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Hungary-Romania
Cross-Border Co-operation
Programme 2007-2013

Analysis Report

**State-aid analysis in the
Hungarian - Romanian Cross-
border Cooperation
Programme 2007 - 2013 and
proposals for the period 2014
2020**

**BEST SMART CONSULTING
SRL**



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ABBREVIATIONS	2
Executive Summary	3
Introduction	4
1. Objectives of analysis and expected results	5
2. Object of analysis	7
3. Geographical area covered	11
4. Methodological approach	12
5. The Analysis for the current programming period (2007-2013)	16
6. The Analysis for the 2014-2020 programming period	20
7. Conclusions and recommendations	38
8. Annexes	47

ABBREVIATIONS

BSC: Best Smart Consulting SRL

CBC: Cross-Border Co-operation Programme

EC: European Commission

ECJ: European Court of Justice

EGC: European General Court

ETC: European Territorial Cooperation

GBER: Regulation (CE) no. 800/2008 declaring certain categories of aid compatible with the common market in application of Articles 87 and 88 of the Treaty (General block exemption Regulation/the future general exemption regulation for aid categories that is to be approved by the EC until July 2014.

INS: National Institute of Statistics

MDRAP: Ministry of Regional Development and Public Administration

HU – RO Programme: Hungary – Romanian Cross-Border Cooperation Programme 2007 – 2013

SGEI: Service of General Economic Interest

TFEU: Treaty on the Functioning of the European Union

EU: European Union

Executive Summary

The Report on State-aid analysis in the Hungarian-Romanian Cross-border Cooperation Programme 2007-2013 and proposals for the period 2014-2020 was drafted in March - June 2014 in the contract no. 346 and 1331/30.12.2013 between Ministry of Regional Development and Public Administration (MDRAP) and Best Smart Consulting Ltd.

The Analysis Report was elaborated based on the data collected by the consultants from the documents mostly made available by MDRAP and from interviews carried in the contact period. The Report was drafted in accordance with the strategy and methodology in the Inception Report and accurately addressing the requests in the Terms of Reference (ToR).

Following our analysis we found that the 5-step methodology currently used for the assessment of the state-aid presence observes the criteria provided for in Article 107(1) of the TFEU and that no manifest errors have occurred.

With regard to the 2014-2020 programming period we are recommending improvements of the State aid detection check-list, as well as the inclusion of a State aid section in the Applicants' Handbook and the introduction of a check-list for the first level control.

Following the analysis of the Strategic Projects and Thematic Objectives envisaged for the CBC Ro-Hu 2014-2020 we found that, subject to several targeted conditions, no State aid is involved.

Introduction

The Report on State-aid analysis in the Hungarian-Romanian Cross-border Cooperation Programme 2007-2013 and proposals for the period 2014-2020 was drafted in March - June 2014 in the contract no. 346 and 1331/30.12.2013 between Ministry of Regional Development and Public Administration (MDRAP) and Best Smart Consulting Ltd.

The Analysis Report was elaborated based on the data collected by the consultants from the documents mostly made available by MDRAP and from interviews carried in the contact period. The Report was drafted in accordance with the strategy and methodology in the Inception Report and accurately addressing the requests in the Terms of Reference (ToR).

1. Objectives of analysis and expected results

In the Terms of Reference (ToR)¹, the Contracting Authority, namely the Ministry of Regional Development and Public Administration, as National Authority for the Hungary–Romanian Cross Border Cooperation Programme 2007-2013, requested the performance of a state-aid impact analysis within the Hungary–Romanian Cross Border Cooperation Programme 2007-2013 and within the one afferent to the programming period 2014-2020.

Consequently, the object of the consultancy was focused on the performance of an analysis regarding possible state-aid measures within the Hungary–Romanian Cross Border Cooperation Programme 2007-2013 and the assessment of its impact as well as state-aid recommendations for the future programming period 2014-2020.

Regarding the future programming period 2014 – 2020 the requirements of the Contracting Authority were the followings:

- Performing an analysis of State-aid potential incidence based on the thematic objectives and priority investment axes as they are provided in the new European Territorial Cooperation (ETC) draft Regulation,
- In correlation to the above mentioned activity, conducting an analysis in order to identify whether amendments are needed to the Applicant Guide so that to exclude the activities that cannot be financed through State-aid,
- Recommendations for the design of the next programme from the viewpoint of State-aid incidence, taken into consideration the findings and conclusions from these two above mentioned activities. Under this section, we will include our opinion on a possible umbrella block exemption schema for ETC programmes, general remarks on the use of Altmark² criteria for ETC programmes and assimilation to Services of General Economic Interest).

¹http://www.fonduriue.ro/res/filepicker_users/cd25a597fd62/Informative/anunturi/04.10.2013/TermenideReferinta_AjutordeStat_PCTUngaria_Romania.pdf

² Judgement of the ECJ of 24 July 2003 in the Altmark Trans case (C-280/00)

Regarding the current state-aid approach the requirements were the followings:

- The analysis of the current 5-step methodology used internally for the assessment of the state-aid potential;

- Conducting an analysis aimed at highlighting the concept of local impact (also, if there is an impact on competition) within the eligible border regions (including an analysis on possible derogation of ETC programmes from State aid). The “local impact” concept will be analysed taking into consideration the current activities developed within the projects funded by the programme.

2. Object of analysis

2.1 Brief description of the Hungary – Romanian Cross Border Cooperation Programme 2007-2013

The European Territorial Cooperation Objective replaced the INTERREG Community Initiative within the period 2007 – 2013, thus strengthening the importance of cross-border cooperation promotion, as integral part of the EU Cohesion Policy.

In compliance with article no. 3 of the COUNCIL REGULATION (EC) no. 1083/2006 (which formulates general provisions for the European Fund for Regional Development, European Social Fund and the Cohesion Fund), within the European Territorial Cooperation Objective, FEDR assistance is ensured for interventions related to three main cooperation spheres:

- Development of cross-border economic, social and environmental activities through joint strategies for a sustainable territorial development;
- Strengthening of the cross-border cooperation through actions related to the Community priorities and the promotion of an integrated territorial development;
- Strengthening of the regional policy efficiency by promoting the interregional cooperation through experience exchange at the corresponding territorial level.

The general strategic goal³ of the Cooperation Programme is to bring the people, communities and economic actors of the border area closer to each other in order to facilitate the joint development of the co-operation area, building upon the key strengths of the border region.

The programme ensures a wide range of opportunities to the potential beneficiaries, by means of two priority axes and various intervention domains.

³ Source: http://www.huro-cbc.eu/ro/obiective_si_prioritati

The projects initiated within various priority axes shall contribute to the successful fulfilment of the general goal of the programme.

Priority 1 – Improve the key conditions of joint, sustainable development of the cooperation area

The funds allocated to this priority axis shall be used for the **improvement of the basic conditions of the joint development in the cooperation area**. It includes both the development of the transport and communication infrastructure and the public transportation facilities in the region, means which play an important role in the encouragement of cross-border transportation of people and goods and of an adequate information flow. Furthermore, the priority axis also includes interventions meant to prevent and protect the relatively clean natural environment, which is a prerequisite for any type of human activity.

Major interventions domains:

1.1. Improvement of cross-border transportation facilities

1.1.1 Road development

1.1.2 Railway development

1.1.3 Preparation of studies, plans/projects

1.2. Improvement of cross-border communications

1.2.1 Broadband cross-border infrastructure development

1.2.2 Community access programs

1.2.3 Cross-border newscast

1.2.4 Elaboration of studies

1.3. Environmental protection

1.3.1 Protection of nature and natural values

1.3.2 Water management

1.3.3 Waste management

1.3.4 Preparation of studies and plans

Priority 2 - Strengthen social and economic cohesion of the border area

The general objective of the priority axis is to intensify the economic competitiveness of the region through the development of the business environment and the enhancement of the human resources quality.

