

EARTO Note on EU State Aid Rules for Research & Innovation

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This paper sheds light on the EU state aid rules for Research Development and Innovation (RDI) that apply to Research and Technology Organisations (RTOs), detailing in particular the legal basis and rationale behind the EU state aid rules and how these apply to RTOs. Of particular interest, this note aims at explaining:

- the key definitions of the concepts of “economic” and “non-economic” activities in this context,
- how to apply the EU state aid rules when an RTO or a research infrastructure carries out both economic and non-economic activities, and the special case of public investment in research infrastructures.

This paper has to be regarded as a general explanatory document. The analysis of a state aid case by the European Commission is highly dependent on the given context of the case, where professional guidance by qualified state aid or competition lawyers is required.

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1. Legal basis and rationale behind EU state aid rules

1.1 What is state aid

In law, the legislative intent is important to keep in mind when interpreting the rules. It is crucial to bear in mind the legislative intent or the rationale behind the EU state aid rules when applying them in practice: state aid is the use of state funding or resources to support a selected company, which then gains an advantage over its competitors.

State aid legislation, based on Article 107 of the [Treaty on the Functioning of the European Union](#) (TFEU) therefore ensures that there is fair and open competition within the EU, preventing Member States subsidising businesses unfairly and maintaining a level playing field within the EU. Article 107 stipulates that 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 common market.

In 2016, the European Commission also issued a [Notice on the notion of state aid](#) (Notice) as referred to in Article 107(1) of the TFEU (Notice) to provide further clarification on the key concepts relating to the notion of state aid, with a view to contributing to an easier, more transparent and more consistent application of this notion across the Union.

To be considered as state aid, according to Art.107(1) of the TFEU, a measure needs to have all these features (see [EC website](#)):

- there has been an intervention by the State or through state resources which can take a variety of forms (e.g. grants, interest and tax reliefs, guarantees, government holdings of all or part of a company, or providing goods and services on preferential terms, etc.);
- the intervention gives the recipient an advantage on a selective basis, for example to specific companies or industry sectors, or to companies located in specific regions;
- competition has been or may be distorted;
- the intervention is likely to affect trade between Member States.

State aid measures meeting these criteria require notification to the European Commission by virtue of Article 108(3) of the TFEU, unless they fall within an exemption. Such exemptions are often used to enable Member States to resolve market failures.

1.2 Exemptions for RDI to address market failure

Aid for RDI can primarily be justified on the basis of Articles 107(3)(b) and 107(3)(c) of the TFEU, according to which the European Commission may consider compatible with the internal market state aid to promote the execution of an [important project of common European interest](#) (IPCEI) or to facilitate the development of certain economic activities within the Union, where such aid does not adversely affect trading conditions to an extent which goes contrary to the common interest.

In 2014, the European Commission has adopted new rules on state aid for RDI:

- [The General Block Exemption Regulation](#) (GBER) sets out the conditions under which R&D&I-aid (among others) is exempt from the obligation of prior notification to the European Commission (block-exempted). Such aid needs to serve a purpose of common interest, have a clear incentive effect, be appropriate and proportionate, be granted in full transparency and subject to a control mechanism and regular evaluation, and not adversely affect trading conditions to an extent that is contrary to the common interest (GBER Art. 5).
- [The Framework for state Aid for R&D&I](#) (RDI Framework) contains guidelines on the notion of State aid in the field of R&D&I activities (chapter 2) and rules for the assessment of RDI aid that is not eligible for block-exemption (chapter 3 and 4). The European Commission will assess measures notified by Member States according to the criteria in chapter 3 and 4.

The European Commission has identified a series of RDI measures for which State aid may, under specific conditions, be compatible with the internal market, mainly because they address market

failures related to positive externalities (knowledge spill-overs), imperfect and asymmetric information or coordination failure (RDI Framework Art. 12):

- aid for R&D projects where the aided part of the research project falls within the categories of fundamental research and applied research (industrial research and experimental development)
- aid for feasibility studies related to R&D projects
- aid for the construction and upgrade of research infrastructures
- aid for innovation clusters
- aid for innovation activities (may be awarded to SMEs for obtaining, validating and defending patents and other intangible assets, for the secondment of highly qualified personnel, and for acquiring innovation advisory and support services, or to encourage large enterprises to collaborate with SMEs)

