

III

(Other acts)

EUROPEAN ECONOMIC AREA

EFTA SURVEILLANCE AUTHORITY DECISION No 280/21/COL

of 13 December 2021

amending the procedural and substantive rules in the field of State aid by introducing new Guidelines on criteria for the analysis of the compatibility with the internal market of State aid to promote the execution of important projects of common European interest [2022/1170]

THE EFTA SURVEILLANCE AUTHORITY (ESA),

Having regard to the Agreement on the European Economic Area ('the EEA Agreement'), in particular to Articles 61 to 63 and Protocol 26,

Having regard to the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice ('the Surveillance and Court Agreement'), in particular to Article 24 and Article 5(2)(b),

Whereas:

Under Article 24 of the Surveillance and Court Agreement, ESA shall give effect to the provisions of the EEA Agreement concerning State aid.

Under Article 5(2)(b) of the Surveillance and Court Agreement, ESA shall issue notices or guidelines on matters dealt with in the EEA Agreement, if that Agreement or the Surveillance and Court Agreement expressly so provides or if ESA considers it necessary.

On 25 November 2021, the European Commission adopted a revised Communication on criteria for the analysis of the compatibility with the internal market of State aid to promote the execution of important projects of common European interest ('the Guidelines') ⁽¹⁾.

The Guidelines are also of relevance for the European Economic Area ('EEA').

Uniform application of the EEA State aid rules is to be ensured throughout the EEA in line with the objective of homogeneity established in Article 1 of the EEA Agreement.

According to Section General Paragraph II of Annex XV to the EEA Agreement, ESA, after consultation with the European Commission, is to adopt acts corresponding to those adopted by the European Commission.

The Guidelines may refer to certain European Union policy instruments and to certain European Union legal acts that have not been incorporated into the EEA Agreement. With a view to ensuring uniform application of State aid provisions and equal conditions of competition throughout the EEA, ESA will generally apply the same points of reference as the European Commission when assessing the compatibility of aid with the functioning of the EEA Agreement.

⁽¹⁾ C(2021) 8481 final (OJ C 528, 30.12.2021, p. 10).

Having consulted the European Commission,

Having consulted the EFTA States,

HAS ADOPTED THIS DECISION:

Article 1

1. The substantive rules in the field of State aid are amended by introducing new Guidelines on criteria for the analysis of the compatibility with the internal market of State aid to promote the execution of important projects of common European interest. The Guidelines are annexed to this Decision and form an integral part of it.
2. The Guidelines will replace the existing guidelines for the analysis of the compatibility with the functioning of the EEA Agreement of state aid to promote the execution of important projects of common European interest ^(?) with effect from 1 January 2022.

Article 2

ESA will apply the Guidelines, with the following adaptations where applicable, including, but not limited to, the following:

- (a) If there is a reference to 'Member State(s)', ESA reads it as a reference to 'EFTA State(s)' ^(?), or where appropriate 'EEA State(s)'.
- (b) If there is a reference to the 'European Commission', ESA reads it as a reference to the 'EFTA Surveillance Authority'.
- (c) If there is a reference to 'the Treaty' or 'TFEU', ESA reads it as a reference to 'the EEA Agreement'.
- (d) If there is a reference to Article 107 TFEU or sections of that Article, ESA reads it as a reference to Article 61 of the EEA Agreement and the corresponding sections of that Article.
- (e) If there is a reference to Article 108 TFEU or sections of that Article, ESA reads it as a reference to Article 1 of Part 1 of Protocol 3 of the Surveillance and Court Agreement and the corresponding sections of that Article.
- (f) If there is a reference to the wording '(in-)compatible with the internal market', ESA reads it as '(in-)compatible with the functioning of the EEA Agreement'.
- (g) If there is a reference to the wording 'within (or outside) the Union', ESA reads it as 'within (or outside) the EEA'.
- (h) If there is a reference to 'intra-Union trade', ESA reads it as a reference to 'intra-EEA trade'.
- (i) If the Guidelines set out that they will be applied to 'all sectors of economic activity', ESA applies them to 'all sectors of economic activity or parts of sectors of economic activity falling within the scope of the EEA Agreement'.
- (j) If there is a reference to Commission Notices or Guidelines, ESA reads it as a reference to the corresponding ESA Guidelines.