Major intervention domains:

2.1. Support of business cross-border cooperation

2.1.1 Development of business infrastructure

2.1.2 Business cooperation

2.1.3 Tourism development

2.2. Promotion of the C+D and innovation cooperation

2.2.1 Development of joint research infrastructure

2.2.2 Performance of joint research projects

2.2.3 Cooperation between various sectors engaged in C+D

2.2.4 Preparation of studies and plans

2.3. Cooperation in the labour and education domain – joint development of skills and knowledge

2.3.1 Cooperation between education institutions

2.3.2 Cooperation in the labour market

2.4 Protection of health and prevention of joint risks

2.4.1 Development of joint health and risk prevention infrastructure

2.4.2 Joint institutional development

2.5 Cooperation between communities

2.5.1 Cooperation between communities

2.2 Perspectives for the next programming period 2014-2020

The analysis regarding the future programming period considered the 11 Thematic Objectives presented in the European Regulations for the programming period 2014-2020. The analysis focused on the following 9 Thematic Objectives indicated by the client:

5/b Promoting investment to address specific risks, ensuring disaster resilience and developing disaster management systems

6/b Investing in the water sector to meet the requirements of the Union's environmental acquis and to address needs, identified by the MS, for investment that goes beyond those requirements

6/c Conserving, protecting, promoting and developing natural and cultural heritage

7/b Enhancing regional mobility by connecting secondary and tertiary nodes to TEN-T infrastructure, including multimodal nodes

7/c Developing and improving environment-friendly (including low noise), and low-carbon transport systems including inland waterways and maritime transport, ports, multimodal links and airport infrastructure, in order to promote sustainable regional and local mobility

8/b Supporting employment friendly growth through the development of endogenous potential as part of a territorial strategy for specific areas, including the conversion of declining industrial regions and enhancement of accessibility to and development of specific natural and cultural resources

9/a Investing in health and social infrastructure which contributes to national, regional and local development, reducing inequalities in terms of health status, promoting social inclusion through improved access to social, cultural and recreational services and transition from institutional to community-based services

9/b Providing support for physical economic and social regeneration of deprived urban and rural areas

11/a Enhancing institutional capacity of public authorities and stakeholders and efficient public administration by promoting legal and administrative cooperation and cooperation between citizens and institutions.

3. Geographical area covered

The current Hungary – Romanian Cross Border Cooperation Programme 2007 – 2013 is a programme afferent to the European Territorial Cooperation Objective – programme implemented on the border area between Hungary and Romania (internal EU border), incorporating 8 NUTS III regions, 4 from Romania and 4 from Hungary.

The eligible border area covers the South-Eastern part of Hungary and the North-Western part of Romania.

The overall strategic goal of this cooperation programme is to bring the people, communities and economic actors of the border area closer to each other in order to facilitate the joint development of the co-operation area, building upon the key strengths of the border region.



The State aid impact analysis subject to the consultancy project shall be geographically limited to the level of the counties located in Romania, namely: **Satu Mare, Bihor, Arad and Timiș.**

4. Methodological approach

The methodology of the analysis covered two components according to the programming period.

4.1 The component of analysis regarding the future programming period (2014 -2020)

This component addressed the following questions and results:

Analysis questions	Outputs	
	Findings	Conclusions and recommendations
1. How should State aid be approached in drafting the Programme and the implementation documents, such as Guidelines for calls for proposals (grids, co-financing rates, etc), implementation manual, taking into consideration the thematic objectives and the priority axis, based on the new ETC regulation proposal?	Conducting an analysis of State aid potential incidence based on the thematic objectives and priority investment axes as they are provided in the new ETC draft Regulation	Recommendations for the design of the next programme from the viewpoint of State aid incidence. The recommendations will include: - opinion on a possible umbrella block exemption scheme for ETC programmes, - general remarks on the use of Altmark criteria for ETC programmes and assimilation to Services of General Economic Interest;
2. How should State aid be analysed in drafting the applications submitted for financing?	Conducting an analysis in order to identify whether amendments are needed to the Applicant Guide so that to exclude the activities that cannot be financed through state-aid).	- recommendations regarding the analysis and assesment of applications from a State aid perspective, in correlation with the Applicants' Guide provisions;
3. In correlatin with the previous questions, what should be the approach when drafting and signing the Grant contracts (for exampe requirements to beneficiaries)?	Conducting an analysis in order to identify whether amendments are needed to the Applicant Guide so that to exclude the activities that cannot be financed through state-aid	- Checklist referring to control documents to be used both by the authorities and beneficiaries in order to observe the State aid rules, where applicable.
4. How should State aid be checked by the controller	Conducting an analysis in order to identify whether	

(first level control and following controls)?	amendments are needed to the Applicant Guide so that to exclude the activities that cannot be financed through state-aid	
5. How should State aid be monitorized after the end of the projects?	Conducting an analysis in order to identify whether amendments are needed to the Applicant Guide so that to exclude the activities that cannot be financed through state-aid	
6. How should State aid be avoided within ETC Programmes/small sized projects?	Conducting an analysis of State aid potential incidence based on the thematic objectives and priority investment axes as they are provided in the new ETC draft Regulation	

4.2 The component of analysis regarding the current programming period (2007 -2013)

This component addressed the following questions and results:

Analysis questions	Outputs
1. Is it feasible to use the local impact approach with regard to the activities financed through CTE projects within this Programme?	Conducting an analysis aimed at highlighting the concept of local impact (also, if there is an impact on competition) within the eligible border regions (including an analysis on possible derogation of ETC programmes from State aid)
2. Should you take into consideration the eligible beneficiaries, for the CTE Programmes, on the basis of lawmaking initiatives, is it possible to make, from a State aid perspective, a connection between the categories of eligible beneficiaries and the categories of activities conducted by them?	The analysis of the current 5-step methodology used internally for the assessment of the state-aid potential

For both components the methodology of analysis included secondary data collection (based on desk review) and primary data (based on interviews and consultations with MDRAP representatives).

With regard to the *desk review of documents*, the following relevant documents will be envisaged:

- The Programme draft for the period 2014 – 2020;
- The documents available on the website www.huro-cbc.eu;
- The Applicant’s Guide for the current programming period and its annexes;
- The *Draft Communication on State aid to promote important projects of common European interest*;
- Communication from the Commission on the application of the European Union State aid rules to compensation granted for the provision of services of general economic interest (OJ C008/11.01.2012);
- EU Guidelines for the application of State aid rules in relation to the rapid deployment of broadband networks (OJ C25/26.01.2013);
- Regulations and communications on State aid to the transport sector;
- The Draft EC *Notice on the State-aid notion*;
- EC Regulation 1407/2013 on the minimis aid;
- EC Regulation 800/2008 – GBER;
- Similar Programmes that comprised State aid;
- TECHNICAL MEETING WITHIN THE COORDINATION COMMITTEE OF THE FUNDS (COCOF) “State aid issues in infrastructure cases” – 29 January 2013, with a focus on the analytical grids;
- EGC and ECJ case law on the principles of Prudent Market Operator (Prudent Private Investor, Prudent Private Creditor, etc);

- EC cases on purely local interventions⁴;
- Evaluation and strategic analysis reports of Cross-Border Programme;
- Projects summaries made available by the client (a sample of 2+8 projects from the current programming period and 12 strategic projects from the future programming period);
- State-Aid in Scotland, 2012;
- State-Aid in UK – The Basics, 2013;
- *State aid in ETC programmes: Why is an exemption needed specifically for ETC?* – INTERACT, May 2012;
- IPA ADRIATIC CROSSBORDER COOPERATION PROGRAMME 2007-2013 - STATE AID RULES.

Primary data collection included two interviews. The first interview was carried with Ms. Roxana Racoviță (programme manager MRDPA) and was focused on the gathering more data for an in-depth understanding of the content of the thematic objectives of CBC RO-HU 2014-2020. The second interview was carried with Mrs. Maria Alexandru (Director of State Aid Department in the Competition Council) and was focused on gaining an in-depth understanding on the potential incidence of State Aid for the strategic projects and thematic objectives in the CBC RO-HU 2014 – 2020. Also, the data collection included three consultation meetings with the representatives of MDRAP with the purpose of gathering updated relevant data on the State-aid incidence regarding both the current and the future programming periods.

