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Vademecum

for beneficiaries of State aid within the scope of economic activity of an entrepreneur awarded under Operational Programme Innovative Economy, 2007-2013

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List of legal acts and other documents related to granting support under Operational Programme Innovative Economy

The legal acts and other documents enumerated below were quoted and referred to in a relevant context in this Vademecum along with information about their contents and relationship with State aid.

(1) Commission Regulation (EC) No 1628/2006 of 24 October 2006 on the application of Articles 87 and 88 of the Treaty to national regional investment aid (OJ EU L 302 of 01.11.2006).

(2) Commission Regulation (EC) No 1998/2006 of 15 December 2006 on the application of Articles 87 and 88 of the Treaty to *de minimis* aid (OJ EU L 379 of 28.12.2006, p. 5).

(3) Commission Regulation (EC) No 800/2008 of 6 August 2008 declaring certain categories of aid compatible with the common market in application of Articles 87 and 88 of the Treaty (OJ L 214 of 09.08.2008, p. 3).

(4) Council Regulation (EC) No 1407/2002 of 23 July 2002 on State aid to the coal industry (OJ EU L 205 of 2.8.2002, p. 1; OJ Polish special edition, Chapter 8, Volume 2, p. 170).

(5) Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 93 of the EC Treaty (OJ EC L 83 of 27.03.1999).

(6) Commission Regulation (EC) No 271/2008 of 30 January 2008 amending Regulation (EC) No 794/2004 implementing Council Regulation (EC) No 659/1999 laying down detailed rules for the application of Article 93 of the EC Treaty (OJ L 140 of 30.4.2004, p. 1).

(7) Commission Regulation (EC) No 70/2001 of 12 January 2001 on the application of Articles 87 and 88 of the EC Treaty to State aid to small and medium-sized enterprises (OJ L 10 of 13.01.2001), as amended by Regulation No 364/2004/ EC of 25 February 2004 (OJ EC L 63 of 28.02.2004).

(8) Council Regulation (EC) No 104/2000 of 17 December 1999 on the common organisation of the markets in fishery and aquaculture products (OJ EC L 17 of 21.01.2000, p. 22; OJ EU Polish special edition, Chapter 4, Volume 4, p. 198, as amended).

(9) Commission Regulation (EC) No 1725/2003 of 29 September 2003 adopting certain international accounting standards in accordance with Regulation (EC) No 1606/2002 of the European Parliament and of the Council (OJ EC L 261 of 13.10.2003, p. 1; OJ EU Polish special edition, Chapter 13, Volume 32, p. 4, as amended).

(10) Council Regulation (EC) No 1083/2006 of 11 July 2006 laying down general provisions on the European Regional Development Fund, the European Social Fund and the Cohesion Fund and repealing Regulation (EC) No 1260/1999 (OJ EU L 210/25).

(11) Act of 23 April 1963 Civil Code (Dz. U. 1964, No 16, item 93, as amended).

(12) Act of 15 September 2000 Code of Commercial Companies (Dz. U. of 2000, No 94, item 1037, as amended).

(13) Act of 30 June 2000 Industrial Property Law (Dz. U. of 2003, No 119, item 1117, as amended).

(14) Act of 30 May 2008 on some forms of support for innovative activity (Dz. U. of 2008, No 116, item 730).

(15) Act of 22 March 1989 on the crafts (Dz. U. of 2002 No 112, item 979 and of 2003, No 137, item 1304).

(16) Act of 4 March 2005 on National Capital Fund (Dz. U. of 2005, of 6 April 2005).

(17) Act of 22 September 2006 on the transparency of financial relations between public authorities and public entrepreneurs and on financial transparency of some enterprises (Dz. U. No 191, item 1411, as amended).

(18) Act of 30 May 1989 on professional self-government of some entrepreneurs (Dz. U. No 35, item 194 and of 1997, No 121, item 769 and 770).

(19) Act of 30 May 1989 on chambers of commerce (Dz. U. No 35, item 195, as amended).

(20) Act of 30 April 2004 on the procedural issues concerning State aid (Dz.U. of 2007, No 59, item 404, as amended).

(21) Act of 6 December 2006 on the principles of development policy (Dz.U. of 2006, No 227, item 1658 and of 2007, 140, item 984).

(22) Act of 30 June 2005 on public finance (Dz. U. of 2005, No 249, item 2104, as amended).

