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State Aid and EU funding: Are they compatible?

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State Aid and EU funding: Are they compatible?

Abstract

State aid involves the transfer of state resources. These are resources which are controlled by public authorities. EU funds which are granted directly to undertakings without coming under the control of a public authority of a Member State cannot be considered to be state resources. However, EU funds channelled through managing authorities become state resources and can constitute state aid if all the other criteria of Article 107(1) TFEU are satisfied.

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CONTENTS

LIST OF ABBREVIATIONS

COSME	Competitiveness Programme for SMEs
CPR	Common Provisions Regulation
EFSI	European Fund for Strategic Investments
EIB	European Investment Bank
EIF	European Investment Fund
ESIF	European Structural and Investment Funds
GBER	General Block Exemption Regulation
SME	Small and Medium-sized Enterprise
TEN-T	Trans-European Transport Networks
TFEU	Treaty on the Functioning of the European Union

EXECUTIVE SUMMARY

The Treaty on the Functioning of the European Union declares state aid to be in principle incompatible with the internal market. However, this principle is not absolute. Under certain conditions state aid may be granted to undertakings. A public measure constitutes state aid when it satisfies all of the criteria of Article 107(1) TFEU, one of which is the transfer of resources that are controlled by the state.

The concept of control in the meaning of Article 107(1) has been interpreted very widely by EU courts. Control is deemed to be exercised whenever the state has discretion to determine the beneficiaries of an aid measure and make resources available to them.

In certain situations such control may be exercised over EU funds. For this reason, public officials and beneficiary undertakings are on occasion uncertain as to whether the funding received by undertakings constitutes state aid.

This paper explains that EU funds channelled through the managing authorities of Member States become state resources and can constitute state aid if all the other criteria of Article 107(1) are satisfied. This is the case with ESIF, TEN-T funds that are combined with national resources and investments that combine EFSI with national resources.

By contrast, EU funds which are granted directly to undertakings without coming under the control of a public authority of a Member State cannot be considered to be state resources. It follows that such direct funding by the EU does not constitute state aid. This is the case with COSME, Horizon 2020, EIB/EIF funds and ESI Funds that support financial instruments managed at EU level.

Nonetheless, public officials occasionally appear uncertain as to when EU funding should be subject to state aid rules. This uncertainty arises partly because the source of the funds is the EU and partly because EU regulations such as those of COSME and Horizon 2020 require "consistency" or "compliance" with state aid rules.

This paper recommends that that uncertainty is eliminated through revision of those Regulations so that they refer to the need to avoid distortion of competition without mentioning state aid. A bolder revision of those Regulations would insert text explicitly stipulating that EU funds managed at EU level do not fall within the scope of state aid rules. Such an explicit statement is not unprecedented. Recital 26 of the 2014 General Block Exemption Regulation and recital 13 of the 2013 *de minimis* Regulation say so. The Regulations they replaced [i.e. Regulation 800/2008 and 1998/2006, respectively] did not. Indeed, since it is the Commission, the EIB/EIF or other EU bodies that manage funds at EU level, they can always act in a manner that avoids distortion of competition in the internal market.

1. THE CONCEPT OF STATE AID

KEY FINDINGS

- A public measure constitutes state aid when all of the criteria in Article 107(1) TFEU are satisfied.
- For a measure to constitute state aid it must involve transfer of state resources.
- State resources are those over which the state can exercise control.

Member States have to comply with state aid rules whose primary objective is to prevent undue distortion of competition. State aid is normally funded by state resources. However, state aid measures may also be funded by EU resources which are managed at Member State level. By contrast, EU resources which are not channelled through public authorities at Member State level are not subject to state aid control. This is the case of programmes managed at European level.

This distinction between management at Member State and European level often causes confusion. The confusion is compounded by the fact that, first, in either case the source of the funds is the EU and, second, EU regulations establishing funds at EU level also refer to "consistency" or "compliance" with state aid rules.

The purpose of this paper is to examine the precise legal relation between state aid and EU funding and explain when EU funding falls within the scope of Article 107(1) TFEU which declares state aid to be incompatible with the internal market. The paper also makes recommendations on how to eliminate the confusion concerning the state aid status of EU funding.