2. RTOs and EU state aid rules

2.1 Key definitions related to RTOs

In EU state aid rules:

- **“Research and knowledge-dissemination organisations”** are entities, irrespective of their legal status (organised under public or private law) or way of financing, whose primary goal is to independently conduct fundamental research, applied research (industrial research and/or experimental development) or to widely disseminate the results of such activities by way of teaching, publication or knowledge transfer. Examples cited include universities or research institutes, technology transfer agencies, innovation intermediaries, research-oriented physical or virtual collaborative entities (GBER Art.83, RDI Framework Art.15).
- **“Research infrastructures”** are facilities, resources and related services that are used by the scientific community to conduct research in their respective fields and covers scientific equipment or set of instruments, knowledge-based resources such as collections, archives or structured scientific information, enabling information and communication technology-based infrastructures such as grid, computing, software and communication, or any other entity of a unique nature essential to conduct research. Such infrastructures may be ‘single-sited’ or ‘distributed’ (an organised network of resources) (GBER Art.91, RDI Framework Art.15).
- **“Undertakings”** are any entities, regardless of their legal status and the way in which they are financed, which are engaged in economic activities. The status of the entity under national law is not decisive, and whether the entity is set up to generate profits or not is not relevant either. The only relevant criterion in determining whether an entity is an undertaking is whether it carries out an economic activity. Besides, 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. (Notice Art.7 to 10).

2.2 Direct and Indirect Transmission of State Aid to and through RTOs

State Aid can be directly transmitted by the state to an undertaking, but also indirectly through the collaboration with an intermediary publicly funded organisation such as research organisations like RTOs. The question of whether and under which conditions undertakings obtain an advantage within the meaning of Article 107(1) of the Treaty (see §1.1 above) in cases of contract research or research services provided by a research organisation or research infrastructure, as well as in cases of collaboration with a research organisation or research infrastructure must be answered in accordance with general State aid principles (RDI Framework §2.2).

RTOs receive basic funding from their national/regional governments and public funding through competitive projects funded by public RDI agencies like the Framework Programme or national agencies. In addition, regardless of their legal status and even though they are non-for profit (all their profit is reinvested into new RDI activities), RTOs can be qualified as “undertakings” since some of their activities are “economic” in the sense of the EU state aid rules (see point 4. below).

State aid rules therefore apply to them, even though the European Commission considers that certain of their activities qualified as “non-economic” fall outside the scope of the State aid rules (see point 3. below).

RTOs therefore need to make sure that they do not indirectly and illegally transmit such aid to their partners on the occasion of collaborations of all types with industrial companies in a way that would have anti-competitive effects in Europe (giving an advantage on a selective basis to specific companies or industry sectors, or to companies located in specific regions, that might distort competition and affect trade between Member States).

2.3 Categorisation of Research

It is important that RTOs make the distinction between fundamental research, industrial research and experimental development according to the definitions of the RDI Framework Article 15.

It could also be interesting, especially in the case of RTOs, to distinguish within the category of fundamental research between “oriented fundamental research” and “non-oriented fundamental research”. For instance, the OECD Frascati manual gives the following definitions:

- Pure basic research as “*Pure basic research is research carried out for the advancement of knowledge, without working for long-term economic or social benefits and with no positive efforts being made to apply the results to practical problems or to transfer the results to sectors responsible for its application*”.
- Oriented basic research as “*research carried out with the expectation that it will produce a broad base of knowledge likely to form the background to the solution of recognised or expected current or future problems or possibilities*”.

3. Public funding of non-economic activities under EU state aid rules

The European Commission considers that at no state aid is awarded for the following activities, which are generally of a non-economic character.

3.1 Collaborative research

The carrying out of independent RDI aimed at gaining more knowledge and better understanding, including collaborative RDI with other parties, is considered to be a non-economic activity and therefore no direct state aid is awarded to RTOs (RDI Framework Art.17, Notice Art.31/32) and no indirect state aid is awarded to the participating undertakings through research organisations/research infrastructures (RDI Framework Art.27 & 28) for such activities.

To be qualified as collaborative RDI, the RO or RI needs to engage in “effective collaboration” with at least one other independent party, which entails that several of the following criteria (array of proof) are fulfilled and defined in the collaborative research agreements.

There is no need that all of them are applied simultaneously.