(23) Act of 2 July 2004 on freedom of economic activity (consolidated text: Dz. U. of 2007, No 155, item, 1095).

(24) Act of 16 April 1993 on combating unfair competition (consolidated version: Dz.U. of 2003, No 153, item 1503, as amended).

(25) Act of 6 September 2001 on road transport (consolidated text: Dz. U. of 2007, No 125, item, 874).

(26) Act of 29 September 1994 an accounting (Dz. U. of 2002, No 76, item 694, as amended).

(27) Act of 9 November 2000 on the establishment of the Polish Agency of Enterprise Development (consolidated text: Dz.U. of 2007, No 42, item 275).

(28) Act of 16 February 2007 on competition and consumer protection (Dz.U. of 2007, No 50, item 331).

(29) Ordinance of the Council of Ministers of 13 October 2006 on the establishment of the map of regional aid (Dz. U. No 190, item 1402).

(30) Ordinance of the Council of Ministers of 20 October 2007 concerning declarations on *de minimis* aid and *de minimis* aid in agriculture and fisheries (Dz. U. No 53, item 354).

(31) Ordinance of the Council of Ministers of 20 March 2007 on information about the received State aid and information about failure to obtain aid (Dz. U. No 61, item 413).

(32) Ordinance of the Council of Ministers of 11 August 2004 on detailed manner of calculating the value of State aid awarded in different forms (Dz. U. No 194, item 1983, as amended).

(33) Ordinance of the Council of Ministers of 13 July 2000 on introduction of the Nomenclature of Territorial Units for Statistics (NTS) (Dz. U. No 58, item 685, as amended).

(34) Ordinance of the Minister of Economy and Labour of 27 January 2005 on National SME Services Network (Dz. U. No 27, item 221).

(35) Ordinance of the Minister of Regional Development of 7 April 2008 on granting financial aid under Operational Programme Innovative Economy 2007-2013 by Polish Agency for Enterprise Development (Dz. U. No 68, item 414).

(36) Ordinance of the Minister of Regional Development on granting financial aid for Measure 5.3 Support for innovation centres of the Operational Programme Innovative Economy 2007-2013 by the Polish Agency for Enterprise Development (draft).

(37) Ordinance of the Minister of Regional Development of 22 August 2008 on granting financial aid for the support of the creation and development of e-Commerce under the Operational Programme Innovative Economy 2007-2013 by the Polish Agency for Enterprise Development (Dz. U. No 153, item 956).

(38) Ordinance of the Minister of Interior and Administration of 29 October 2008 on granting financial aid by the Implementing Authority for European Programmes for provision of a broadband access to the Internet under the Operational Programme Innovative Economy 2007-2013 (Dz. U. No 204, item 1280).

(39) Ordinance of the Minister of Economy of 2 April 2008 on granting financial aid for investments of high importance to the economy under Operational Programme Innovative Economy 2007-2013 Dz. U. No 61, item 379).

(40) Ordinance of the Minister of Sport and Tourism on detailed allocation, conditions and procedure of granting State aid in the scope of supporting culture and cultural heritage under the Operational Programme Innovative Economy, 2007-2013 (draft).

(41) Ordinance of the Minister of Sport and Tourism on detailed allocation, conditions and procedure of granting State aid in the scope of regional investment aid and *de minimis* aid under the Operational Programme Innovative Economy, 2007-2013 (draft).

(42) Ordinance of the Minister of Economy of 15 June 2007 on financial support granted by the National Capital Fund (Dz. U. No 115, item 796).

(43) Operational Programme Innovative Economy 2007-2013 approved by way of the Decision of the European Commission No K(2007) of 1 October 2007 on adoption of the Operational Programme Innovative Economy under Community aid from the European Regional Development Fund covered with the objective "convergence" in Poland and adopted by way of the Resolution of the Council of Ministers of 30 October 2007 on adoption of the Operational Programme Innovative Economy 2007-2013.

(44) Detailed description of priorities of the Operational Programme Innovative Economy. Document drawn up on the basis of the Innovative Economy Operational Programme, 2007-2013 approved by way of the Decision of the European Commission of 1 October 2007 and by the way of the Resolution of the Council of Ministers of 30 October 2007. Version of 10.10.2008.

(45) Guidelines on national regional aid for 2007-2013 (Dz. U. EU C 54 of 4.3.2006, p. 13).