⁴ E.g. EC decisions in the cases N 258/2000 *Leisure Pool Dorsten*, N 630/2003 *Local Museums Sardinia*, N 543/2001 *Ireland – Capital allowances for hospitals*, N 257/2007 *Subsidies for theatre productions in the Basque country*

5. The Analysis for the current programming period (2007-2013)

5.1 The analysis regarding the concept of local impact within the eligible border regions

Most of the CBC Programmes aim at avoiding the State aid issues. This approach results both from the Baltic Sea 2007-2013 CBC and the Central Europe 2007-2013 CBC and is a conclusion of the Interact analysis "*State aid in ETC programmes: Why is an exemption needed specifically for ETC?*".

The reasons behind this approach are:

- The low intensities allowed for the State aid funding;
- The bureaucratic procedure before the European Commission. Given that CBC's are under strict deadlines, especially the length of the procedure may cause serious problems for the Managing Authorities

The most used methods for the purpose of avoiding State aid are:

1. Not considering the companies as eligible beneficiaries or partners; even if this approach does not offer a full legal certainty over the lack of State aid issues, it seems to be regarded as an important step in order to avoid State aid implications („best proxy”);

2. The use of check-lists aimed at detecting State aid and counselling to applicants in order to remove any suspicion of State aid.

Such a check list that could be used for the CBC 2014-2020 Programme has been drafted and is presented in Annex no. 1 of the Report. If at least one of the 5 criteria that defines the State aid is not fulfilled, then the measure or the project under scrutiny does not involve State aid.

3. Where there is a risk of State aid, the use of the „*de minimis*” aid.

The „*de minimis*” aid is defined as the aid from the State not exceeding EUR 200.000 (EUR 100.000 for the companies providing transport of goods) during a period of 3 consecutive years). On the basis of the provisions of Regulation 994/1998 the EC does not consider such aid as affecting trade between Member States, and thus it does not represent State aid.

However, the Member State granting "*de minimis*" aid has an obligation to monitor it, both in order to avoid the situation that an undertaking receives several such aid that cumulatively overpass the threshold and in order to be

able to answer the possible EC's requests for information regarding the „*de minimis*” aid granted. For the monitoring purpose, the Member States can establish a „*de minimis*” Register which would allow for the verification of the „*de minimis*” aid granted to an undertaking, irrespective of the granting authority during the current and two previous fiscal years.

At present, such register has not been established in Romania. Therefore, the only solution to avoid granting aid labeled as „*de minimis*” to undertakings that already have or would exceed the threshold is the request of a “Statement on own responsibility” regarding the “*de minimis*” aid received.

Furthermore, each time the EC requests information on “*de minimis*” aid granted by the Member State, such information has to be provided within 20 days.

With regard to the internal regulations, the article 6 of the *Government Emergency Ordinance 117/2006 regarding the national procedures in the State aid field* provides for an obligation to inform the Romanian Competition Council with regard to any “*de minimis*” scheme within 15 days from issuing.

Examples of “*de minimis*” aid schemes used by other Programmes co-financed by the European Union through Structural Instruments are:

- The “*de minimis*” scheme approved by the Order 3188/2011 aimed at the development of business support structures – Competitiveness poles (Key Area of Intervention 1.3 Sustainable entrepreneurship development of the SOP Increase of Economic Competitiveness).

For that scheme, the intensity of the grant was of 100%, and the eligible costs were related to consultancy services, management of the competitiveness poles and participation of SME's to fairs and exhibitions.

- The “*de minimis*” scheme aimed at financing projects aiming at improving the health and safety conditions for employees, approved by the Order 310/2009, part of the SOP Human Resources Development 2007-2013. Within that scheme, activities consisting in training, acquisition of equipment, consultancy, project management were financed with a maximum intensity of the grant of 100%.

- The “*de minimis*” scheme approved by the Order no 387/2008 regarding the support for innovative Start-ups and Spin-offs, operation 2.3.1 of the SOP Increase of Economic Competitiveness.

For this scheme, projects implemented by newly established undertakings that put into practice an innovative idea were financed. The eligible costs covered acquisition of equipment, costs related to research (salaries, supplies, etc), administrative costs. The maximum intensity of the Grant could not exceed 90% of the eligible costs of the project.

4. Another solution is the financing of objectives of merely local interest. Such financing does not affect trade between Member States. On a first view the trans-national nature of the Programme seem to exclude such an argument. However, the part of the projects analysed during this project show a clear local interest nature.

In order to assert a local nature of a project, the following characteristics have to be fulfilled⁵:

(a) the aid does not lead to demand or investments being attracted to the region concerned and does not create obstacles to the establishment of undertakings from other Member States;

(b) the goods or services produced by the beneficiary are purely local or have a geographically limited attraction zone;

(c) there is at most a marginal effect on the markets and on consumers in neighbouring Member States;

Some examples are:

- swimming pools and other leisure facilities intended predominantly for a local catchment area;
- museums or other cultural infrastructure unlikely to attract visitors from other Member States;
- hospitals and other health care facilities aimed at a local population;
- news media and/or cultural products which, for linguistic and geographical reasons, have a locally restricted audience
- a conference centre, where the location and the potential effect of the aid on prices is unlikely to divert users from other centres in other Member States;

concerning the financing of cable ways (and in particular ski lifts), the EC practice clarified that the following factors should typically be taken into

⁵ Proiect de comunicare a Comisiei privind noțiunea de ajutor de stat în temeiul articolului 107 alineatul (1) din TFUE

account to draw a distinction between installations liable to have a local catchment area and others:

- a) the location of the installation (e.g. within cities or linking villages);
- b) operating time;
- c) predominantly local users (proportion of daily as opposed to weekly passes);
- d) the total number and capacity of installations relative to the number of resident users;
- e) other tourism-related facilities in the area.

We consider that such approach as those described above are caused by the *inherent conflict between the objectives of State aid control (which limits distortion of the common market) and CBC's (which works with at least two member states in subsidising projects of common interest)*⁶, results in creating difficulties, if not making impossible, the reach of the objectives of the Programmes by limiting the instruments at it's use

Such actions result in:

- either forbidding undertakings to apply for financing within the Programmes, either limiting their financing to EUR 200.000. Such approach significantly limits the possibilities to support the economic development of the areas of intervention;

- support for merely local interest projects may not necessarily be in line with the cross-border requirements of the Programme, as the Programme should be supposed to attract customers from other Member States to the objectives it finance

We believe a step forward to solve those issues it is the *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*⁷. Even if it does not provide for a State aid exemption (the correct solution, at least in our opinion), it offers a favourable framework for the authorization for such Programmes. Should it be the case for State aid notification, we believe this Communication should be used to cover the entire CBC Ro-Hu 2014-2020 (especially because it does not provide for a threshold regarding the intensity).

⁶ *State aid in ETC programmes: Why is an exemption needed specifically for ETC?* – INTERACT, May 2012

⁷ http://ec.europa.eu/competition/state_aid/modernisation/ipcei_communication_en.pdf

5.2 The analysis of the current 5-step methodology used internally for the assessment of the state-aid presence

The detailed analysis of the current 5-step methodology used within the 2007-2013 CBC for the assessment of the state-aid presence is detailed in Annex 2.

A sample of projects has been selected in order to carry out the analysis. The sample of 8 projects financed under the 2007-2013 has been selected based on the methodology shown in Annex no. 3. The 8 projects have been examined from a State aid perspective. Along with that sample, two analyses used for projects from another CBC have been scrutinized.

As a result of the analysis we found no manifest assessment error with regard to State aid presence. We consider that in just two cases additional conditions should have been imposed in order to fully rule out the State aid rules.

Therefore, it is our opinion that the “current 5-step methodology currently used for the assessment of the state-aid presence” observes the criteria provided for in Article 107(1) of the TFEU.

With regard to the 2014-2020 programming period we recommend the use of the procedure drafted in Annex 1, which includes suggestions for the improvement of the State aid detection check-list.

6. The Analysis for the 2014-2020 programming period

6.1 The concept of State aid

According to the provision of Article 107(1) of the TFEU “*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*”.