^(?) EFTA Surveillance Authority Decision No 84/16/COL of 27 April 2016 amending, for the hundredth-and-first time, the procedural and substantive rules in the field of State aid by introducing new Guidelines for the analysis of the compatibility with the functioning of the EEA Agreement of State aid to promote the execution of important projects of common European interest [2017/267] (OJ L 39, 16.2.2017, p. 49), and EEA Supplement No 11, 16.2.2017, p. 1.

^(?) The 'EFTA States' refers to Iceland, Liechtenstein and Norway.

Done in Brussels, 13 December 2021.

For the EFTA Surveillance Authority

Bente ANGELL-HANSEN
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Responsible College Member

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COMMUNICATION FROM THE COMMISSION**Criteria for the analysis of the compatibility with the internal market of State aid to promote the execution of important projects of common European interest****1. INTRODUCTION**

1. This Communication gives guidance on the assessment of public financing of important projects of common European interest (IPCEIs) under Union State aid rules.
2. IPCEIs can make a very important contribution to sustainable economic growth, jobs, competitiveness and resilience for industry and the economy in the Union and strengthen its open strategic autonomy, by enabling breakthrough innovation and infrastructure projects through cross-border cooperation and with positive spill-over effects on the internal market and the society as a whole.
3. IPCEIs make it possible to bring together knowledge, expertise, financial resources and economic actors from across the Union, in a bid to address important market or systemic failures or societal challenges that could not otherwise be addressed. They are designed to bring together the public and private sectors to undertake large-scale projects of significant benefit to the Union and its citizens.
4. IPCEIs can underpin all policies and actions that seek to achieve common European objectives, in particular the European Green Deal ⁽¹⁾, the Digital Strategy ⁽²⁾ and the Digital Decade ⁽³⁾, the New Industrial Strategy for Europe ⁽⁴⁾ and its update ⁽⁵⁾, the European Strategy for Data ⁽⁶⁾ and Next Generation EU ⁽⁷⁾. IPCEIs can also contribute to a sustainable recovery following serious economic disturbances such as those caused by the COVID-19 pandemic and support efforts to strengthen the Union's social and economic resilience.
5. Taking into account the updated New Industrial Strategy and the Small and Medium-sized Enterprise (SME) Strategy ⁽⁸⁾, it is important that SMEs and start-ups can participate in IPCEIs and benefit from them. The Commission will take into account in its assessment any circumstances which indicate that the notified aid is less likely to unduly distort competition, for example due to its amount.

⁽¹⁾ Communication from the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions – 'The European Green Deal', COM(2019) 640 final, 11 December 2019.

⁽²⁾ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions – 'Shaping Europe's digital future', COM(2020) 67 final, 19 February 2020.

⁽³⁾ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions – '2030 Digital Compass: the European way for the Digital Decade', COM(2021) 118 final, 9 March 2021.

⁽⁴⁾ Communication from the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions – 'A New Industrial Strategy for Europe', COM(2020) 102 final, 10 March 2020.

⁽⁵⁾ Communication from the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions – 'Updating the 2020 New Industrial Strategy: Building a stronger Single Market for Europe's recovery', COM(2021) 350 final, 5 May 2021.

⁽⁶⁾ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions – 'A European strategy for data', COM(2020) 66 final, 19 February 2020.

⁽⁷⁾ Communication from the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions – 'Europe's moment: Repair and Prepare for the Next Generation', COM(2020) 456 final, 27 May 2020.

⁽⁸⁾ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions – 'An SME Strategy for a sustainable and digital Europe', COM(2020) 103 final, 10 March 2020.

6. The deployment of IPCEIs often requires a significant participation from public authorities whenever the market would not otherwise finance such projects. This Communication sets out the rules that apply where public financing of such projects constitutes State aid, in order for State aid for IPCEIs to be considered to be compatible with the internal market. Notably, the rules aim at ensuring that such aid will not to an undue extent adversely affect trading conditions between Member States, and at limiting the effects of such aid on trade and competition to the minimum necessary.
7. Article 107(3), point (b) of the Treaty on the Functioning of the European Union provides that aid to promote the execution of an important project of common European interest may be considered to be compatible with the internal market. Accordingly, this Communication sets out guidance on the criteria the Commission will apply for assessing State aid granted to promote the execution of IPCEIs. It first sets out its scope and then provides a list of criteria the Commission will use to assess the nature and the importance of IPCEIs for the purposes of applying Article 107(3), point (b) of the Treaty. It then explains how the Commission will assess the compatibility of the public financing of IPCEIs with State aid rules.
8. This Communication does not exclude the possibility that aid to promote the execution of IPCEIs may also be found compatible with the internal market on the basis of other Treaty provisions, in particular Article 107(3), point (c) of the Treaty. However, those Treaty provisions may not fully address the relevance, specificities and features of IPCEIs. These may require specific eligibility, compatibility and procedural rules, as set out in this Communication.