1. Definition of a common objective, with generally no obligation of results but rather obligation of means (to exert reasonable effort) to fulfil the common objective;
2. Division of labour between the participants: joint participation and contribution in the definition of the scope of the project, the specification of the RDI activities, and their implementation;
3. Sharing of the financial, technological, scientific and other risks between partners, even though one or several parties may bear the full costs of the project (without margin) and thus relieve other parties of its financial risks;
4. Sharing of the research results:
 - Intellectual Property Rights (IPR) and access rights are allocated to the different partners with respect to the value of their contribution and respective interest, or in the case of an exploitation by the partner, a compensation equivalent to the market price¹ is

¹To determine an equivalent market price for intellectual property rights/access rights (RDI Framework Art. 29), several possibilities exist: open, transparent and non-discriminatory competitive sale procedure, or independent expert valuation, or arm’s length conditions, or when undertaking has a right of first refusal, research

attributed to the research organisation/research infrastructure (royalties) with respect to the value of their contribution and the value of the technology,

- Non-IPR results are widely disseminated through conferences, publication, open access repositories, or free or open source software.
5. Conclusion of the terms and conditions prior to the project start, with details of the contributions to costs, sharing of risks (financial, technological and scientific), dissemination of research results, and access to and rules for allocation of intellectual property rights).

Collaborative projects fulfilling several of the above-mentioned criteria can be qualified as “non-economic” with no direct state aid is awarded to RTO and no indirect state aid awarded to the participating undertakings through the Research organisation or Research infrastructure.

Regarding RTOs’ activities:

- Collaborative research through consortia is a non-economic activity when the partners are partially financed by public institutions at European, national and regional level without any direct transfer of funds between the partners. Such projects are normally to be considered as collaborative research projects by the public institutions which fund them, since they are themselves subject to EU state aid rules. Indeed, the sets of actions defined by national agencies need to be notified to the European Commission under specific state aid schemes, and the general conditions of these national agencies are approved by the European Commission. Partners among the consortium need to respect the rules in the consortium agreement which needs to fulfil the general conditions of those national agencies (IP, sectorial exclusivity rights, dissemination of results).
- Direct collaborative research between RTOs and industrial partners, even bilateral collaboration with only one industrial partner, does not normally constitute state aid when the collaboration agreement between the RTO and its industrial partner(s) follows the above mention criteria (“array of proof”: risk sharing, obligation of means, sharing of intellectual property, co-decisions, etc.) In such case, no indirect state aid is awarded to the industrial partners through the RTO (RDI Framework Art.27 & 28).

Wording issues:

- It is worth noting that the term “contract research” is often used within RTOs to characterise research activities that are referred to as “collaborative” and “non-economic” in the EU state aid rules. Indeed, some (and even often the majority) of RTOs’ contracts with industry can be characterised as what is called “collaborative research” under the EU state aid rules definition. RTOs are therefore encouraged to rather use the term “collaborative research” or “bilateral & independent research” to qualify these “non-economic” activities in EU state aid rules, rather than “contract research” which the European Commission associates with “economic” activities in EU state aid rules.
- It is also important to bear in mind that the terms “economic/non-economic” in EU state aid rules do not bear the same meaning as the terms “lucrative/non-lucrative” in National Tax Laws. What is called “non-economic activity” in the EU state aid rules can be “economic” or “lucrative” in national taxation law. National taxation laws and EU RDI state aid rules have different goals and purposes and should not be confused at Member State level.
- The term “non-economic” in EU state aid rules does **not** mean “does not have an economic impact”.

Importance for RTOs to have collaborative partnerships with industry (of a non-economic nature vis à vis state aid rules):

- **Overcome market failure: RTOs can charge a lower price for those collaborations to share the financial risks with their partner(s) (100% full costs without taking a margin, or eventually less than 100% full cost), which can help support SMEs’ access to innovation by decreasing risk.**

organisations/research infrastructures solicit offers from third parties so that the collaborating undertaking has to match its offer accordingly.

- **Build capacity and enriching its IP assets in exchange for dedicated access rights to IP, which may range up to exclusive sector-specific licenses, so that the results created in a given agreement with a given industrial partner, could serve as the background of a future agreement with another industrial partner in another field. This is crucial to RTOs' business mode: to develop different applications in different fields for a technology, and therefore create higher socio-economic impact.**

To determine the market price for intellectual property rights/access rights, various methods can be used to abide by the state aid rules', including:

- Benchmark analysis of market prices in the same field: analysing the practices between actors in the sector, commercial data, published transactions,
- Detailed business plans with expected results for the exploitation of the technology in the years to come, including the turnover and the gross margin obtained by the exploitation of the IP.