Such aid may be granted by the Member States only after submitting a formal notification and receiving a prior approval from the European Commission. For that fall under the scope of the GBER⁸ issued by the European Commission on the

⁸ Commission Regulation declaring certain categories of aid compatible with the internal market in application of Articles 107 and 108 of the Treaty available at http://ec.europa.eu/competition/state_aid/legislation/block.html

basis of the *Enabling Regulation*⁹ there is no need for a notification and the prior approval from the European Commission as long as the State aid in question observes all the requirements provided by the GBER.

In order to be considered State aid a measure has to fulfil all the criteria provided by the Article 107(1) of the TFUE”:

a. Presence of State resources

The state-aid norms comprise exclusively the measures that imply the public sources/resources transfer (including from national, regional and local authorities, banks and public foundations, etc.). Moreover, the aid does not need to be granted by the state as such. The aid can be granted by a public or private intermediate body appointed by the state.

For the CBC Programmes, the criteria is automatically fulfilled.

b. The provision of an economic advantage to an undertaking

First of all it is important to analyse whether the recipient of the aid is an **undertaking**. The State aid case-law considers an undertaking any entity, irrespective of the type of legal organisation, which performs economic activities. Economic activity means the supply of goods and services on a given market.

The classification of an entity as an undertaking is always relative to a specific activity. An entity that carries out both economic and non-economic activities is to be regarded as an undertaking only with regard to the former. Furthermore, the application of the State aid rules as such does not depend on whether the entity is set up to generate profits, as also non-profit entities can offer goods and services on a market too. Also, the State authorities may themselves be considered as undertakings should they be involved in economic activities.

It worth mentioning that whenever the State acts in the exercise of its public powers, respectively the activity in question is a task that forms part of the essential functions of the State or is connected with those functions by its nature, its aim and the rules to which it is subject, it is not to be considered an undertaking.

⁹ Council Regulation (EC) No 994/98 of 7 May 1998 on the application of Articles 92 and 93 (now 87 and 88 respectively) of the Treaty establishing the European Community to certain categories of horizontal State aid

With regard to the economic advantage, meaning that aid must be materialised in an economic advantage which the enterprise would not have otherwise benefited from.

Beside the direct economic advantage, which is clear in the case of grants awarded from the CBC as the entity receives a clear advantage by means of the grant itself, a discussion may arise with regard to indirect advantage.

An advantage can be conferred on undertakings other than those to which State resources are directly transferred (indirect advantage). An indirect advantage is present if the measure is designed in such a way so as to channel its secondary effects towards identifiable undertakings or groups of undertakings. This is the case, for example, if the direct aid is, de facto or de jure, made conditional on the purchase of goods or services produced by certain undertakings only. Also, the indirect advantage might occur, for example, in the following cases”:

- business incubators established with State support if part of the aid is transferred by the recipient undertaking to the incubated companies (by means of lower level of rent as compared to the market conditions, of services as accounting or law consultancy provided at lower fees than those available on the market.

- building of infrastructure for the sole or main use of an undertaking.

Such indirect advantages should be distinguished from mere secondary economic effects that are inherent in almost all State aid measures (e.g. through an increase of output). For this purpose, the foreseeable effects of the measure should be examined from an ex ante point of view.

c. Selectivity

A measure is considered selective when it grants an advantage in a selective way to certain undertakings or categories of undertakings or to certain economic sectors.

As the grants within the CBC framework are awarded only to certain entities, the selective nature is always present.

An analysis of the selective nature is relevant only when there is an indirect advantage. For example, in the cases involving research, if the results of the research are made available to a limited number of undertakings there might be

a selective economic advantage granted to those undertakings. In order to avoid the selectivity issues in such a case ensuring a sufficient promotion of the results, by means of publication in speciality magazines and/or on the project's web page.

d. Distortion of competition

A measure granted by the State is considered to distort or threaten to distort competition when it is liable to improve the competitive position of the recipient compared to other undertakings with which it competes.

For the case of the CBC, should all the other above conditions be fulfilled, this criteria is automatically met, with the exemption of the situation in which the recipient is holding a legal monopoly.

c. Effect on trade between Member States

An advantage granted to an undertaking operating in a market which is open to competition will normally be assumed to affect trade between Member States.

Public support can be considered capable to affect intra-EU trade even if the recipient is not directly involved in cross-border trade. For instance, the subsidy may make it more difficult for operators in other Member States to enter the market by maintaining or increasing local supply.

However, if the service in question is of a merely local interest (see Section 5.1 for details) there is no effect on trade between Member States.

6.2 The analysis, from a State aid perspective, of the Strategic projects for the CBC 2014 - 2020

The analysis is detailed in Annex no. 4 and has been carried out on the Strategic projects provided by the Client.

The analysis can be classified into 3 situations, as shown below.

1. Projects that consists of infrastructure for which there is no State aid risk, or the risk is minimal

- a. a project involving water flow rehabilitation (objects reconstruction, channel dredging, small boat lifting structure, purchasing maintenance vehicles and road development;

b. 2 projects aiming road development;

For those projects there are no State aid issues as long as the infrastructure is made available for public use without any consideration. This also apply to other projects that include road development activities.

2. Projects where the State exercises its public power attributes, or where there is a legal monopoly.

- a. a project involving railway infrastructure – legal monopoly
- b. a project involving Development of two first-aid /emergency centres, development of 3 heliports to serve the first aid / emergency centres, modernization of public roads - ensuring the infrastructure for emergency situations is a basic attribute of the State
- c. a project involving health infrastructure - Given that in Romania “public hospitals are an integral part of a national health service and are almost entirely based on the principle of solidarity. Such hospitals are directly funded from social security contributions and other State resources and provide their services free of charge on the basis of universal coverage”¹⁰, we consider that no undertaking is involved.

3. Projects where additional conditions are necessary to avoid the risk of State aid.

a. Transport path between HU county and RO county

The transport services are raising State aid issues. There are several possible solutions to those issues:

There is no way in which a State monopoly can be established in international road transport.

A. The measure does not constitute State aid if it’s granted in the form of Public service compensation. In this case the Regulation (EC) No 1370/2007 of the European Parliament and of the Council of 23 October 2007 on public passenger transport services by rail and by road is relevant.

According to the Regulation 1370, the following conditions have to be met:

“Article 4

¹⁰ Draft Commission Notice on the notion of State aid pursuant to Article 107(1) TFEU – Paragraph 24

1. Public service contracts and general rules shall:

(a) clearly define the public service obligations with which the public service operator is to comply, and the geographical areas concerned;

(b) establish in advance, in an objective and transparent manner,

(i) the parameters on the basis of which the compensation payment, if any, is to be calculated, and

(ii) the nature and extent of any exclusive rights granted, in a way that prevents overcompensation. In the case of public service contracts awarded in accordance with Article 5(2), (4), (5) and (6), these parameters shall be determined in such a way that no compensation payment may exceed the amount required to cover the net financial effect on costs incurred and revenues generated in discharging the public service obligations, taking account of revenue relating thereto kept by the public service operator and a reasonable profit;

(c) determine the arrangements for the allocation of costs connected with the provision of services. These costs may include in particular the costs of staff, energy, infrastructure charges, maintenance and repair of public transport vehicles, rolling stock and installations necessary for operating the passenger transport services, fixed costs and a suitable return on capital.”

In order to fulfil those obligations, the following conditions should be met:

- there should be a normative act (Law, Ordinance, Emergency Ordinance, Government Decision, Local Council Decision) describing the service and the obligations attached to it, including the obligations related to the schedule and price;

- a technical and economic study should be drawn in order to estimate the revenues and costs for the operation of the service and determining the parameters on the basis of which the compensation will be calculated.

Such a study should cover the following topics:

- a breakdown of estimated costs needed to run the business in an efficient way, including a reasonable profit. Therefore, comparison with the companies running cross-border transport activities is needed.

- a market study showing the demand for the service, the conditions in which the service would be required by the potential customers, in terms of schedule, tariffs, etc.

- a calculation of the estimated revenues.

The compensation should cover:

1. the difference between the revenues and the efficient costs (the costs have to be in line with those of a "well run company". Basically, the costs should be in line with the costs of the sector)

2. a reasonable rate of profit (for example the medium rate of return in the public transport sector).