2. SCOPE

9. The Commission will apply the principles set out in this Communication to IPCEIs in all sectors of economic activity.
10. Those principles do not apply to:
 - (a) measures consisting of aid for undertakings in difficulty, as defined in the rescue and restructuring guidelines ⁽⁹⁾ or any successor guidelines, with the exception of undertakings which were not in difficulty on 31 December 2019 but became undertakings in difficulty on or after 1 January 2020 for as long as the Temporary Framework ⁽¹⁰⁾ is applied;
 - (b) measures consisting of aid for undertakings which are subject to an outstanding recovery order following a previous Commission decision declaring aid illegal and incompatible with the internal market;
 - (c) aid measures that constitute by themselves, by virtue of the conditions attached to them or of their financing method, a non-severable violation of Union law ⁽¹¹⁾, in particular:
 - (i) aid measures in accordance with which the granting of aid is subject to the obligation for the beneficiary to have its headquarters in the Member State concerned or be predominantly established in that Member State;
 - (ii) aid measures in accordance with which the granting of aid is subject to the obligation for the beneficiary to use nationally produced goods or national services;
 - (iii) aid measures restricting the possibility for the beneficiary to use the obtained research, development and innovation results in other Member States.

⁽⁹⁾ Guidelines on State aid for rescuing and restructuring non-financial undertakings in difficulty (OJ C 249, 31.7.2014, p. 1). As explained in paragraph 23 of those guidelines, given that its very existence is in danger, an undertaking in difficulty cannot be considered an appropriate vehicle for promoting other public policy objectives until such time as its viability is assured.

⁽¹⁰⁾ Communication from the Commission – Temporary framework for State aid measures to support the economy in the current COVID-19 outbreak (OJ C 91 I, 20.3.2020, p. 1), and its amendments.

⁽¹¹⁾ See for instance Case C-156/98 *Germany v Commission* [2000] ECLI:EU:C:2000:467, paragraph 78 and Case C-333/07 *Régie Networks v Rhone Alpes Bourgogne* [2008] ECLI:EU:C:2008:764, paragraphs 94 to 116.

3. ELIGIBILITY CRITERIA

11. In determining whether or not a project falls within the scope of Article 107(3), point (b) of the Treaty, the Commission will apply the criteria set out in Sections 3.1, 3.2 and 3.3 of this Communication.

3.1. Definition of a project

12. The aid proposal must concern a single project, which is clearly defined in respect of its objectives as well as the terms of its implementation, including its participants and its funding ⁽¹²⁾.
13. The Commission may also consider eligible an 'integrated project', that is to say, a group of single projects inserted in a common structure, roadmap or programme aiming at the same objective and based on a coherent systemic approach. The individual components of the integrated project may relate to separate levels of the supply chain but must be complementary and significantly add value in their contribution towards the achievement of the European objective ⁽¹³⁾.

3.2. Common European interest

3.2.1. General cumulative criteria

14. The project must represent a concrete, clear and identifiable important contribution to the Union's objectives or strategies and must have a significant impact on sustainable growth, for example by being of major importance for the European Green Deal, the Digital Strategy, the Digital Decade and European Strategy for Data, the New Industrial Strategy for Europe and its update, Next Generation EU, the European Health Union ⁽¹⁴⁾, the new European Research Area for research and innovation ⁽¹⁵⁾, the new Circular Economy Action Plan ⁽¹⁶⁾, or the Union's objective to become climate neutral by 2050, among others.
15. The project must demonstrate that it is designed to overcome important market or systemic failures, preventing the project from being carried out to the same extent or in the same manner in the absence of the aid, or societal challenges, which would not otherwise be adequately addressed or remedied.
16. Unless a smaller number is justified by the nature of the project ⁽¹⁷⁾, the project must ordinarily involve at least four Member States and its benefits must not be confined to the financing Member States, but extend to a wider part of the Union. The benefits of the project must be clearly defined in a concrete and identifiable manner ⁽¹⁸⁾.