Article 107(1) TFEU requires that "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."

It is now well-established in the case law of the Court of Justice of the European Union that Article 107(1) lays down four cumulative criteria that determine whether a public measure constitutes state aid. These criteria are:

1. There must be a transfer of state resources, which is imputable to the state.
2. The transfer must confer an advantage.
3. The advantage must be selective.
4. The aid must be liable to affect trade between Member States and distort competition.

Before examining in detail the meaning of state resources, it is instructive to consider briefly the other criteria of Article 107(1).

Advantage means reduction of the costs which are normally borne in the budgets of undertakings. Normal costs are the costs which are incurred by undertakings before the intervention of the state.

For a public measure to fall within the scope of Article 107(1) it must be selective. A selective measure applies only to some undertakings, or some sectors of the economy, or some regions of the Member State or some type of economic activity. The fact that it may benefit many undertakings is irrelevant. What is relevant is that it does not apply to all undertakings which are in the same factual or legal situation as determined by the objective of the measure.

A public measure affects trade when it aids a product that is traded in the internal EU market or supports an undertaking that is active in international – i.e. cross-border – trade. The effect on trade does not have to be substantial or to have actually occurred. Even a small, expected impact on trade is sufficient to constitute affectation of trade in the meaning of Article 107(1).
When trade is affected, competition is also considered to be distorted because competitors in other Member States do not receive aid from the same source. It is irrelevant that the market position of the aid recipient may not improve or that the competitors may have received similar aid from their own public authorities.

2. MEANING OF STATE RESOURCES

KEY FINDINGS

- Transfer of state resources in the meaning of Article 107(1) TFEU occurs when the resources are controlled by the state and the decision to transfer them can be attributed to the state.
- Control means that the state has discretion to determine in general how certain resources may be used.
- Attribution means that the state takes the decision directly or indirectly via bodies it controls concerning the execution of a specific transfer.

According to the case law of the Court of Justice of the European Union, an aid measure must be financed by state resources and must be attributed to a decision of a public authority.
Article 107(1) makes a distinction between "Member States" and "state resources". The term "Member States" includes any public authority at any level of government – central, regional or local. Money paid out of the budget of a public authority is a state resource. Budgetary expenditure is always attributed to a decision of a public authority.
It is important to note that a measure is deemed to be funded by the budget of a public authority not only when that authority actually pays an amount out of its budget but also when it fails to receive or collect money that is owed to it such as taxes or when it forgoes potential revenue, for example, by renting out a state asset (e.g. land or building) at a rate lower than market rates. A measure is also considered to be funded by a public budget when a public authority assumes liabilities which are not sufficiently covered with equivalent revenue. This happens when a public authority provides a guarantee or offers an indemnity which is not priced at a market rate that corresponds to the amount of the liability and the risk that is assumed.
The term "state resources" covers any other resource that is controlled by a public authority but remains outside a public budget. This is typically the case of entities or companies which are owned by the state. As owner, the state can in principle determine how they manage their budgets or how they dispose of their resources. The state may also be able to determine how resources are spent in the case of organisations over which it exercises supervisory control.
The Court of Justice of the European Union has ruled that ownership or control by the state of an undertaking or organisation is not enough to prove that state resources are transferred in the

meaning of Article 107(1) whenever such undertakings or organisations can act autonomously and pursue their own policy independently of that of the state. For example, a state-owned investment bank may have commercial operations which are purely profit driven. A state-funded research organisation which normally pursues academic research may also have the right to engage in collaboration with industry, for example, to test new technologies. In these circumstances, a decision by such an undertaking or organisation to provide funds or to treat preferentially (e.g. through a lower price or rent or interest rate) another undertaking cannot be automatically attributed to the state. It must be shown to be the result of state intervention, rather than the autonomous decision of that organisation.

However, it can be difficult to prove that the state has actually instructed the undertaking or organisation it owns or controls to grant aid to another undertaking. This is because normally there are many channels of communication and influence between an organisation and its owners or controlling authority. For this reason, the Court of Justice has ruled that attribution does not need to be based on evidence of a specific decision of the state. An aid measure can be attributed to the state on the basis of other facts such as the extent of the integration of the organisation in the state administration, the extent to which state representatives participate in the day-to-day decisions of the organisation or any other evidence that demonstrates that the organisation acts to further public policy objectives.