- an independent audit of the financial statements on the basis of which the compensation shall be granted should be required. The audit should also cover the opportunity and efficiency of costs and revenues.

3. With regard to entrustment of the provision of the public service, it should be granted on the basis of an open, transparent and non-discriminatory procedure.

4. However the authority might decide to provide the service by itself, or through an internal operator. In such a case, the authority or the operator should be "prohibited from taking part in competitive tendering procedures outside the territory of that authority. The authority controlling the internal operator should also be allowed to prohibit this operator from taking part in competitive tenders organised within its territory."

B. With respect to the waste processing activities, it is recommended to avoid the situations in which the activity is provided on a commercial basis (e.g. by selling the results of a recycling activity).

b. Increasing employment by common marketing of agricultural products

With regard to the establishment of the logistic centre:

A. the application of the private investor principle is very difficult, as it applies only to capital injections in a company, while the financing provided by the CBC is a grant.

B. Also, the use of the Regional investment aid is difficult, as the contribution from the Local authority also represents State resources.

C. One solution might be that the beneficiary of the project acts only as a vehicle for the financing and establishes a new undertaking in association with a private entity which provides the contribution.

In that case, either the Regional investment aid or the "pari passu" principle (which annuls the economic advantage) might be used.

D. Another solution might be to notify the project to the European Commission as a project of common European interest.

E. A solution deriving from the case C 3/04 – Business Incubators Germany might be that after the period in which the building is provided for free, all the profits resulted are transferred to the State Budget for the rest of the normal period of use of the buildings. That way, no advantage would be provided to the owner. Usually, the absence of profits is not relevant the assessment of State aid, as, for example, this might occur as a result of mismanagement. Still, in this case, it is clear that the purpose of the activity is not the commercialization of services, but the development of the area. Therefore, the absence of profits would clearly show that no economic advantage has been provided.

F. Should there be a possibility to identify market failure for the provision of the services, the Altmark criteria should be fulfilled:

1. the recipient undertaking must have public service obligations and the obligations must be clearly defined;

This obligation requires an normative act (Law, Ordinance, Emergency Ordinance, Government Decision, Local Council Decision) describing the service and the obligations attached to it, including the obligations related to the schedule and price.

2. the parameters for calculating the compensation must be objective, transparent and established in advance

This obligation requires a technical and economic study in order to estimate the revenues and costs for the operation of the service and determining the parameters on the basis of which the compensation will be calculated.

Such a study should cover the following topics:

- a breakdown of estimated costs needed to run the business in an efficient way. Therefore, comparison with the companies running cross-border transport activities is needed.

- a market study showing the demand for the service, the conditions in which the service would be required by the potential customers, in terms of schedule, tariffs, etc.

3. the compensation cannot exceed what is necessary to cover all or part of the costs incurred in the discharge of the public service obligations, taking into account the relevant receipts and a reasonable profit;

4. Where the undertaking which is to discharge public service obligations is not chosen pursuant to a public procurement procedure which would allow for the selection of the tenderer capable of providing those services at the least cost to the community, the level of compensation needed must be determined on the basis of an analysis of the costs of a typical well-run company.

For the 4th and 5th requirement, an independent audit of the financial statements on the basis of which the compensation shall be granted should be required. The audit should also cover the opportunity and efficiency of costs and revenues.

In any of the above mentioned cases the constructor and the administrator (should there be the case) of the incubators should be selected through a open, transparent and non-discriminatory tender procedure in order to avoid State aid at their respective levels.

c. A project involving - Building of warehouse and storage facilities, purchase of equipment, IT, consultancy, training, organising agricultural producers

For this project, we suggest that the following steps are taken in order to ensure the lack of State aid involvement:

- The market failure in providing this type of services should be justified in an economic analysis of the local market;

The study should focus on:

- describing the geographical dimension of the market (local, regional, national, European);

- describing the structure of the offer and of the demand;

- showing the reasons for which the free market fails to provide the service (e.g. because of the lack of expectations to reach profit provided the estimated costs and revenues).

- A technical and economic study should be drafted to justify the costs, the revenues and the level of financing at a reasonable level.

- A Decision of the County Council should declare the service as an service of local/county interest aiming at supporting the farmers in the designated area;

- The owner of the Centre should not aim profit, but the purpose of supporting the activity of farmers and associations of farmers;

- The project should clearly state that the profit is not one of its aims. The aim of the project should be to address a need for which the competitive markets offers no solution.

- The constructor should be selected by means of a open tender that is sufficiently publicized (e.g. both in Hungarian and Romanian newspapers with national coverage)

- Should the authority does not provide the management of the Centre, the management operator should be selected by means of an open tender that is sufficiently publicized (e.g. both in Hungarian and Romanian newspapers with national coverage). From a State aid perspective it is not relevant if the management operator is a public or a private entity.

- If the case, the administrator of the Centre should be selected by means of an open tender that is sufficiently publicized (e.g. both in Hungarian and Romanian newspapers with national coverage). The fees for the services and the level of compensation should be selection criteria within the tender.

6.3 The analysis, from a State aid perspective, of the Thematic Objectives for the CBC 2014 - 2020

A. 5/b Promoting investment to address specific risks, ensuring disaster resilience and developing disaster management systems;

As long as the projects are kept in the sphere of exercising public power, the projects should not represent State aid.

B. 6/b Investing in the water sector to meet the requirements of the Union's environmental acquis and to address needs, identified by the MS, for investment that goes beyond those requirements

The applicants should be asked to state within the proposals whether the activity is a legal monopoly or not. If there is, the applicants should describe the way in which the service is provided and to specify the legal basis.

If the activity is not a legal monopoly, then the Alltmark rules apply, respectively:

1. the recipient undertaking must have public service obligations and the obligations must be clearly defined;

This obligation requires an normative act (Law, Ordinance, Emergency Ordinance, Government Decision, Local Council Decision) describing the service and the obligations attached to it, including the obligations related to the schedule and price.

2. the parameters for calculating the compensation must be objective, transparent and established in advance

This obligation requires a technical and economic study in order to estimate the revenues and costs for the operation of the service and determining the parameters on the basis of which the compensation will be calculated.

3. the compensation cannot exceed what is necessary to cover all or part of the costs incurred in the discharge of the public service obligations, taking into account the relevant receipts and a reasonable profit;
4. Where the undertaking which is to discharge public service obligations is not chosen pursuant to a public procurement procedure which would allow for the selection of the tenderer capable of providing those services at the least cost to the community, the level of compensation needed must be determined on the basis of an analysis of the costs of a typical well-run company.

For the 4th and 5th requirement, an independent audit of the financial statements on the basis of which the compensation shall be granted should be required. The audit should also cover the opportunity and efficiency of costs and revenues.

- C. 6/c Conserving, protecting, promoting and developing natural and cultural heritage;

Probably in most of the cases there will not be State aid involved as projects financing cultural institutions are usually of merely local interest.

- D. 7/b Enhancing regional mobility by connecting secondary and tertiary nodes to TEN-T infrastructure, including multimodal nodes

Provided that the projects focus on infrastructure, there should be no state aid involved, as long as the infrastructure is provided on a non-discriminatory basis.

Should there be a focus on public urban transportation, the Alltmark Criteria should be observed.

- E. 7/c Developing and improving environment-friendly (including low-noise), and low-carbon transport systems including inland waterways and maritime transport, ports, multimodal links and airport infrastructure, in order to promote sustainable regional and local mobility

According to the Regulation 1370, the following conditions have to be met:

“Article 4

1. Public service contracts and general rules shall:

(a) clearly define the public service obligations with which the public service operator is to comply, and the geographical areas concerned;

(b) establish in advance, in an objective and transparent manner,

(i) the parameters on the basis of which the compensation payment, if any, is to be calculated, and

(ii) the nature and extent of any exclusive rights granted, in a way that prevents overcompensation. In the case of public service contracts awarded in accordance with Article 5(2), (4), (5) and (6), these parameters shall be determined in such a way that no compensation payment may exceed the amount required to cover the net financial effect on costs incurred and revenues generated in discharging the public service obligations, taking account of revenue relating thereto kept by the public service operator and a reasonable profit;

(c) determine the arrangements for the allocation of costs connected with the provision of services. These costs may include in particular the costs of staff, energy, infrastructure charges, maintenance and repair of public transport vehicles, rolling stock and installations necessary for operating the passenger transport services, fixed costs and a suitable return on capital.”