(46) Guidelines of the Minister of Regional Development concerning eligibility of expenditure under the Operational Programme Innovative Economy, 2007-2013. Version of 5.06.2008.

(47) Community Guidelines on State aid for rescuing and restructuring firms in difficulty (OJ EU C 244 of 01.10.2004, p. 2).

(48) Community framework on state aid to shipbuilding (OJ EC C 317 of 30.12.2003).

(49) Commission notice on current State aid recovery interest rates and reference/discount rates for 27 Member States applicable as from 1 September 2010 (OJ EU of 23 August 2008 (in accordance with Article 10 of Commission Regulation (EC) No 794/2004).

(50) Community guidelines on State aid to promote risk capital investments in small and medium-sized enterprises (OJ.EU.C.06.194.2).

Introduction

Operational Programme Innovative Economy allocates almost EUR 10 billion to be distributed within the next few years. The majority of these resources is targeted at direct or indirect support for entrepreneurs.

From the day of the Polish accession to the European Union Poland is obliged to apply in its legal order the provisions and rules pertaining to awarding State aid applicable in the entire European Union and drawn up by the European Commission and the Council.

The Operational Programme Innovative Economy provides for granting support in line with the principles of aid schemes (schemes on granting State aid). OP IE is almost entirely aimed at entrepreneurs and except for few Measures, which provide support from structural funds that is not related to awarding State aid, all other Measures are covered with the regime of awarding State aid. It does not follow from the wish of Polish, local or national authorities but from the EU law and regime of its direct application under the Polish legal order.

Therefore, all obligations and regimes to which an entrepreneur is subject, stringent requirements within the scope of, e.g. prohibition on starting the investment implementation before the day of submitting the application, the obligation to keep the project for a specified period of time, close observance of the catalogue of the so-called eligible expenditure or the inability to obtain support outside the limit following from the so-called intensity of State aid, do not result from the intention to impose additional obligations and restrictions by the entities awarding the aid but from the obligation within this scope imposed on the Polish authorities (and not only Polish) by the European Commission.

The issues related to State aid constitute probably the most complicated field of Community law as a significant amount of the rules of conduct follows not from the legislation set out in regulations but from the decisions of the European Court of Justice issued in specific cases, guidelines and communications, etc. This legal system is referred to as the case law.

This study will make an attempt to demonstrate in as accessible manner as possible, what State aid is and what it is not, what to do not to come into conflict with the rules of law and what is the risk if such conflict takes place. Ignorance of the law is harmful and since the consequences of breaching the law can be severe, we will try to show you how to act in order to at least minimize this risk.

The study will refer to the provisions of law, principles and rules concerning State aid. As long as this study aims at establishment of a practical approach to the problem of State aid it cannot, however, establish it in isolation from the provisions of law. It is as obvious as the fact that the very provisions, principles and rules fail to respond to the majority of questions faced by the entrepreneurs and other beneficiaries of State aid. An attempt will be made to illustrate this in reference to the discussed topics and individual issues.

This study is focused around the most significant aspects. However, given the vastness of the topic in certain respects the study refers to other documents, legislation and case law that have already been elaborated.

The handbook was created, above all, for entrepreneurs since it is the most numerous group of recipients of the Operational Programme Innovative Economy for which the provided co-financing was covered with the State aid regime.

It is our hope that close reading of this handbook will make it possible to understand the principles of awarding State aid, obligations related thereto, as well as opportunities and risk that it brings. State aid is one of the most complicated issues of the EU law. It is a multilevel and very interesting issue as it is placed at the verge of law and economy and is subject to the assessment of the European Commission in the form of exceptions and casus based on exemptions from rules and attempting to reconcile different and often contradictory interests.

It is our hope that this handbook will help you to successfully cope with State aid issues in the projects co-financed from the European funds.

General principles related to awarding State aid in the context of the Operational Programme Innovative Economy, 2007-2013

1. State aid under Operational Programme Innovative Economy, 2007-2013

This part will discuss the following issues:

- Applicable aid schemes under OP IE,
- Aid schemes under preparation,
- Schemes planned to be changed,
- Procedure of granting State aid.

This short chapter should present the general principles of awarding State aid under the Operational Programme Innovative Economy, 2007-2013. All unfamiliar terms will be gradually explained in the further part of this Vademecum, therefore, one should not be discouraged with the official language used in this short ordering chapter – subsequent chapters will surely explain all doubts, unfortunately not everything can be explained right at the beginning.