The state may also be able to control resources which are managed by wholly private entities. This is typically the case of arrangements for the funding of the production of electricity from renewable resources. A levy is imposed by law on users of electricity. The revenue from the levy is collected by the distributors of electricity which may be private undertakings. The distributors of electricity use that revenue to offset the higher cost of green electricity which they are obliged by law to buy. Although the revenue from electricity levies never enters the treasury of the state, the General Court ruled, in case T-47/15, *Germany v Commission*, that the state, through its legislative acts, determined how revenue was raised and how it was used. The users of electricity had no choice but to pay the levy, while the distributors had no other option but to buy green electricity. The end beneficiaries were green electricity producers. The General Court concluded that the state exercised control over those resources that were eventually paid to green electricity producers via the distributors.

By contrast, in the landmark cases C-379/98, *PreussenElektra* and more recently in case C-329/15, *ENEA*, the Court of Justice ruled that when the state regulates transactions between undertakings by imposing certain obligations, such as compulsory purchase, there is no transfer of state resources because the regulatory intervention of the state does not earmark the resources that can be used to fulfil those obligations. The Court of Justice also ruled in the seminal cases C-345/02, *Pearle* and C-677/11, *Doux Elevage*, that the regulatory intervention of the state that imposes obligations or grants rights does not result in transfer of state resources whenever the relevant decisions are taken independently and are not attributed to the state.

In summary, a transfer of state resources in the meaning of Article 107(1) occurs when the state controls the resources in question and decides how to dispose of them. In particular, state resources are transferred in the following circumstances:

1. A public authority makes a payment out of its budget.
2. A public authority forgoes revenue it could otherwise obtain.
3. A public authority accepts a liability without charging an adequate fee that can offset the risk of that liability such as, for example, a sufficiently high guarantee premium or rate of interest.
4. An entity owned or controlled by the state provides grants or funds to undertakings according to instructions or directives by the state.
5. An entity that is not owned or controlled by the state is obliged by law or administrative act to make specified resources available to undertakings.

3. EU FUNDS

KEY FINDINGS

- EU funds managed at Member State level (i.e. ESIF) come under the control of the state.
- EU funds managed at European level do not come under the control of the state.
- EU funds committed to Member States and then returned to European level may fall outside the control of the state.
- EU funds and Member State funds combined at European level may not come under the control of the state if the state is not involved in their actual investment.

By assigning decisive significance to state control, the case law on Article 107(1) consequently ignores the source of funds that support aid measures. This raises the question whether EU funds fall within the scope of Article 107(1). The rest of this chapter answers this question in four different settings:

1. EU funds managed at Member State level (i.e. European Structural and Investment Funds).
2. EU funds managed at European level.
3. EU funds committed to Member States and then returned to European level.
4. EU funds and Member State funds combined at European level.

3.1 EU FUNDS MANAGED AT MEMBER STATE LEVEL

Article 6 of Regulation 1303/2013 – the Common Provisions Regulation for European Structural and Investment Funds – requires that operations supported by ESIF must comply with EU law, including state aid law. The Common Provisions Regulation (CPR) refers specifically to state aid rules in Articles 37, 38 and 44 on financial instruments, Article 61 on revenue generating operations, Article 62 on public private partnerships (PPPs), Article 65 on eligible expenditure, Article 71 on durability of operations, Article 131 on payment applications, Article 137 on preparation of accounts, Article 140 on availability of documents, and Article 146 on the obligations of Member States concerning corrections and recovery. In addition, Annex XI lays down ex ante conditionalities for the effective application of state aid law.

Also Article 7(4) of Regulation 1315/2013 on the development of the trans-European transport network stipulates that:

"Member States shall take all necessary measures to ensure that the projects are carried out in compliance with relevant Union and national law, in particular with Union legal acts on the environment, climate protection, safety, security, competition, state aid, public procurement, public health and accessibility."

The above provisions of the CPR and the TEN-T Regulation are addressed to the Member States. Since a public measure constitutes state aid only when all of the criteria of Article 107(1) apply, it follows that compliance with state aid law is necessary only when state resources are used. The question arises as to whether ESI Funds are considered to be state resources, even though they emanate from the EU budget.