3.2 Wide dissemination of research results

Wide dissemination of research results on a non-exclusive and non-discriminatory basis (teaching, open-access databases, open publications or open software) can be qualified as "non-economic" with no state aid awarded to RTOs (RDI Framework Art.19, Notice Art.31/32).

3.3 Public education

Public education organised within the national educational system including PhD programmes, can be qualified as "non-economic" with no direct state aid awarded to RTOs (RDI Framework Art.19, Notice Art.31/32).

3.4 Knowledge transfer activities

Knowledge transfer activities include licensing, creation of spin-off, or other forms of management of knowledge created by the research organisation/research infrastructure can be qualified as "non-economic" when (RDI Framework Art.19, Notice Art.31/32):

- they are conducted either by the research organisation/research infrastructure (including their departments or subsidiaries) or jointly with, or on behalf of other such entities,
- and all profits from those activities are reinvested in the primary activities of the research organisation/research infrastructure.

In addition, the non-economic nature of those activities is not prejudiced by contracting the provision of corresponding services to third parties by way of open tenders.

Most RTOs are non-profit organisations and their profits are totally re-invested in RDI activities. Therefore, RTOs' knowledge transfer activities such as licencing and spin-offs' creation are "non-economic", falling outside state aid rules. Therefore, the direct aid to RTOs for these activities (spin-off creation, licencing) is usually allowed.

For instance, the creation of a spin-off by an RTO is an activity that is qualified as "non-economic", providing it fulfils certain rules such as:

- hosting of the spin-offs by the Research Organisation should be limited in time (eg. 3 years) and in the size of the spin-offs (eg. 10 employees).
- sectorial exclusive licence is not an issue providing that the sectorial exclusivity is limited to a certain domain and that there are exploitation thresholds ensuring sufficient exploitation.

RTOs can externalise all or some of the knowledge transfer activities linked to spin-off creation or licencing to private companies (ie. tech start-up accelerators, RTOs' affiliates for taking equity in RTOs' spin-offs, etc.), which does not affect the fact that it is a non-economic activity.

4. Public funding of economic activities under EU state aid rules

The Union legal order is neutral with regard to the system of property ownership and does not in any way prejudice the right of Member States to act as economic operators. However, when public authorities directly or indirectly carry out economic transactions in any form, they are subject to Union state aid rules (Notice Art.73). All activities that do not qualify as “non-economic” are qualified as “economic” activities, for which EU state aid rules apply. Therefore, for such activities, the full value of the contribution of the research organisation/research infrastructure to the project may be considered as an advantage for the collaborating undertakings (if no equivalent contribution is rendered by the undertaking to the research organisation or infrastructure).

4.1 Economic activity: a definition

Any activities consisting in offering goods and services on a market are “economic” activities. This encompasses the execution of “contract research” for industry (see definition below), however there are also other categories. In the RDI field, this includes for instance the renting out equipment and laboratories or the provision of services to enterprises (RDI Framework Art.21).

In EU state aid rules, the term “contract research” is used for agreements which do not fulfil the conditions of “effective collaborative research” (see 3.1), when the industrial partner typically:

- specifies the terms and conditions of the contract on his own,
- and owns the results of the research activities,
- and carries all the risk of failure (financial, technological, scientific).

For RTOs, economic activities mainly consist of “contract research” with enterprises for technical assistance, studies or consulting, or the provision of services outside of any collaborative agreement, as well as contracts for the sale of products. Basically, any activities undertaken bilaterally with industrial partner(s) outside of the scope of a public RDI programme can be qualified as “economic” in the sense of EU state aid rules if it does not fulfil the set of criteria listed to characterise “non-economic activities”.

As the industrial partner typically specifies the terms and conditions of the contract, there is no co-decision nor joint participation for such activities. There is typically no obligation of dissemination of non-IPR results in such activities, and, because these activities are at very high Technology Readiness Level, they rarely lead to scientific publications.

The same wording issues as for the “non-economic” activities occur also (see 3.1).