In order to fulfil those obligations, the following conditions should be met:

- there should be a normative act (Law, Ordinance, Emergency Ordinance, Government Decision, Local Council Decision) describing the service and the obligations attached to it, including the obligations related to the schedule and price;

- the act based on which the provision of services has been entrusted to the specific undertaking (e.g. the contract for the provision of services);

- a technical and economic study should be drawn in order to estimate the revenues and costs for the operation of the service and determining the parameters on the basis of which the compensation will be calculated;

- an independent audit of the financial statements on the basis of which the compensation shall be granted should be required. The audit should also cover the opportunity and efficiency of costs and revenues.

3. With regard to entrustment of the provision of the public service, it should be granted on the basis of an open, transparent and non-discriminatory procedure.

4. However the authority might decide to provide the service by itself, or through an internal operator. In such a case, the authority or the operator should be “prohibited from taking part in competitive tendering procedures outside the territory of that authority. The authority controlling the internal operator should also be allowed to prohibit this operator from taking part in competitive tenders organised within its territory.”

F. 8/b Supporting employment friendly growth through the development of endogenous potential as part of a territorial strategy for specific areas, including the conversion of declining industrial regions and enhancement of accessibility to and development of specific natural and cultural resource;

I. Should there be a possibility to identify market failure for the provision of the services, the Altmark criteria should be fulfilled:

1. the recipient undertaking must have public service obligations and the obligations must be clearly defined;

This obligation requires an normative act (Law, Ordinance, Emergency Ordinance, Government Decision, Local Council Decision) describing the service and the obligations attached to it, including the obligations related to the schedule and price.

2. the parameters for calculating the compensation must be objective, transparent and established in advance

This obligation requires an technical and economic study in order to estimate the revenues and costs for the operation of the service and determining the parameters on the basis of which the compensation will be calculated.

3. the compensation cannot exceed what is necessary to cover all or part of the costs incurred in the discharge of the public service obligations, taking into account the relevant receipts and a reasonable profit;

4. Where the undertaking which is to discharge public service obligations is not chosen pursuant to a public procurement procedure which would allow for the selection of the tenderer capable of providing those services at the least cost to the community, the level of compensation needed must be determined on the basis of an analysis of the costs of a typical well-run company.

For the 4th and 5th requirement, an independent audit of the financial statements on the basis of which the compensation shall be granted should be required. The audit should also cover the opportunity and efficiency of costs and revenues.

II Otherwise, we would recommend a GBER State aid scheme covering aid for start-ups and training aid.

G. 9/a Investing in health and social infrastructure which contributes to national, regional and local development, reducing inequalities in terms of health status, promoting social inclusion through improved access to social, cultural and recreational services and transition from institutional to community-based services;

In order to avoid State aid the measure should focus on:

- public hospitals and other health institutions that are part of the universal health coverage;
- providing disadvantaged people no cost access to social services.

H. 11/a Enhancing institutional capacity of public authorities and stakeholders and efficient public administration by promoting legal and administrative cooperation and cooperation between citizens and institutions.

The Thematic Objectives does not normally involve State aid.

Annex no 4 provides the conditions that have to be met by the above mentioned strategic projects and Thematic objectives in order to exclude State aid. The conditions mainly refer to the public availability of the infrastructure without any consideration

6.4 Analysis aimed at identifying the necessary amendments to the Applicant's Handbook in order to exclude projects that might involve State aid

As agreed, given that the Applicant's Handbook (the Guide) for the period 2014 – 2020 is not yet available, the present analysis has been carried out on the Guide used for the period 2007-2013¹¹. Given the provisions of the Guide, we have aimed at identifying the provisions which should be included in the document in order to avoid the State aid incidence.

The Guide does not include references to the State aid rules. This can be explained by the fact that the CBC Ro-Hu 2007 – 2013 have been assessed as not involving State aid. In fact, such an approach is common to CBC Programmes across Europe for which the State aid tends to be avoided, maybe with the exemption of the “*de minimis*” aid.¹²

Ass long as it would be possible, the Client would like to keep the approach for the next programming period, so that the intensity limits applicable in the case of State aid be avoided.

Provided that, we consider that the analysis has to start with the criteria defining State aid.

- **The State resources** criteria is always considered as **fulfilled** on the basis of the rules governing the ERDF.

- The existence of an **economic advantage** awarded to a company. Given that the grants awarded through the CBC provide, by their nature, an advantage, this criteria can be considered automatically fulfilled as long as the beneficiary can be considered an undertaking. As provided for in Article 107(1) of the TFEU, an undertaking any entity that is engaged in an economic activity, regardless of it's legal status or organization and regardless of the existence of the distinct legal person. Thus, what needs to be analysed is the presence of an **activity that has a commercial nature**.

- **The selectivity criteria** is automatically fulfilled as, on one hand, the beneficiaries of the grants awarded within the Programme are clearly identified and, on another hand, where indirect beneficiaries exist they do not represent all the undertakings that are engaged on a specific market.

¹¹ “Applicant's Handbook for Project Generation and Development – 5th Call for proposals HURO/1101” – de pe portalul Internet <http://www.huro-cbc.eu/ro/>

¹² “Practical Guide for filling in the Application Form of the Baltic Sea Region Programme 2007-2013” și “Central Europe Cooperating for Success – Application Manual Second Call”

- The measure **distorts or threaten to distort competition**. As a rule, this criteria is considered as fulfilled when the activity financed is not a legal monopoly.

- The measure is **liable to affect trade between Member States**. At a first view, this criteria seems to be automatically fulfilled. For this the section *1.1.1 Cross-border character and impact* of the Applicants' Handbook is relevant.

Despite this, both the *Analysis of the 5 steps methodology for the detection of State aid* and the analysis of the strategic projects and of the Thematic Objectives for the 2014-2020 period we have identified situations which, given the markets affected, have a mere local impact.¹³

From the analysis of the Central Europe CBS and Baltic Sea CBC we have concluded that the approaches provided within the documents similar to the Applicants' Handbook are the following:

- either by providing for an obligation that the projects' results are made available to all competitors acting on the relevant market;

- either by excluding private companies from grants exceeding 200.000 Euro so that, should State aid criteria be fulfilled, the aid would represent "*de minimis*" aid.

The first approach is especially relevant for projects that aim activities such as infrastructure development and/or research. Still, it has to be taken into account that, even if it is an exempted aid and the intensity of the State aid can reach 100%, even the aid provided to fundamental research projects is State aid.¹⁴ Should such projects be financed there are procedural requirements, especially those to inform the European Commission and to periodically provide reports on the State aid granted.

With regard to the second approach we identify the following issues:

- the concept of undertaking is not limited to private companies. Other entities (such as State owned companies, NGOs, public authorities or parts of them) may be considered as undertakings in the light of State aid rules;

¹³ The analysis of local impact is provided in Section 7 of the present Report

¹⁴ Section 4 of the New GBER

- “*de minimis*” aid, even if it technically does not represent State aid, involves procedural obligations, such as the obligation to inform the Competition Council¹⁵ and reporting obligations¹⁶.

We consider that the inclusion of an obligation to ensure a large dissemination of the projects’ results, similar to the Baltic Sea CBC could be included within the Applicants’ Handbook and/or within the financing contract.

In addition to such an obligation, we consider that, in line with the State aid avoidance approach, we consider that the inclusion in the Applicants’ Handbook (or in an Annex to it) of the State aid criteria explained and of a reference to the Commission Notice on the Notion of Aid (even if it is a draft document) could be useful in order to provide the beneficiaries to assess if there is a State aid risk. Also, the check-list presented in Annex 1 could be included in the Statement on own responsibility requested from the beneficiaries.

We would also consider that the procedure included in the same Annex could significantly diminish the risk of non-detected State aid being awarded.