Although EU courts have not explicitly said that structural funds can be state resources in the meaning of Article 107(1), they have had several opportunities to examine state aid measures co-funded by EU resources. In cases C-245/16, *Nerea*, C-138/03, *Italy v Commission*, T-254/00, *Hotel Cipriani v Commission* and T-82/96, *ARAP v Commission*, among others, the Court of Justice or the General Court considered support from EU structural funds in the context of state aid schemes and never questioned whether structural funds were state resources.

As explained in the previous section, the decisive element in the classification of resources as state resources is not their origin but whether the state can exercise control over them. Indeed, paragraph 60 of the Commission's Notice on the Notion of State aid explains that:

"Resources coming from the Union (for example from structural funds), from the European Investment Bank or the European Investment Fund, or from international financial institutions, such as the International Monetary Fund or the European Bank for Reconstruction and Development, are considered as State resources if national authorities have discretion as to the use of these resources (in particular the selection of beneficiaries)."

All EU structural and cohesion funds fall within the responsibility of managing authorities. These are public authorities appointed by Member States for the explicit purpose of designing and implementing operational programmes and ensuring that EU funds are spent efficiently and effectively. In discharging their responsibilities, managing authorities may determine the eligible beneficiary undertakings and the conditions for provision of financial support. Their legal powers to determine eligible beneficiaries and terms of funding confer to them control over the use of EU funds.

Guidance on how EU resources should be considered is also provided in secondary legislation and various Commission documents. For example Regulation 1407/2013 on *de minimis* aid stipulates in Article 3(5) that:

"The ceilings laid down in paragraph 2 shall apply irrespective of the form of the *de minimis* aid or the objective pursued and regardless of whether the aid granted by the Member State is financed entirely or partly by resources of Union origin."

By contrast, EU funds which do not come under the control of Member States are not considered to be state resources and therefore fall outside the scope of Article 107(1).

Indeed paragraph 60 of the Notice on the Notion of State Aid, that was quoted above, clarifies that:

"By contrast, if [EU] resources are awarded directly by the Union, by the European Investment Bank or by the European Investment Fund, with no discretion on the part of the national authorities, they do not constitute State resources (for example funding awarded in direct management under the Horizon 2020 framework programme, the EU programme for the Competitiveness of Enterprises and Small and Medium-sized Enterprises (COSME) or the Trans-European Transport Network (TEN-T) funds)."

More formally, recital 26 of the General Block Exemption Regulation (Regulation 651/2014) states explicitly that:

"Union funding centrally managed by the institutions, agencies, joint undertakings or other bodies of the Union, that is not directly or indirectly under the control of Member States, does not constitute State aid."

A slightly different wording is found in recital 13 of the *de minimis* Regulation according to which:

"A measure might be considered not to be State aid within the meaning of Article 107(1) of the Treaty …, for instance because the measure complies with the market economy operator principle or because the measure does not involve a transfer of State resources. In particular, Union funding centrally managed by the Commission which is not directly or indirectly under the control of the Member State does not constitute State aid and should not be taken into account in determining whether the relevant ceiling is complied with."

A similar statement is made in paragraph 6 of the Commission's Introduction to the Analytical Grids on State Aid to Infrastructure:[1]

"If … resources are awarded directly by the Union, by the EIB or by the EIF, with no discretion on the part of the national authorities, they do not constitute State resource".

In summary, when EU resources flow through a channel, fund or body over which the state can exercise control, they have to be classified as state resources. Conversely, when EU resources are granted directly to undertakings without transiting through a state-controlled body or fund, they fall outside the scope of state aid rules.

However, as will be explained in the next section, even EU resources managed at European level have to be granted in conformity with the spirit of state aid law. The previous sentence used the word "spirit" on purpose to indicate that it is not clear how the conformity of direct EU funding with state aid rules is achieved in practice.