4.2 Price to charge for economic activities

Economic transactions carried out by public bodies (including public undertakings) do not confer an advantage on its counterpart, and therefore do not constitute aid, if they are carried out in line with normal market conditions (Notice Art.74).

For the activities considered as “economic” in the sense of the EU state aid rules, to make sure that no illegal transmission of aid is passed on through the RTOs to the industrial partners (indirect aid), the research organisation/research infrastructure needs to receive an adequate remuneration for its services. This remuneration is deemed adequate when one of the following conditions is fulfilled (Framework RDI Art.25):

- a. the research organisation/research infrastructure provides its research service or “contract research” at market price, or
- b. where there is no market price, the research organisation/research infrastructure provides its research service or “contract research” at a price which:
 - reflects the full costs of the service and generally includes a margin established by reference to those commonly applied by undertakings active in the sector of the service concerned, or
 - is the result of arm’s length negotiations where the research organisation/research infrastructure, in its capacity as service provider, negotiates in order to obtain the maximum economic benefit at the moment when the contract is concluded and covers at least its marginal costs.

In addition, when the ownership of, or access rights to intellectual property remains with the research organisation/research infrastructure, their market value may be deducted from the price payable for the services concerned (Framework RDI Art.26).

This article holds two options for an “adequate remuneration” of economic activities: market price, or two alternatives when there is no identifiable market price.

As market prices are not always applicable in the RDI context, determining an “equivalent to market price” is very important for RTOs. In order to do that and make sure they abide by the EU state aid rules, RTOs should normally follow the first alternative in option (b), that is to say charge 100% full costs + margin for their economic activities to ensure no illegal indirect transmission of aid to their industrial partner.

The second alternative to determine an “equivalent market price” based on “*arm’s length negotiations (...) to obtain the maximum economic benefit*” would normally cover the full costs if the provider was able to calculate those costs (see the MEO test below and the Notice Art.74), and could be eventually used in the rare case where there is no possibility to determine the full cost. This can differ per research organisation (mainly used by those with no analytical costing to their services) and per contract negotiation and should be handled with great care.

For the access and price to charge for the use of research infrastructure for economic activities, the European Commission considers that:

- the Market Economy Operator test² (MEO test) can be satisfied for public funding of open infrastructures not dedicated to any specific user(s) where their users incrementally contribute, from an ex ante viewpoint, to the profitability of the project/operator. This is the case where the operator of the infrastructure establishes commercial arrangements with individual users that allow covering all costs stemming from such arrangements, including a reasonable profit margin on the basis of sound medium-term prospect. This assessment should take into account all incremental revenues and expected incremental costs incurred by the operator in relation to the activity of the specific user (Notice Art.228).
- access to the infrastructure shall be open to several users and be granted on a transparent and non-discriminatory basis. Undertakings which have financed at least 10 % of the investment costs of the infrastructure may be granted preferential access under more favourable conditions. In order to avoid overcompensation, such access shall be proportional to the undertaking's contribution to the investment costs and these conditions shall be made publicly available. (GBER Chap.4, Sec.4, Art.26).

All these aspects need to be taken into account by RTOs when determining the price to charge for access to research infrastructures when used for economic activities. It should also be noted that the price must be incurred by the receiver of the services. If the price is paid by third parties like shareholders, then the selective advantage gained by the receiving party is not offset by the payment and hence, it may qualify as state aid.

When a research infrastructure is used for economic activities, RTOs need to make them available and open to all users on a transparent and non-discriminatory basis and on market terms.

- When determining an adequate remuneration, RTOs need to take into account the depreciation costs of the infrastructure corresponding to the life of the project, calculated on the basis of generally accepted accounting principles. This is essential to make sure that no illegal indirect state aid is transmitted to their industrial partner when the infrastructure was publicly funded. Normally, RTO need to charge 100% full cost + margin + cost of infrastructure depreciation for the project, which is then “equivalent to the market price”.
- Preferential access under more favourable conditions may be granted to undertakings which have financed at least 10 % of the investment costs of the infrastructure, proportionally to

² Section 4.2 of the Notice on the notion of state aid details the terms of use to comply with the Market Economy Operator test (MEO test), which can be used to identify the presence of state aid in case of public investment (tender, benchmarking, standard assessment methodology).

the undertaking's contribution to the investment costs. These conditions shall be made publicly available.

