Aid for young innovative enterprises'
- Various SME-innovation objectives: IPR costs, innovation advisory/support, loan of highly qualified personnel. Various levels of aid intensities/ notification thresholds
- Excluded from GBER: Aid for process and organisational innovation in services; projects must be ICT-related
- Excluded from GBER: Aid for innovation clusters. Cluster definition implies regional/physical component. Operating aid limited to 5 years.



GBER 2014

- 'Start-up aid' - SME access-to-finance. Various aid-instruments.
- Single SME- innovation aid category. Regular aid intensity - 50% and 100% if max. 200kEUR/3 years for advisory and support services. Single notification threshold - 5 million EUR/SME
- Block-exemptible. Higher aid-intensity for SMEs; no obligation to use/exploit ICT
- Block-exemptible. No longer necessary to operate 'in a region'. Higher aid intensity for investment aid - 50%; operating aid up to 10 years degressive.

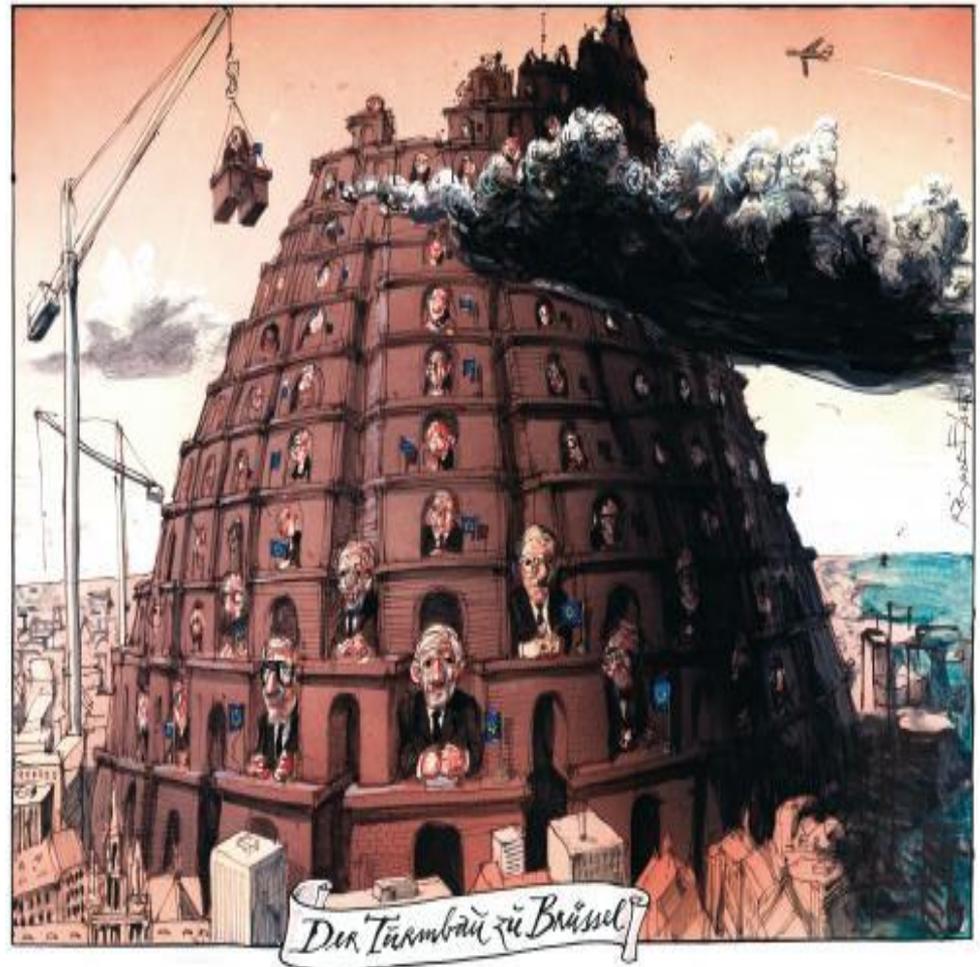
Compatibility criteria for large individual aid subject to the notification obligation