[1] The Analytical Grids are on the same web page as the Notice on the Notion of State Aid and can be accessed at: http://ec.europa.eu/competition/state_aid/modernisation/notice_aid_en.html

3.2 EU FUNDS MANAGED AT EUROPEAN LEVEL

Article 107(1) refers to aid granted by "Member States" or through "state resources". EU aid from the EU budget is neither granted by Member States, nor through state resources. After all, the EU budget is based on "own resources", i.e. resources that belong to the EU. Moreover, the annual EU budget is decided by the two arms of the budgetary authority, which are European Parliament and the Council. Therefore, EU resources that do not come under the control of a Member State cannot fall within the scope of Article 107(1).

Nonetheless, the Financial Regulation of the EU (Regulation 966/2012) makes two references to state aid. Recital 52 stipulates that "financial instruments should only be implemented under strict conditions, so that there are no budgetary risks for the budget and no risk of market distortion which is inconsistent with state aid rules." Then Article 140 of the same Regulation specifically requires that "financial instruments shall comply with the following: (c) non-distortion of competition in the internal market and consistency with State aid rules".

Recital 52 proscribes "inconsistency" with state aid rules, while Article 140(c) requires "consistency" with state aid rules, as a means of avoiding distortions in the internal market.

There are also references to state aid in other documents. Regulation 1287/2013 establishing a programme for the competitiveness of enterprises and small and medium-sized enterprises (COSME) also refers to state aid. The objective of COSME is to support SMEs primarily with financial instruments in the form of equity and debt. Recital 31 of that Regulation provides that:

"To ensure that financing is limited to tackling market, policy and institutional failures, and with a view to avoiding market distortions, funding from the COSME programme should comply with the State aid rules of the Union."

Then Article 17(10) of the COSME Regulation requires that:

"The financial instruments shall be implemented in compliance with the relevant State aid rules of the Union."

Once more, compliance with state aid rules is seen as a means of avoiding distortions in the internal market.

The EU supports undertakings not only with financial instruments. Regulation 1291/2013 establishing Horizon 2020 – the Framework Programme for Research and Innovation – refers to state aid too.

Recital 42 of that Regulation requires that:

"Funding from Horizon 2020 should be designed in accordance with State aid rules so as to ensure the effectiveness of public spending and to prevent market distortions, such as crowding-out of private funding, creating ineffective market structures or preserving inefficient businesses."

Annex I, Part II, Section 2 on Access to Risk Finance, of Regulation 1291/2013 states that:

"The design of the Debt and Equity facilities takes account of the need to address the specific market deficiencies, and the characteristics (such as degree of dynamism and rate of company creation) and financing requirements of these and other areas without creating market distortions."

Part of the funds from Horizon 2020 is managed by the EIB/EIF through their InnovFin facility and takes the form of risk-bearing instruments. Those funds are also outside the scope of state aid rules, but as required by Regulation 1291/2013, the EIB/EIF have to implement them without causing distortions.

In summary, the requirements for consistency or compliance with state aid rules in the Financial Regulation, the COSME Regulation and the Horizon 2020 Regulation are intended to safeguard the integrity of the internal market. The Commission, as the sole authority with competence to assess the compatibility of state aid with the internal market, cannot possibly control itself. But it can ensure that its own programmes or those of other EU institutions do not fragment the internal market.

Indeed, on 21 January 2014, the Commissioner responsible for competition, Joaquín Almunia, and the EIB President, Werner Hoyer, issued a joint statement on "State aid matters in relation to the activities of the EIB Group".[2] In that statement they identified three different situations.

1) Where the EIB Group employs own resources:

"Own resources awarded directly by the EIB Group do not constitute State aid under Article 107(1) TFEU, and as such fall outside the scope of the State aid rules. … the financing from the EIB group is not to be considered for the calculation of the *de minimis* threshold, of the notifications thresholds and of maximum aid intensities. Nevertheless, wherever guarantees from Member States are granted for EIB Group financing or in case of co-financing or any other State support, the Member State(s) concerned remain responsible for notifying any State aid."

This is in line with the case law on Article 107(1) according to which any guarantee granted by a Member State to an undertaking that is not priced at a market rate constitutes state aid, regardless of the source of the funding obtained by that undertaking.

2) Where the EIB group implements and manages Member States' programmes:

"For programmes managed and implemented by the EIB Group on behalf of, or together with, a Member State, funded by resources from national budgets, or by resources from the Union budget which flow through national budgets (European Structural and Investment Funds), or by a combination of those resources, State aid rules apply. The Member State remains responsible for ensuring the compliance, and if necessary, the notification of any State aid to the Commission's Competition services."