5. When an RTO carries out activities of both economic and non-economic nature

5.1 Need for separate accounting for economic and non-economic activities

Any support for investment in research organisations/research infrastructures that is only used in non-economic activities does not constitute direct state aid to RTOs. **When the same entity carries out activities of both economic and non-economic nature, the public funding of the non-economic activities will not fall under Article 107(1) of the Treaty if the two kinds of activities and their costs, funding and revenues can be clearly separated so that cross-subsidisation of the economic activity is effectively avoided.** Evidence of due allocation of costs, funding and revenues can consist of annual financial statements of the relevant entity (RDI Framework Art.18).

RTOs need to carry out a detailed analysis of all their RDI agreements to determine for each one of them if they are of an "economic" or "non-economic" nature in the sense of the EU state aid rules, based on the definitions detailed above.

This exercise enables RTOs to demonstrate that the right costs were charged for the different activities. It will demonstrate that all economic activities were charged at a price equivalent to market price (often 100% full cost + margin + eventually depreciation costs of RDI infrastructure used), and that the RTO is compliant with the EU state aid rules.

5.2 When economic activities are ancillary

When research organisations/research infrastructures are used almost exclusively for a non-economic activity, their funding may fall outside state aid rules in their entirety, provided that the economic use is limited in scope and remains purely ancillary (RDI Framework Art.20 and Notice Art.207). This is the case when:

- the economic activity is directly related to and necessary for the operation of the research organisation/research infrastructure or intrinsically linked to its main non-economic use, and
- the economic activity is limited in scope: no more than 20% of the relevant entity's annual capacity is used in economic activity.

Carrying out the separation of economic and non-economic activities in its accounting system is also key for RTOs to determine if their economic activities are "ancillary" or not. The Commission considers activities to be ancillary where they consume exactly the same inputs (materials, equipment, labour and fixed capital) as the non-economic activities and the capacity allocated each year to such activities does not exceed 20% of the relevant entity's overall annual capacity.

This 20% threshold can be calculated in different ways (ie. price, turnover, total budget, duration of use, etc.). The term "relevant entity" is not a defined term. What is the "relevant entity" must be established by each RTO given the structure and circumstances of their own organisation. It might well apply to the RTO as a whole.

When such conditions have been met, these economic activities are deemed "ancillary". In this case, such activities, including the ancillary economic activities, are deemed not to receive state aid in their entirety.

6. Public funding of research infrastructures

The case of the public funding of research infrastructures is covered in the GBER (GBER Art.49 and Chap.4 Sec.4 Art.26) and further clarifications are also given in the 2016 Notice on the notion of state aid (Notice chap.7).

6.1 General rules & rationale

Any support for investment in research infrastructures that are only used in non-economic activities does not constitute state aid.

If an infrastructure is used for both economic and non-economic activities, Member States have to ensure that the public funding provided for the non-economic activities cannot be used to cross-subsidise the economic activities. To do so, it requires that:

- The costs and financing of economic and non-economic activities should be accounted for separately on the basis of consistently applied and objectively justifiable cost accounting principles (GBER Art.49) (see 5.1).
- The price charged for the operation or use of the infrastructure for economic activities shall correspond to a market price to ensure that no public funding benefit other activities (GBER Chap.4, Sec.4, Art.26) (see 4.2).
- The Notice also adds in its Art.206 that “this [cross-subsidisation of economic activities] can notably be ensured by limiting the public funding to the net cost (including the cost of capital) of the non-economic activities” (Notice Art.206).

6.2 Case when economic activities performed by the infrastructure are purely ancillary

If, in cases of mixed use, the infrastructure is used almost exclusively for a non-economic activity, the European Commission considers that its funding may fall outside the state aid rules in its entirety, provided the economic use remains purely ancillary (see 5.2).

The same reasoning as in 5.2 applies: after carrying out the separation of economic and non-economic activities in its accounting system at infrastructure level, if an infrastructure has less than 20% of “economic” activities under the EU state aid rules definition, and if these activities consume the same input as the infrastructure’s non-economic activities (RDI Framework Art.20 and Notice Art. 207), then all the activities of the infrastructure, including the ancillary economic activities, are deemed not to receive State aid in their entirety.