⁽¹²⁾ In the case of research and development, when two or more projects are not clearly separable from each other and, in particular when they do not have independent probabilities of technological success, they must be considered as a single project.

⁽¹³⁾ Hereafter a single project and an integrated project are referred to as a 'project'.

⁽¹⁴⁾ Communication from the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions – 'Building a European Health Union – preparedness and resilience', COM(2020) 724 final, 11 November 2020.

⁽¹⁵⁾ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions – 'A new ERA for Research and Innovation', COM(2020) 628 final, 30 September 2020.

⁽¹⁶⁾ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions – 'A new Circular Economy Action Plan for a cleaner and more competitive Europe', COM(2020) 98 final, 11 March 2020.

⁽¹⁷⁾ A smaller number of Member States, but not less than two, may be exceptionally justified in duly motivated circumstances, for example, if the project concerns interconnected research infrastructures, TEN-E and TEN-T projects that are of fundamentally transnational importance because they are part of a physically connected cross-border network or are essential to enhance cross-border traffic management or interoperability; or the project is financed from EU funds, in relation to which legal provisions on Member States' collaboration require a lower number of participating Member States. In all cases, projects must be designed in a transparent manner in line with point 17.

⁽¹⁸⁾ The mere fact that the project is carried out by undertakings in different countries, or that a research infrastructure is subsequently used by undertakings established in different Member States, is not sufficient for a project to qualify as an IPCEI. The Court has upheld the Commission's policy of considering that a project may be described as being of common European interest for the purposes of Article 107(3), point (b) when it forms part of a transnational European programme supported jointly by a number of governments of the Member States, or arises from concerted action by a number of Member States to combat a common threat. Joined Cases C-62/87 and 72/87 *Exécutif régional wallon and SA Glaverbel v Commission* [1988] ECLI:EU:C:1988:132, paragraph 22.

17. All Member States must be given a genuine opportunity to participate in an emerging project. Notifying Member States must demonstrate that all Member States were informed of the possible emergence of a project, for example by way of contacts, alliances, meetings, or match-making events, also involving SMEs and start-ups, and given opportunity to participate.
18. The benefits of the project must not be limited to the undertakings or to the sector concerned but must be of wider relevance and application to the economy or society in the Union through positive spillover effects (such as having systemic effects on multiple levels of the value chain, or up- or downstream markets, or having alternative uses in other sectors or modal shift) which are clearly defined in a concrete and identifiable manner.
19. The project must involve important co-financing by the beneficiary ⁽¹⁹⁾.
20. Member States must provide evidence as to whether the project complies with the principle of 'do no significant harm' within the meaning of Article 17 of Regulation (EU) 2020/852, or other comparable methodologies ⁽²⁰⁾. In the overall balancing of the positive effects of the aid against its negative effects on competition and trade, the Commission will consider compliance with this principle as an important factor in its assessment. In general, investments that do significant harm to environmental objectives within the meaning of Article 17 of Regulation (EU) 2020/852 are unlikely to have sufficient positive effects to outweigh their negative effects on competition and trade. The positive effects of a project in addressing important market or systemic failures or societal challenges that could not otherwise be addressed are in all cases subject to individualised assessment.

3.2.2. General positive indicators

21. In addition to the cumulative criteria in Section 3.2.1, the Commission will take positive note of the following suggested elements by Member States:
 - (a) the design of the project involves the Commission or any legal body to which the Commission has delegated its powers, such as the European Investment Bank and the European Investment Fund;
 - (b) the selection of the project involves the Commission or any legal body to which the Commission has delegated its power, provided that that body is acting for that purpose as an implementing structure;
 - (c) the governance structure of the project involves the Commission or any legal body to which the Commission has delegated its powers, and the participating Member States;
 - (d) the project involves important collaborative interactions in terms of number of partners, involvement of organisations from different sectors, or the involvement of undertakings of different sizes and, in particular, cooperation between large enterprises and SMEs, including start-ups, in different Member States and supports the development of more disadvantaged regions;
 - (e) the project involves co-funding or co-financing from a Union fund ⁽²¹⁾ in direct, indirect or shared management;
 - (f) the project involves a significant contribution by independent private investors ⁽²²⁾;
 - (g) the project addresses a clearly identified and significant strategic dependency.