Again, this is in line with the concept of state control of resources in the meaning of Article 107(1). When the EIB manages a fund on behalf of a Member State it simply acts as an agent of that Member State carrying out the public policy defined by that Member State.

3) Where the EIB group acts under a mandate from the European Commission and manages EU funds:

"Union financing does not qualify as State aid – and therefore substantive and procedural requirements of the State aid rules do not apply – when it consists only of Union resources without involvement of any resources from or under the control of Member States. However, under the

[2] The Joint Statement can be accessed at:
http://ec.europa.eu/competition/state_aid/modernisation/joint_statement_en.pdf

Financial Regulation, the "consistency" of Union financial instruments with State aid rules must be ensured, in order to avoid undue distortion of competition on the internal market and to ensure consistent treatment of financing for equivalent projects granted from Union and Member States' funds. Such consistency requires clear, concrete and easily implementable criteria, which can be spelled out in agreements to be concluded between the relevant Commission services and the EIB Group."

This statement clarifies that the consistency with state aid rules required by the Financial Regulation is achieved by the EIB, and any other EU institution, through pursuit of policies that avoid distortions of competition. EIB and other EU institutions commit themselves to implement programmes that do not distort competition, rather than formally notify state aid measures to the Commission or apply block exemption regulations such as the GBER. After all, there is no procedure for state aid notification by EU institutions to the Commission.

3.3 EU FUNDS ALLOCATED TO MEMBER STATES AND THEN RETURNED TO EUROPEAN LEVEL

In implementing financial instruments co-funded by ESIF, Article 38 of the CPR provides two options to Member States. "Managing authorities may provide a financial contribution to the following financial instruments:

(a) financial instruments set up at Union level, managed directly or indirectly by the Commission;

(b) financial instruments set up at national, regional, transnational or cross-border level, managed by or under the responsibility of the managing authority."

It is clear that option (b) has to comply with state aid rules because Member States decide who the eligible beneficiaries are and the terms of financing.

However, the state aid status of option (a) is far from clear, nor is it an option that is often chosen by Member States. Anecdotal evidence suggests that not more than a few Member States have chosen to return ESI Funds back to the European level by contributing to financial instruments managed directly by the Commission or indirectly via the EIB/EIF.

With respect to the state aid status of option (a), it can be inferred from well-established principles in the case law that, first, the Commission cannot control itself, but, second, the Commission has a mandate to preserve the integrity of the internal market. Therefore, the Commission will not pursue policies or implement programmes that distort competition.

However, the question arises whether Member States may be held responsible under state aid rules for the contributions they make to financial instruments managed at EU level. The answer to this question is provided by paragraph 7 of the Commission's Introduction to the Analytical Grids that was quoted earlier. It clarifies that:

"Member States may contribute ESI Funds to financial instruments set up at EU-level. Such contributions would not be imputable to the State and, therefore, would not constitute State aid in the meaning of Art 107(1) TFEU, provided the contributing Member State does not attach any conditions as to the use of these contributions. The condition that the ESIF contributions are invested in the territory of the contributing Member State specified in the Operational

Programme(s) does not make the resources imputable to the Member State since the ESI Funds are allocated to Member States in accordance with Union rules that have already determined in which Member State's territory those funds should be invested."

In other words, Member States "lose" control over the resources they contribute to EU level funds because they are managed according to the terms decided by the Commission. Moreover, the decision to invest those resources back in the territory of the contributing Member State cannot be attributed to that Member State because the funds were made available by the EU on condition that they are invested in that Member State. Hence, it is a decision that is attributed to the EU.

3.4 EU FUNDS AND MEMBER STATE FUNDS COMBINED AT EUROPEAN LEVEL

Commission President Juncker's initiative to establish the European Fund for Strategic Investments (EFSI) has created another state aid complication. From the analysis in previous sections it follows that when EU resources are invested into undertakings without flowing through public authorities they fall outside the scope of Article 107(1). The purpose of EFSI is to leverage private sector involvement. Therefore, the combination of EU resources with private resources does not constitute state aid because it does not involve state resources (or because they are invested in public infrastructure projects which are not considered to be economic in nature).