The Applicants’ Handbook could also include a request to the beneficiaries to show the reasons for which they consider that

- The project does not award an economic advantage to an undertaking;
- The project does not distort or threaten to distort competition including, where the case, the legal basis that confer to the activity a legal monopoly status;
- The project does not affect trade between Member States

If a project is not considered State aid on the basis of its qualification as a Service of General Economic Interest, the applicant should provide:

- The normative act (Law, Ordinance, Emergency Ordinance, Government Decision, Local Council Decision) describing the service and the obligations attached to it, including the obligations related to the price.

¹⁵ Article 6 of the Emergency Ordinance No 117/2006 regarding national procedures in the state aid field

¹⁶ Upon request from the European Commission.

- technical and economic study in order to estimate the revenues and costs for the operation of the service and determining the parameters on the basis of which the compensation will be calculated.

- an independent audit of the financial statements on the basis of which the compensation shall be granted. The audit should also cover the opportunity and efficiency of costs and revenues.

Despite any precautions there still remain a risk that, following an analysis, the European Commission or a Romanian or Hungarian court¹⁷ could decide that a certain grant awarded represents illegal¹⁸ State aid and order the recovery of such aid. Should such a case occur, especially if Romania would ensure the Managing Authority, and taking into consideration the difficulty to recover aid from another Member State, we consider that a provision should be included in the Applicants' Handbook and in the contract which should allow the recovery of the aid plus interest¹⁹.

¹⁷ Commission notice on the enforcement of State aid law by national courts (2009/C 85/01)

¹⁸ In the case of a decision by the European Commission it also might decide that the State aid is not compatible with the Common Market.

¹⁹ http://ec.europa.eu/competition/state_aid/legislation/reference_rates.html

7. Conclusions and recommendations

7.1 Recommendations regarding the drafting of the CBC Ro-Hu 2014 - 2020 taking into account the SGEI concept and the State aid rules

According to the ECJ decision in the Altmark case with respect to the application of the State aid rules in the case of the compensation of the SGEI obligations:

„...where a State measure must be regarded as compensation for the services provided by the recipient undertakings in order to discharge public service obligations, so that those undertakings do not enjoy a real financial advantage and the measure thus does not have the effect of putting them in a more favourable competitive position than the undertakings competing with them, such a measure is not caught by Article [107 (1)] of the Treaty. However, for such compensation to escape classification as State aid in a particular case, a number of conditions must be satisfied.

1. First, the recipient undertaking must actually have public service obligations to discharge, and the obligations must be clearly defined. In the main proceedings, the national court will therefore have to examine whether the public service obligations which were imposed on Altmark Trans are clear from the national legislation and/or the licences at issue in the main proceedings..
2. Second, the parameters on the basis of which the compensation is calculated must be established in advance in an objective and transparent manner, to avoid it conferring an economic advantage which may favour the recipient undertaking over competing undertakings. Payment by a Member State of compensation for the loss incurred by an undertaking without the parameters of such compensation having been established beforehand, where it turns out after the event that the operation of certain services in connection with the discharge of public service obligations was not economically viable, therefore constitutes a financial measure which falls within the concept of State aid within the meaning of Article [107 (1)] of the Treaty.

3. Third, the compensation cannot exceed what is necessary to cover all or part of the costs incurred in the discharge of public service obligations, taking into account the relevant receipts and a reasonable profit for discharging those obligations. Compliance with such a condition is essential to ensure that the recipient undertaking is not given any advantage which distorts or threatens to distort competition by strengthening that undertaking's competitive position.
4. Fourth, where the undertaking which is to discharge public service obligations, in a specific case, is not chosen pursuant to a public procurement procedure which would allow for the selection of the tenderer capable of providing those services at the least cost to the community, the level of compensation needed must be determined on the basis of an analysis of the costs which a typical undertaking, well run and adequately provided with means of transport so as to be able to meet the necessary public service requirements, would have incurred in discharging those obligations, taking into account the relevant receipts and a reasonable profit for discharging the obligations.”

Basically, in order to avoid the qualification as State aid of the compensation awarded for an SGEI it is necessary

În practică, pentru evitarea calificării compensării acordate pentru prestarea unui serviciu economic de interes general ca ajutor de stat este necesar:

1. The service has to be defined through means of a normative act (law, ordinance, emergency ordinance, Government Decision, Decision of the local authority).

2. The European Commission only checks SGEI definition against manifest error.²⁰ However, in order to avoid the SGEI nature being challenged, a technical and economic study in order to estimate the revenues and costs for the operation of the service and determining the parameters on the basis of which the compensation will be calculated.

Such a study should cover the following topics:

- a breakdown of estimated costs needed to run the business in an efficient way. Therefore, comparison with the companies running cross-border transport activities is needed.

²⁰ Communication from the Commission on the application of the European Union State aid rules to compensation granted for the provision of services of general economic interest, para. 46

- a market study showing the demand for the service, the conditions in which the service would be required by the potential customers, in terms of schedule, tariffs, etc.

3. the compensation cannot exceed what is necessary to cover all or part of the costs incurred in the discharge of the public service obligations, taking into account the relevant receipts and a reasonable profit;

4. Where the undertaking which is to discharge public service obligations is not chosen pursuant to a public procurement procedure which would allow for the selection of the tenderer capable of providing those services at the least cost to the community, the level of compensation needed must be determined on the basis of an analysis of the costs of a typical well-run company.

For the 4th and 5th requirement, an independent audit of the financial statements on the basis of which the compensation shall be granted should be required. The audit should also cover the opportunity and efficiency of costs and revenues.

7.2 Recommendations regarding the amendments to the Applicants' Handbook

With regard to the Applicant's Guide, we recommend the inclusion of a new section dedicated to State aid, having the following content:

"State aid

1. The CBC Ro-Hu does not represent a State aid scheme and the financing of operations involving State aid is not allowed.

2. According to the provisions of Article 107(1) of the TFEU and the case-law of the EC and of the European Court of Justice, the State aid is any measure granted by the State that fulfills **all** the criteria below:

a. Presence of State resources

The state-aid norms comprise exclusively the measures that imply the public sources/resources transfer (including from national, regional and local authorities, banks and public foundations, etc.). Moreover, the aid does not need to be granted by the state as such. The aid can be granted by a public or private intermediate body appointed by the state.

For the CBC Programmes, the criteria is automatically fulfilled.

b. The provision of an economic advantage to an undertaking

First of all it is important to analyse whether the recipient of the aid is an **undertaking**. The State aid case-law considers an undertaking any entity, irrespective of the type of legal organisation, which performs economic activities. Economic activity means the supply of goods and services on a competitive market.

The classification of an entity as an undertaking is always relative to a specific activity. An entity that carries out both economic and non-economic activities is to be regarded as an undertaking only with regard to the former. Furthermore, the application of the State aid rules as such does not depend on whether the entity is set up to generate profits, as also non-profit entities can offer goods and services on a market too. Also, the State authorities may themselves be considered as undertakings should they be involved in economic activities.

It worth mentioning that whenever the State acts in the exercise of its public powers, respectively the activity in question is a task that forms part of the essential functions of the State or is connected with those functions by its nature, its aim and the rules to which it is subject, it is not to be considered an undertaking.

With regard to the economic advantage, meaning that aid must be materialised in an economic advantage which the enterprise would not have otherwise benefited from.

Beside the direct economic advantage, which is clear for most of the grants awarded from the CBC as the entity receives a clear advantage by means of the grant itself a, discussion may arise with regard to indirect advantage.

However, according to the ECJ decision in the Altmark in cases that involve compensation awarded to an undertaking for the fulfilment of obligations related to the provision of a Service of General Economic Interest does not provide an economic advantage, and therefore does not qualify as State aid subject to several conditions:

1. "First, the recipient undertaking must actually have public service obligations to discharge, and the obligations must be clearly defined. In the main proceedings, the national court will therefore have to examine

whether the public service obligations which were imposed on Altmark Trans are clear from the national legislation and/or the licences at issue in the main proceedings..