⁽¹⁹⁾ When assessing the extent of co-financing, the Commission will take into account the specificities of certain sectors and of SMEs. In exceptional, and duly motivated circumstances, the Commission may consider that aid is justified even in the absence of important co-financing by the beneficiary.

⁽²⁰⁾ Regulation (EU) 2020/852 of the European Parliament and of the Council of 18 June 2020 on the establishment of a framework to facilitate sustainable investment (OJ L 198, 22.6.2020, p. 13). For measures which are identical to measures within Recovery and Resilience Plans as approved by the Council, their compliance with the 'Do no significant harm' principle is considered fulfilled as this has already been verified.

⁽²¹⁾ Union funding centrally managed by the institutions, agencies, joint undertakings or other bodies of the EU that is not directly or indirectly under the control of the Member State does not constitute State aid. State aid can be cumulated with financing from a Union fund provided that the condition in point 35 is complied with.

⁽²²⁾ Contribution of tangible and intangible assets, as well as land, must be accounted at market price.

3.2.3. Specific criteria

22. Research & Development & Innovation (R & D&I) projects must be of a major innovative nature or constitute an important added value in terms of R & D&I in the light of the state of the art in the sector concerned ⁽²³⁾.
23. Projects comprising of first industrial deployment must allow for the development of a new product or service with high research and innovation content or the deployment of a fundamentally innovative production process. Regular upgrades without an innovative dimension of existing facilities and the development of newer versions of existing products do not qualify as first industrial deployment.
24. For the purpose of this Communication, first industrial deployment means the upscaling of pilot facilities, demonstration plants or of the first-in-kind equipment and facilities covering the steps subsequent to the pilot line including the testing phase and bringing batch production to scale, but not mass production or commercial activities ⁽²⁴⁾. The end of first industrial deployment is determined taking into account, inter alia, the relevant R & D&I-related performance indicators pointing at the ability to start mass production. First industrial deployment activities can be financed with State aid as long as the first industrial deployment follows on from an R & D&I activity and itself contains an important R & D&I component which constitutes an integral and necessary element for the successful implementation of the project. The first industrial deployment does not need to be carried out by the same entity that carried out the R & D&I activity, as long as that entity acquires the rights to use the results from the previous R & D&I activity, and the R & D&I activity and the first industrial deployment are both described in the project.
25. Infrastructure projects in the environmental, energy, transport, health or digital sectors, to the extent that they are not covered by points 22 and 23, must be of great importance for the environmental, climate, energy (including security of energy supply), transport, health, industrial or digital strategies of the Union or contribute significantly to the internal market, including, but not limited to those specific sectors, and can be supported for the period until becoming fully operational following construction.

3.3. Importance of the project

26. In order to qualify as an IPCEI, a project must be important quantitatively or qualitatively. It should be particularly important in size or scope or imply a very considerable level of technological or financial risk, or both. To determine the importance of a project, the Commission will take into account the criteria set out in Section 3.2.

4. COMPATIBILITY CRITERIA

27. When assessing the compatibility with the internal market of aid to promote the execution of an IPCEI on the basis of Article 107(3), point (b) of the Treaty, the Commission will take into account the criteria ⁽²⁵⁾ set out in Sections 4.1, 4.2 and 4.3 of this Communication.
28. The Commission will carry out, in the meaning of Section 4.2., a balancing test to assess whether the expected positive effects of the aid outweigh the possible negative effects.

⁽²³⁾ This might include, when relevant, progressively advancing towards the state of the art, to the extent that a participating project clearly and credibly aims at and describes how it will go beyond such state of the art.

⁽²⁴⁾ Limited sales, when necessary in the specific sector, related to the testing phase, including sample or feedback or certification sales, are excluded from the notion of "commercial activities".

⁽²⁵⁾ According to the Court of Justice, the Commission enjoys discretion as regards the assessment of the compatibility of IPCEIs. Joined Cases C-62/87 and 72/87 *Exécutif régional wallon and SA Glaverbel v Commission* [1988] ECLI:EU:C:1988:132, paragraph 21.

29. Taking into account the nature of the project, the Commission may consider that the presence of important market or systemic failures or societal challenges, as well as the contribution to a common European interest, can be presumed for the individual components of an integrated project where the project fulfils the eligibility criteria set out in Section 3.