The OP IE does not provide for awarding individual aid. This follows from Article 21 of the Act on the principles of development policy, which provides for awarding State aid under the Operational Programmes only in the form of aid schemes (the draft of the amendment to the Act on the principles of development policy plans to change the provisions in order to enable the provision of individual aid and not only aid under aid schemes).

The OP IE foresees 9 ordinances establishing 18 aid schemes; 5 ordinances for 14 aid schemes are already binding and 4 ordinances setting up 3 programmes are in the course of a more or less advanced legislation process (in the further part of this handbook it will be precisely explained why it is possible for one ordinance to contain a few or even several aid schemes).

Out of 18 aid schemes 2 need to be notified to the European Commission since they are not based on block exemptions (a basic advantage of awarding aid under aid schemes based on block exemptions is the fact that there is no need to notify these schemes and aid granted under them to the European Commission). The State aid awarded under the Operational Programme Innovative Economy is regulated within the framework of the below described aid schemes.

The applicable schemes:

(1) Act of 30 May 2008 on some forms of support for innovative activity (Dz. U. No 116, item 730). The Act regulates the principles of awarding support under Measure 4.3 Technological credit.

(2) Ordinance of the Minister of Regional Development of 7 April 2008 on granting financial aid under the Operational Programme Innovative Economy 2007-2013 by the Polish Agency for Enterprise Development (Dz. U. No 68, item 414). It is the most extensive aid scheme regulating granting State aid under as much as 10 Measures of OP

IE: 1.4, 3.1, 3.3, 4.1, 4.2, 4.4, 5.1, 5.2, 5.4 and 6.1, and it establishes 9 aid schemes (for combined Measures 1,4 /4.1 there is only one aid scheme). The Act will be amended in respect to Regulation No 800/2008. The amending works are in progress and according to the communication from the Ministry of Regional Development the amended Ordinance is planned to enter into force in February 2009.

(3) Ordinance of the Minister of Regional Development of 13 August 2008 on granting financial aid for the support of the creation and development of e-Commerce under the Operational Programme Innovative Economy 2007-2013 by the Polish Agency for Enterprise Development (Dz. U. No 153, item 956). Within the framework of the Ordinance, 2 aid schemes have been established – for Measure 8.1 and Measure 8.2. The Ordinance should be amended in respect to Commission Regulation (EC) No 800/2008. The amending works are in progress and the amended Ordinance is planned to enter into force in January 2009.

(4) The Ordinance of the Minister of Economy of 15 June 2007 on financial support granted by the National Capital Fund (Dz. U. No 115, item 796) determining the detailed conditions of awarding support by the NCF under Measure 3.2 Support for funds of risk capital.

(5) Ordinance of the Minister of Economy of 2 April 2008 on granting financial aid for investments of high importance to the economy under Operational Programme Innovative Economy 2007-2013 (Dz. U. No 61, item 379) setting out the principles of awarding support and its amount within the framework of Measure 4.5 Support for investments of high importance to the economy of the OP IE. The Ordinance requires to be adjusted to Commission Regulation (EC) No 800/2008.

(6) Ordinance of the Minister of Interior and Administration on granting financial aid by the Implementing Authority for European Programmes for provision of a broadband access to the Internet under the Operational Programme Innovative Economy, 2007-2013. The Ordinance sets up the aid scheme for Measure 8.4.

Drafts of aid schemes under preparation:

(1) Draft Ordinance of the Minister of Regional Development on granting financial aid for Measure 5.3 Support for innovation centres of the Operational Programme Innovative Economy 2007-2013 by the Polish Agency for Enterprise Development. Support for innovation centres, which is foreseen within the framework of this Ordinance, does not constitute State aid given the assumption that the entire support that the centres obtain from the Implementing Authority will be re-transferred within specified time limits to the entrepreneurs and the innovation centres will not obtain in that manner any benefit. At that stage (of transferring support to entrepreneurs) we deal with State aid.

(2) Draft Ordinance of the Minister of Sport and Tourism on detailed allocation, conditions and procedure of granting State aid in the scope of supporting culture and cultural heritage under the Operational Programme Innovative Economy, 2007-2013, which establishes the aid scheme for Measure 6.4. This Ordinance will require

notification to the European Commission on the basis of Article 87(3)(d) of the Treaty.