6.3 Case when the economic activities performed by the infrastructure are not ancillary

If, in cases of mixed use, the economic activities performed by the infrastructure cannot be qualified as ancillary, the funding for economic activities constitutes direct state aid to RTOs.

- If an infrastructure is used for both economic and non-economic activities, public funding for infrastructure’s construction will fall under the state aid rules only insofar as it covers the costs linked to the economic activities. Public funding of the costs linked to the non-economic activities of the infrastructure does not constitute state aid (Notice Art.205).
- Only the costs linked to the economic activities should therefore be taken into account with a view to ensuring compliance with the notification thresholds and maximum aid intensities in EU state aid rules (GBER Art.49 and Notice Art.205). So when the investment in a research infrastructure covering the costs for economic activities is over the threshold of €20 million per infrastructure, it is subject to the notification requirement of Article 108(3) of the Treaty: the European Commission needs to be notified ex-ante and the aid granted needs to be assessed (GBER Chap.1 Art.4(1)(j)).
- For the funding covering the economic activities, the aid intensity shall not exceed 50% of the eligible costs (investment costs in intangible and tangible assets). A claw-back mechanism shall be put in place in order to ensure that the aid intensity of 50% is not exceeded as a result of an increase in the share of economic activities compared to the situation envisaged at the time of awarding the aid (GBER Chap.3 Sec.4 Art.26).
- In addition, RTOs still have to make sure no indirect state aid is granted to undertakings through their economic activities (see 5)

Example of a research infrastructure used for both economic and non-economic activities using the same facilities for both types activities (Source: [EC presentation](#)):

- Total investment costs of €100m;
- Use for non-economic activities accounts for ~75% of the infrastructure's overall annual capacity (€75m) can be fully funded by the State (no state aid)
- Use for economic activities accounts for ~25% of the infrastructure's overall annual capacity (€25m), excluding operating aid for infrastructure which needs to be covered by users' fees.

Two case scenarios for the funding of the economic activities:

1. If the remaining €25m corresponding to economic activities are financed through means (private) that do not include state resources, there is no aid.
2. If the remaining €25m corresponding to economic activities are financed through public funding, then state aid is present (public funding of economic activities).
 - The GBER provides for a €20m notification threshold and a maximum intensity of 50%, which means that the infrastructure can receive €12.5m (50% of the investment costs of €25m attributed to the economic activity, which is below the €20m threshold) as compatible aid exempted from notification.
 - For the remaining €12.5m to be financed through public funding, the European Commission needs to be notified and the aid granted needs to be assessed.

Conditions to fulfil in any case:

- Separation of accounts for economic and non-economic activities for the research infrastructure
- Monitoring of the ratio between non-economic and economic activities and claw-back mechanism in place to ensure that applicable aid intensity of 50% is not exceeded as a result of an increase in the share of economic activities
- Non-discriminatory and transparent access to research infrastructure by users (exception only to users contributing at least 10% of investment costs from private resources)

Summary:

Type of activity supported	Relevant costs	Maximum support amount without notification	Intensity of support
Non-economic / no aid	€75m	€75m	100%
Economic / aid	€25m	€12.5m	50%
Total	€100m	€87.5m	87.5%

EARTO - European Association of Research and Technology Organisations

Founded in 1999, EARTO promotes Research and Technology Organisations and represents their interest in Europe. EARTO network counts over 350 RTOs in more than 20 countries. EARTO members represent 150.000 highly-skilled researchers and engineers managing a wide range of innovation infrastructures.

RTOs - Research and Technology Organisations

From the lab to your everyday life. RTOs innovate to improve your health and well-being, your safety and security, your mobility and connectivity. RTOs' technologies cover all scientific fields. Their work ranges from basic research to new products and services development. RTOs are non-profit organisations with public missions to support society. To do so, they closely cooperate with industries, large and small, as well as a wide array of public actors.

EARTO Working Group Legal Experts: is composed of 25 corporate legal advisers working within our membership. Established in autumn 2013, this Working Group has also worked on the revision of the state aid rules & the GBER. Our experts also contributed to the setting-up of the DESCA Consortium Agreement model for Horizon 2020. More recently they were at the origin of the EARTO Paper on Open X, the EARTO Background Note on the US Federal Agencies Data Sharing Policies, two EARTO Position Papers on the European Licencing Framework for Standard Essential Patents, and the EARTO paper on Public Procurement of Innovation.

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