4.1. Necessity and proportionality of the aid

30. The aid must not subsidise the costs of a project that an undertaking would anyhow incur and must not compensate for the normal business risk of an economic activity. Without the aid, the realisation of the project should be impossible, or should only be possible on a smaller scale, with a more narrow scope, or not with sufficient speed, or in a different manner that would significantly restrict its expected benefits ⁽²⁶⁾. Aid will only be considered proportionate if the same result could not be achieved with less aid.
31. The Member States must provide the Commission with adequate information concerning the aided project as well as a comprehensive description of the counterfactual scenario, which corresponds to the situation where no aid is awarded by any Member State ⁽²⁷⁾. The counterfactual scenario may consist in the absence of an alternative project, where evidence supports that this is the most likely counterfactual, or in an alternative project considered by the beneficiaries in their internal decision-making, and may relate to an alternative project that is wholly or partly carried out outside the Union. To demonstrate the credibility of the counterfactual scenario presented by the beneficiaries, the notifying Member States are invited to provide relevant internal documents of the beneficiaries, such as board presentations, analyses, reports and studies ⁽²⁸⁾.
32. In the absence of an alternative project, the Commission will verify that the aid amount does not exceed the minimum necessary for the aided project to be sufficiently profitable, for example by making it possible to achieve an internal rate of return corresponding to the sector or firm specific benchmark or hurdle rate. Normal rates of return required by the beneficiaries in other investment projects of a similar kind, their cost of capital as a whole or returns commonly observed in the industry concerned may also be used for this purpose. All relevant expected costs and benefits over the lifetime of the project must be considered.
33. The maximum permitted aid level will be determined with regard to the identified funding gap in relation to the eligible costs. If justified by the funding gap analysis, the aid intensity could cover all of the eligible costs. The funding gap refers to the difference between the positive and negative cash flows over the lifetime of the investment, discounted to their current value on the basis of an appropriate discount factor reflecting the rate of return necessary for the beneficiary to carry out the project, notably in view of the risks involved. The eligible costs are set out in the Annex ⁽²⁹⁾.
34. Where it is shown, for example by means of internal company documents, that the aid beneficiary faces a clear choice between carrying out either an aided project or an alternative one without aid, the Commission will compare the expected net present values of the investment in the aided project and the counterfactual project, account being taken of the probabilities of the different business scenarios occurring.

⁽²⁶⁾ The aid application must precede the starts of the works, which is either the start of construction works on the investment or the first firm commitment to order equipment or other commitment that makes the investment irreversible, whichever is the first in time. Buying of land and preparatory works such as obtaining permits and conducting preliminary feasibility studies are not considered as start of works.

⁽²⁷⁾ For projects by SMEs, the counterfactual scenario may consist in the absence of an alternative project as referred to in point 32.

⁽²⁸⁾ Where the information provided is covered by the obligation of professional secrecy, it is to be handled in accordance with Article 30 of Council Regulation (EU) 2015/1589 of 13 July 2015 laying down detailed rules for the application of Article 108 of the Treaty on the Functioning of the European Union (OJ L 248, 24.9.2015, p. 9).

⁽²⁹⁾ In case of an integrated project, the eligible costs must be detailed at the level of each individual project.