(3) Draft Ordinance of the Minister of Sport and Tourism on detailed allocation, conditions and procedure of granting State aid in the scope of regional investment aid and *de minimis* aid under the Operational Programme Innovative Economy, 2007-2013, setting out the aid scheme for Measure 6.4.

2. Identification of State aid within the scope of economic activity of an entrepreneur

This part will discuss the following issues:

- Formal and legal organisation of the State aid system,
- Definition of State aid,
- The concept of the Community market (relevant),
- Conditions of State aid,
- Effects of granting State aid.

The legislation of the European Union contains a general ban on granting aid from State resources - in any form whatsoever, which threatens to distort competition and is incompatible with the common market within the scope in which it distorts trading. This principle is expressed in the Article 87(1) of the Treaty establishing the European Community (the Treaty). The Treaty constitutes the basic Act, which has to be observed by countries accessing the European Union, also Poland as of 1 May 2004. However, the Treaty provides for a number of derogations (annulments), which can be applied by entities awarding State aid in individual Member States.

Both in the Polish, as well as the EU legal order the regulations pertaining to State aid understood as an element of a broadly-conceived competition policy constitute a network of provisions, principles, guidelines, recommendations and directives, which are sometimes very hard to be comprehended by a regular citizen. Almost every sector and each State aid allocation is separately regulated (often in a number of documents that sometimes seem to be contradictory to each other). Hence it is very important to be able to easily move around the system and selectively search for the necessary information concerning the subject of interest for the entrepreneur. Despite the fact that the State aid system is based on the principle of exception from the rule (ban is the rule) this is a system of very extended exceptions. Regional aid, aid for employment, environmental protection, research and development and aid for innovative activity, trainings, protection of cultural heritage, as well as transport, agricultural and fisheries activity and even operational aid or aid within the scope of export or coal industry is eligible precisely as an exception.

On applying for the most popular type of aid (and in professional terms the most popular allocation of aid), i.e. regional aid, the entrepreneurs are often informed that there are different restrictions: that it is not possible to be awarded aid for the purchase of the means of transport, starting-up a bakery, payment of the rent or gas or poultry farming. Why all these restrictions if – in line with what was written above – aid in the transport sector is permissible, likewise the aid for current activity or agricultural aid?

This is the case since each of the aforementioned allocations of State aid is related to specific restrictions following from the European Commission approach to certain fields of activity undertaken by the entrepreneurs in the European Union. Illustrating this on an example it can be stated that if an entrepreneur carries out economic activity within the black coal sector he can obtain support for training of a new employee but he will not receive support for the

construction of a new establishment, setting up a new production line or obtaining new patents since aid for new investments, i.e. regional aid in this sector is impermissible.

What lies behind this approach? In line with the European Commission approach the black coal sector, as a declining industry should not receive support for development from State resources. However, if the owner of a mine intends to train employees thereof within the scope of the rules of occupational safety and health or prepare them to carry out a different more prospective job – e.g. within the scope of using a computer, the European Commission does not see any obstacles and allows for supporting this type of activity of an entrepreneur from State resources.

Thus maybe we will answer the question what State aid is and who can receive it?

The Treaty does not clearly define State aid. Basing on the case law it is possible to define State aid as disbursement of State resources (e.g. via awarding grants, preference loans) or decrease in public income (e.g. via desisting from collection of public levies such as taxes, social security contributions) with the view to support selected (selectivity) entrepreneurs or production of defined goods constituting economic benefit for the beneficiary.

Pursuant to Article 87(1) of the Treaty "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 common market." The above-quoted definition provides for four conditions of State aid:

(1) State aid must be awarded from State resources (State budget, budget of a territorial self-government unit, governmental agency, etc.); in other words, State resources are transferred;

(2) State aid has to constitute an economic benefit for its beneficiary, which distorts or threatens to distort competition;

(3) State aid favours certain entities or production of certain goods / provision of defined services (selectivity, selective transfer);

(4) State aid affects trade between Member States of the European Union.

These conditions have to be meet jointly, i.e. cumulatively: If one of the above-described condition is not met then State aid does not occur.

At the same time, it needs to be remembered that whether a given measure applied by a Member Sate constitutes State aid or not can be finally and efficiently settled only by the European Court of Justice, to which the disputes within this scope between the European Commission and a Member State will be finally forwarded.