2. Second, the parameters on the basis of which the compensation is calculated must be established in advance in an objective and transparent manner, to avoid it conferring an economic advantage which may favour the recipient undertaking over competing undertakings. Payment by a Member State of compensation for the loss incurred by an undertaking without the parameters of such compensation having been established beforehand, where it turns out after the event that the operation of certain services in connection with the discharge of public service obligations was not economically viable, therefore constitutes a financial measure which falls within the concept of State aid within the meaning of Article [107 (1)] of the Treaty.
3. Third, the compensation cannot exceed what is necessary to cover all or part of the costs incurred in the discharge of public service obligations, taking into account the relevant receipts and a reasonable profit for discharging those obligations. Compliance with such a condition is essential to ensure that the recipient undertaking is not given any advantage which distorts or threatens to distort competition by strengthening that undertaking's competitive position.
4. Fourth, where the undertaking which is to discharge public service obligations, in a specific case, is not chosen pursuant to a public procurement procedure which would allow for the selection of the tenderer capable of providing those services at the least cost to the community, the level of compensation needed must be determined on the basis of an analysis of the costs which a typical undertaking, well run and adequately provided with means of transport so as to be able to meet the necessary public service requirements, would have incurred in discharging those obligations, taking into account the relevant receipts and a reasonable profit for discharging the obligations.”

Examples of Services of General Economic Interest that have passed the test following the EC analysis are²¹:

²¹ Such cases have been notified to the European Commission which considered that they do not represent State aid. There are only 10 decisions of the EC since 2000, as usually, such cases are not notified by the Member States.

- A direct grant awarded for the Thessaloniki Submerged Tunnel Project, for activities regarding Land transport and transport via pipelines;²²
- Financing of the public transport services in district of Anhalt-Bitterfeld, for services of freight transport by road and removal services;²³
- Municipal Guarantee for Loan for Geothermal Heat Distribution Network, regarding supply of steam air and air conditioning;²⁴

Another way to avoid economic advantage, in case the project results consist of research, IT tools/software and/or if training is involved, competing undertakings in the relevant market will be able to/can use the project output (e.g. ICT tool/software, training course) in the same way and under the same conditions as the lead partner, any of the project partners or the end users of the project. All undertakings in the market (will) have the same benefit and no undue advantage will be/is given for anybody. This is the case when the outputs are transferable to the whole market and when they are open-source, i.e. the source (e.g. source code, curricula) and certain other rights (e.g. content) normally reserved for copyright holders are provided under a public license. This can be ensured, for example, by offering the results on the project's website.

An advantage can be conferred on undertakings other than those to which State resources are directly transferred (indirect advantage). An indirect advantage is present if the measure is designed in such a way so as to channel its secondary effects towards identifiable undertakings or groups of undertakings. This is the case, for example, if the direct aid is, de facto or de jure, made conditional on the purchase of goods or services produced by certain undertakings only. Also, the indirect advantage might occur, for example, in the following cases”:

- business incubators established with State support if part of the aid is transferred by the recipient undertaking to the incubated companies (by means of lower level of rent as compared to the market conditions, of services as accounting or law consultancy provided at lower fees than those available on the market.

²² Case N134/2007

²³ Case N206/2009

²⁴ Case SA.31261

- building of infrastructure for the solely or main use of an undertaking.

Such indirect advantages should be distinguished from mere secondary economic effects that are inherent in almost all State aid measures (e.g. through an increase of output). For this purpose, the foreseeable effects of the measure should be examined from an ex ante point of view.

c. Selectivity

A measure is considered selective when it grants an advantage in a selective way to certain undertakings or categories of undertakings or to certain economic sectors.

As the grants within the CBC framework are awarded only to certain entities, the selective nature is always present.

An analysis of the selective nature is relevant only when there is an indirect advantage. For example, in the cases involving research, if the results of the research are made available to a limited number of undertakings there might be a selective economic advantage granted to those undertakings. In order to avoid the selectivity issues in such a case ensuring a sufficient promotion of the results, by means of publication in speciality magazines and/or on the project's web page.

d. Distortion of competition

A measure granted by the State is considered to distort or threaten to distort competition when it is liable to improve the competitive position of the recipient compared to other undertakings with which it competes.

For the case of the CBC, should all the other above conditions be fulfilled, this criteria is automatically met, with the exemption of the situation in which the recipient is holding a legal monopoly.

c. Effect on trade between Member States

An advantage granted to an undertaking operating in a market which is open to competition will normally be assumed to affect trade between Member States.

Public support can be considered capable to affect intra-EU trade even if the recipient is not directly involved in cross-border trade. For instance, the subsidy may make it more difficult for operators in other Member States to enter the market by maintaining or increasing local supply.

However, if the service in question is of a merely local interest (see Section 5.1 for details) there is no effect on trade between Member States.

3. By filling the Statement on own responsibility regarding the non State aid nature of the project) you are required to provide all the arguments on which basis you do not consider the project as State aid.

3. In the case that you consider that the project does not represent State aid as a result of the application of the Allmark criteria, in addition to the Statement on own responsibility, you are required to provide copies of the following documents:

- The normative act (Law, Ordinance, Emergency Ordinance, Government Decision, Local Council Decision) describing the service and the obligations attached to it, including the obligations related to the price.

- a technical and economic study in order to estimate the revenues and costs for the operation of the service and determining the parameters on the basis of which the compensation will be calculated.

- the act based on which the provision of the SGEI has been entrusted to you;

- the economic analysis showing that the value of the compensation does not exceed the reasonable costs for the provision of the service.

Moreover, during the implementation of the project you should provide an independent audit of the financial reports on the basis of which the compensation shall be granted. The audit should also cover the opportunity and efficiency of costs and revenues.

4. Please note the European Commission and the European Court of Justice are the only authorities on State aid issues. Should one of those authorities conclude that your project represents State aid the only remedy is to recover the amount State aid awarded from you, plus interest.

7.3 Check-lists for the control of documents to be used by both the Managing Authorities and the beneficiaries in order to observe the State aid rules

State aid detection and, if detected, its analysis for compatibility is an ex-ante process aimed at:

- Assessment on the fulfilment of the criteria set out by Article 107(1) of the TFEU

and, if all the criteria are met

- Assessment of the compatibility with the common market of the aid in question, either by fulfilling the criteria set out in any of the sections of the GBER, either by the notification of the aid to the EC (based on the provisions of a non GBER regulation, or on the basis of a provision of Article 107(3) of the Treaty).

If, for example, the EC would come to analyse a State aid at any time after it is awarded, it would analyse its State aid character and/or its compatibility, such analysis would be carried out taking into account only the information available at the moment that would have been available at the moment the State aid was awarded.

Therefore, it is highly important that the conditions for a measure not to be State aid, or to be compatible State aid, are set beforehand.

In this respect, provided the option for the CBC Ro-Hu 2014-2020 not to include State aid, it is important that during the evaluation of the projects the project is checked against the State Aid criteria, as set by the Article 107(1) of the TFEU.

In order to facilitate this process, and given the complexity of the subject, we have drawn the procedure for State aid compliance in Annex no. 1 which includes a check list that, besides the five criteria, also explains the State aid rules and questions helping both the evaluators and the beneficiaries in detecting whether the projects are subject to State aid rules. Therefore it is our opinion that this check-list can be communicated and used both by beneficiaries when drafting the projects and by the evaluators when assessing the projects.

With regard to monitoring the projects, usually this activity is not focused on the assessment or the re-assessment of the State aid presence, but rather on the degree in which the conditions set out within the project and those imposed during the evaluation are observed. This is the case whether the project is State aid free, "*de minimis*" aid or compatible State aid. Given that and taking into account the situations identified in the analysis of the strategic projects and of the thematic objectives we have drawn a check-list (Annex 5), including possible situations, the relevant questions and the documents that can be used to verify the compliance with the ex-ante conditions.

8. Annexes

ANNEX No 1 – Procedure for State aid compliance

ANNEX No 2 - The Analysis of the Current 5 step methodology used for the detection of State aid

ANNEX No. 3 – The methodology used for the selection of sample of projects

ANNEX No. 4 - Analysis of State aid potential incidence based on the thematic objectives and priority investment axes as they are provided in the new ETC draft Regulation

ANNEX 5 – Check list for the first level control