35. State aid to promote the execution of IPCEIs may be cumulated with Union funding or other State aid, provided that the total amount of public funding granted in relation to the same eligible costs does not exceed the most favourable funding rate laid down in the applicable rules of Union law.
36. As an additional safeguard to ensure that the State aid remains proportionate and limited to the necessary, the Commission may request the notifying Member State to implement a claw-back mechanism ⁽³⁰⁾. The claw-back mechanism should ensure a balanced distribution of additional gains when the project is more profitable than forecasted in the notified funding gap analysis and should apply only to those investments which reach, based on the *ex post* cash flow results and of State aid disbursements, a rate of return exceeding the beneficiaries' cost of capital. Any such claw-back mechanism should be clearly defined in advance in order to provide financial predictability for beneficiaries at the moment of decision-making on participation in the project. Such mechanism should be designed in such a way as to maintain strong incentives for beneficiaries to maximise their investment and project performance.
37. In its analysis, the Commission will take into consideration the following elements:
- (a) specification of intended change: the Member State must clearly specify the change in behaviour which is expected to result from the State aid, that is to say whether a new project will be triggered, or the size, scope, speed or cross-border dimension of a project will be enhanced. The change of behaviour has to be identified by comparing the expected outcome and level of intended activity with and without aid. The difference between the two scenarios shows the impact of the aid measure and its incentive effect;
 - (b) level of profitability: where a project would not in itself be sufficiently profitable for a private undertaking to undertake, but would generate important benefits for society, it is more likely that the aid has an incentive effect.
38. In order to address actual or potential direct or indirect distortions of international trade, the Commission may take account of the fact that, directly or indirectly, competitors located outside the Union have received, in the last three years, or are going to receive, aid of an equivalent intensity for similar projects. However, where distortions of international trade are likely to occur after more than three years, given the particular nature of the sector in question, the reference period may be extended accordingly. If at all possible, the Member State concerned will provide the Commission with sufficient information to enable it to assess the situation, in particular the need to take account of the competitive advantage enjoyed by a third country competitor. If the Commission does not have evidence concerning the awarded or proposed aid, it may also base its decision on circumstantial evidence. The Commission may also take appropriate action to address competition distortions arising from subsidies received outside the Union.
39. When gathering evidence, the Commission may use its investigative powers ⁽³¹⁾.
40. The choice of the aid instrument must be made with a view to the market failure or other important systemic failures which it seeks to address. For instance, where the underlying problem is lack of access to finance, Member States should normally resort to aid in the form of liquidity support, such as a loan or guarantee ⁽³²⁾. Where it is also necessary to provide the undertaking with a certain degree of risk-sharing, a repayable advance should normally be the aid instrument of choice. Repayable aid instruments will generally be considered as a positive indicator.
41. The selection of beneficiaries through a competitive, transparent and non-discriminatory procedure will be considered as a positive indicator.

⁽³⁰⁾ For projects by SMEs, no claw-back mechanism needs to be implemented unless in exceptional circumstances, in particular in consideration to the amounts of aid notified for such projects.

⁽³¹⁾ See Article 25 of Council Regulation (EU) 2015/1589 of 13 July 2015 laying down detailed rules for the application of Article 108 of the Treaty on the Functioning of the European Union (OJ L 248, 24.9.2015, p. 9).

⁽³²⁾ Aid in the form of guarantees must be limited in time, and aid in the form of loans must be subject to repayment periods.

4.2. Prevention of undue distortions of competition and balancing test

42. The Member States must provide evidence that the proposed aid measure constitutes the appropriate policy instrument to address the objective of the project. An aid measure will not be considered appropriate if other less distortive policy instruments or other less distortive types of aid instruments make it possible to achieve the same result.
43. For the aid to be compatible, the negative effects of the aid measure in terms of distortions of competition and impact on trade between Member States must be limited and outweighed by the positive effects in terms of contribution to the objective of common European interest.
44. In assessing the negative effects of the aid measure, the Commission will focus its analysis on the foreseeable impact the aid may have on competition between undertakings in the product markets concerned, including up- or downstream markets, and on the risk of overcapacity.
45. The Commission will assess the risk of market foreclosure and dominance. Projects involving the construction of an infrastructure ⁽³³⁾ must comply with principles of open and non-discriminatory access to the infrastructure and non-discriminatory pricing and network operation, including those laid down in Union law ⁽³⁴⁾.
46. The Commission will assess the potential negative effects on trade including the risk of a subsidy race between Member States, which may arise in particular with respect to the choice of a location.
47. In its assessment of the potential negative effects on trade, the Commission will consider whether aid is conditional on the relocation of a production activity or any other activity of the beneficiary from another Contracting Party to the EEA Agreement to the territory of the Member State granting the aid. Such a condition would appear to be harmful to the internal market, irrespective of the number of job losses actually incurred in the initial establishment of the beneficiary in the EEA, and unlikely to be compensated by any positive effects.

4.3. Transparency

48. Member States must ensure that the following information is published in the Commission's transparency award module or on a comprehensive State aid website, at national or regional level:
 - (a) the full text of the individual aid granting decision and its implementing provisions, or a link to it;
 - (b) the identity of the granting authority or authorities;
 - (c) the name and the identifier of each beneficiary, except business secrets and other confidential information in duly justified cases and subject to the Commission's agreement in accordance with Commission communication on professional secrecy in State aid decisions ⁽³⁵⁾;
 - (d) the aid instrument ⁽³⁶⁾, the aid element and, where different, the nominal amount of aid, expressed as the full amount in national currency granted to each beneficiary;
 - (e) the date of granting and the date of publication;
 - (f) the type of beneficiary (SME/large company/start-up);
 - (g) the region in which the beneficiary is located (at NUTS level II or below);

⁽³³⁾ For avoidance of doubt, pilot lines are not considered as infrastructures.