– the R&D&I-Framework

Aid that is not eligible for
block-exemption must be
notified to the
Commission for approval

Applicable compatibility
criteria – new R&D&I-
Framework:

- Clearer assessment principles
- Greater certainty on information required by Commission
- quicker assessment process
- Earlier Commission decision



Assessment principle	Assessment approach
Contribution to increased R&D&I and need for State intervention (market failure)	<p>Systematic identification of objective of common interest.</p> <p>Demonstration of general/specific market failure by MS for all notified cases, e.g. through sectoral comparison.</p> <p>Presumption of absence of market failure where there are similar projects in the market. Presumption of presence of market failure for EU funded projects.</p>
Appropriateness	To be demonstrated; presumed for EU-funded project
Incentive effect	<p>Aid application before start of works</p> <p>For large individual aids, MS to support counterfactual analysis of incentive effect with company- and industry-specific elements. Counterfactual scenario may even consist in "the absence of an alternative project" or in "an alternative project that is wholly or partly carried out outside the Union."</p>
Proportionality	<p>Where no alternative project exists: Aid must not exceed the minimum necessary to make the project sufficiently profitable. This is the case if the internal rate of return (IRR) is brought to a level that corresponds to sector or firm specific hurdle rates. Where a counterfactual project exists: Aid must not exceed the net extra costs established by comparing the expected net present values of both alternative investments. Where a counterfactual exists but is too remote from aided project: Hurdle-rate approach may apply. All relevant expected costs and benefits must be considered over the lifetime</p>
Negative effects	<p>Analysis of distorting dynamic incentives, creation of market power and maintaining inefficient market structures. Analysis of choice of location.</p> <p>Analysis of manifest negative effects, in particular if violation of EU law (such as free movement of goods and services).</p>

R&D&I State aid – When is it 'necessary'?

R&D&I activities often generate benefits for society in the form of **positive spill-over effects** (e.g. knowledge spill-over to competitors).

Industry may find

R&D&I-investment unattractive if benefits cannot be sufficiently appropriated.

Imperfect information on the risks and benefits of R&D&I activities; successful outcome often highly uncertain

May lead to

non-transparent markets - mismatch between supply and demand – little investment appetite

Successful R&D&I often involves **multiple collaboration partners** and suppliers - diverging interests – contractual design is difficult, problems in designing contracts - difficulties in knowledge sharing.

Coordination and network failures

may impair the ability of R&D-partners to interact.

Detailed assessment of large R&D&I-aid – incentive effect, proportionality and the 'counterfactual scenario'

'Counterfactual scenario' now better described:

"Comprehensive description of what would have happened or could reasonably have been expected to happen without aid".

Alternative scenarios

- ✓ clearly defined and sufficiently predictable
- ✓ considered by the beneficiary undertaking in its internal decision making
- ✓ could for instance be described in internal business plans, risk assessments, or in documents submitted to investors.

'Counterfactual scenario' may even consist in *"the absence of an alternative project"* or in *"an alternative project that is wholly or partly carried out outside the Union."*



Cumulation rules - State aid and EU-funding

- total amount of **State aid** per activity or project per undertaking taken into account
- **EU-funding** not controlled by MS not taken into account
- EU-funding and State aid **for same eligible costs** must not exceed most favourable funding rate laid down in EU-law

Entry into force of new rules on 1 July 2014 – **Adaptation of existing aid schemes**

- R&D&I-aid schemes exempted under GBER 2008:
Shall remain exempted during an adjustment period of six months.
- R&D&I-schemes approved by Commission decision on the basis of the R&D&I-Framework 2007: Commission will invite Member States to commit to take appropriate measures to amend, where necessary, existing schemes to **bring them into line with new Framework no later than 1st January 2015.**



New **EU-rules for R&D&I State Aid**

Thank you for your attention!