Once more the question arises as to the state aid status of participation by Member States in projects co-financed by EFSI. The principle is that there is state aid whenever state resources are involved. This is confirmed by paragraph 8 of the Commission's Introduction to the Analytical Grids, according to which:

> *"Financing by the European Fund for Strategic Investments (EFSI) is not State aid within the meaning of the TFEU, and thus EFSI financing will not have to be approved by the European Commission under EU State aid rules. Projects supported by EFSI may however also benefit from financial support (co-financing) by Member States (ESI Funds and national co-financing). Such co-financing constitutes a transfer of State resources and may amount to State aid. The Commission committed to complete the State aid assessment of Member States' co-financing of EFSI projects as a matter of priority, within six weeks of receiving the required information."*

Therefore, in general, projects supported by EFSI do not receive state aid. However, when a Member State also contributes to a project funded by EFSI, it must comply with state aid rules. In this case, notification to the Commission may be necessary.

4. CONCLUSIONS AND RECOMMENDATIONS

KEY FINDINGS

- Although EU funds managed at European level do not fall within the scope of state aid rules, they have to be consistent and compliant with state aid rules in order to avoid distortion to competition.
- In order to improve legal clarity, the distortion to competition can be avoided without explicit reference to state aid rules.
- There may even be explicit statement that EU funds managed at European level do not fall within the scope of state aid rules.

For a public measure to constitute state aid it must satisfy all of the criteria of Article 107(1) TFEU, one of which is the transfer of resources controlled by the state. The concept of control in the meaning of Article 107(1) has been interpreted very widely by EU courts. Control is deemed to be exercised whenever the state has discretion to determine the beneficiaries of an aid measure and make resources available to them.

Accordingly, EU funds which are granted directly to undertakings without coming under the control of a public authority of a Member State cannot be considered to be state resources. It follows that such direct funding by the EU does not constitute state aid. This is the case with COSME, Horizon 2020, EIB/EIF funds and ESI Funds that support financial instruments managed at EU level.

Funds managed at EU level must be implemented in a manner that avoids distortion of competition. It is worth pointing out that while many studies have been carried out to determine the impact of state aid on Member State economies, it appears that no empirical study has attempted to assess the actual effect of EU managed funds on competition and whether indeed they avoid distortions in the internal market and the European economy at large. State aid that is compatible with the internal market does effect competition, even to a small extent, and in some cases it may even stimulate it. But in all cases its positive effects should outweigh the negative effects. By contrast, there appears to be no publicly available empirical study on the impact of EU managed funds on competition.

EU funds channelled through managing authorities become state resources and can constitute state aid if all the other criteria of Article 107(1) are satisfied. This is the case with ESIF, TEN-T funds that are combined with national resources and investments that combine EFSI with national resources.

The confusion concerning the relation of EU funding with state aid can be eliminated in the following manner. Since the purpose of EU regulations such as those of COSME and Horizon 2020 for seeking "consistency" or "compliance" with state aid rules is to prevent distortions to competition in the internal market, it is sufficient that they refer to this objective without mentioning state aid. After all, since it is for the Commission to lay down the precise terms of EU funding, it has discretion to define them in a way that they are consistent with state aid rules. Such a revision will have no prejudicial effect on the substance of the Regulation.

An even bolder revision of those Regulations would insert text explicitly stipulating that EU funds managed at EU level do not fall within the scope of state aid rules, even though they need to be implemented in a manner that is consistent with avoidance of distortions to competition. Such an explicit statement is not unprecedented. Recital 26 of the 2014 GBER and recital 13 of the 2013 *de minimis* Regulation say so. The Regulations they replaced [i.e. Regulation 800/2008 and 1998/2006, respectively] did not. Indeed, since it is the Commission, the EIB/EIF or other EU bodies that manage funds at EU level, they can always act in a manner that avoids distortion of competition in the internal market.

State aid involves the transfer of state resources. These are resources which are controlled by public authorities. EU funds which are granted directly to undertakings without coming under the control of a public authority of a Member State cannot be considered to be state resources. However, EU funds channelled through managing authorities become state resources and can constitute state aid if all the other criteria of Article 107(1) TFEU are satisfied.

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