⁽³⁴⁾ Where the project involves an energy infrastructure, it shall be subject to the tariff and access regulation and to the unbundling requirements where required by internal market legislation.

⁽³⁵⁾ C(2003) 4582 (OJ C 297, 9.12.2003, p. 6).

⁽³⁶⁾ Grant/Interest rate subsidy; Loan/Repayable advances/Reimbursable grant; Guarantee; Tax advantage or tax exemption; Risk finance; Other. If the aid is granted through multiple aid instruments, the aid amount must be provided by instrument.

- (h) the principal economic sector in which the beneficiary has its activities (at NACE group level);
- (i) the objective of the aid.

49. The requirement to publish information applies with respect to individual aid awards exceeding EUR 100 000. Such information must be published after the decision to grant the aid has been taken, must be kept for at least 10 years and must be available to the general public without restrictions ⁽³⁷⁾.

5. NOTIFICATION, REPORTING AND APPLICATION

5.1. Notification obligation

50. According to Article 108(3) of the Treaty, Member States must notify the Commission in advance of any plans to grant or alter State aid, including aid for an IPCEI.
51. Member States involved in the same IPCEI are invited, whenever possible, to submit a common notification to the Commission including a joint text describing the IPCEI and demonstrating its eligibility.

5.2. Ex post evaluation and reporting

52. The execution of the project must be subject to regular reporting. Where appropriate, the Commission may ask for an *ex post* evaluation to be conducted.

5.3. Application

53. The Commission will apply the principles set out in this Communication from 1 January 2022.
54. It will apply those principles to all notified aid projects in respect of which it is called upon to take a decision on or after 1 January 2022, even where the projects were notified prior to that date.
55. In line with the Notice on the determination of the applicable rules for the assessment of unlawful State aid ⁽³⁸⁾, in the case of non-notified aid, the Commission will apply the principles set out in this Communication if the aid was granted on or after 1 January 2022, and the rules in force at the time when the aid was granted in all other cases.

⁽³⁷⁾ This information must be published within 6 months from the date of granting. In case of unlawful aid, Member States will be required to ensure the publication of this information *ex post* within 6 months from the date of the Commission decision. The information must be available in a format which allows data to be searched, extracted, and easily published on the internet, for instance in CSV or XML format.

⁽³⁸⁾ Commission notice on the determination of the applicable rules for the assessment of unlawful State aid (OJ C 119, 22.5.2002, p. 22).

ANNEX

ELIGIBLE COSTS

- (a) Feasibility studies, including preparatory technical studies, and the costs of obtaining the permissions necessary for the realisation of the project.
 - (b) Costs of instruments and equipment (including installations and transport vehicles) to the extent and for the period used for the project. If such instruments and equipment are not used for their full life for the project, only the depreciation costs corresponding to the life of the project, as calculated on the basis of good accounting practice, are considered as eligible.
 - (c) Costs of the acquisition (or construction) of buildings, infrastructure and land, to the extent and for the period used for the project. Where these costs are determined with regard to the commercial transfer value or the actually incurred capital costs, as opposed to the depreciation costs, the residual value of the land, building or infrastructure should be deducted from the funding gap, either *ex ante* or *ex post*.
 - (d) Costs of other materials, supplies and similar products necessary for the project.
 - (e) Costs for obtaining, validating and defending patents and other intangible assets. Costs of contractual research, knowledge and patents bought or licensed from outside sources at arm's length conditions, as well as costs of consultancy and equivalent services used exclusively for the project.
 - (f) Personnel and administrative costs (including overheads) directly incurred for the R & D&I activities, including those R & D&I activities related to first industrial deployment, or in the case of an infrastructure project, incurred during the construction of the infrastructure.
 - (g) In case of aid to a project of first industrial deployment, the capital and operating expenditures to the extent and for the period used for the project, as long as the industrial deployment follows on from an R & D&I activity and itself contains an important R & D&I component which constitutes an integral and necessary element for the successful implementation of the project. The operating expenditures must be related to such component of the project.
 - (h) Other costs may be accepted if justified, and where they are inextricably linked to the realisation of the project, to the exclusion of operating costs not covered by point (g).
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