Ref. 1.

It is said that State aid must be awarded from State resources. State resources are defined in the Act of 30 June 2005 on public finance. In line with Article 5 of this Act State resources cover public income, resources from the European Union budget, resources from foreign sources, non-returnable resources other than resources from the European Union budget; the

State budget revenue and the revenue from territorial self-government units and other units from the public finance sector coming from different sources, as well as the revenue of units from the public finance sector coming from the activity carried out by them and coming from other sources. As for the legal aspect of public finance, they are understood as cash remaining at the disposal of the State authorities and territorial self-government, i.e. public entities which are in legal, i.e. established by way of law, circulation. Public finance apart from the resources of the State budget (central) and self-governmental budgets cover also all other untypical financial resources, which make it possible to the State to implement its basic tasks. In summary, State finance is nothing else but financial resources at the disposal of public entities (State authorities) allocated to the implementation of its tasks and objectives. Public finance as opposed to private finance have to be subject to clearly defined legal regulations, i.e. rules, which should be observed in the entire process of collecting, storing and spending State resources, as well as the process of flows between entities of the so-called public sector. This results in the fact that grants from State resources, i.e. disbursement of State money (resources) for objectives related to individual projects of specified entities has to be closely controlled and subject to established rules. Therefore, it is not easy for an entrepreneur to go through all the procedures, which will make it possible to obtain State grants. Everyone who on any occasion applied for, e.g. tax waiver, knows how much time needs to be devoted to the elaboration of an application in order to obtain such a waiver. The same is the situation in the case of support from structural funds – these are also State resources, the only difference being that they come directly from the European Union budget, but they are ultimately entered on the State budget account.

Therefore, if a public authority remits interest on a credit for an entrepreneur, resigns from tax collection or provides a grant to an entrepreneur for the implementation of a new investment project, it awards State aid to the entrepreneur, of course on condition that other conditions of State aid are met. As it will become apparent on awarding support to an entrepreneur it will be difficult to state that these conditions are not met.

One more significant issue needs emphasising when discussing this condition. The emergence of State aid or lack thereof, is not pronounced on the basis of an analysis or characteristic features of entities implementing specific tasks. This manner of action is especially unadvisable if a party to the given action is an entity not that clearly identified as the recipient of the aid as an entrepreneur – e.g. foundation, association, healthcare establishment, municipal enterprise, associations of water companies, church's legal persons, hostels, residential home for the elderly, museums, business environment institutions. What needs to be analysed, is **the nature of the performed operation.** Two operations conducted at the same time by the same entities on one instance can be recognised as State aid and on another not. It all depends on **characteristic features and effects** that such an action (operation) has.

What is more, it can also happen that the entity being the aid provider (entity awarding the aid) can on another occasion be the recipient of aid. For example, State entrepreneur having at its disposal State resources can grant State aid to another entity (a private entrepreneur, other State entrepreneur, other entity). Under other circumstances, receiving e.g. a grant for a new investment, under an aid scheme, it will become the recipient of aid.

Ref. 2

What does it mean that aid has to constitute a benefit?

The benefit can be generated in a passive (desistance from collection of public receivables) or an active (provision of support, transfer of a grant for a given purpose, i.e. active disbursement of public resources) form. In general, it does not matter how is the benefit is realised, i.e. how are the resources transferred. The simplest situation is the already many times mentioned grant for a specific investment, a project implemented by an entrepreneur or desistance from collection of public receivables (levies). However, in the economic practice the scope of "benefits" is much more extensive and richer. There can also occur a situation under which a benefit not finally generated, but only announced will constitute State aid (e.g. in case of guarantees and securities made by the State Treasury or other units having State resources at their disposal). In case of repayment of guaranteed liabilities the very guarantee will be subject to assessment in respect to State aid involvement. If the repayment fails to take place and it is necessary to launch State resources to repay the liability, the amount repaid on account of not executed liabilities constitutes State aid. The same initial situation depending on its further development can be differently assessed in respect to State aid.

Let us imagine a situation that Poczta Polska *[Polish Post]* (State-owned enterprise) establishes its own daughter company with the intention to perform only and exclusively certain defined courier services. Of course, this daughter company has competition on the domestic market. The parent company is not involved in the financial issues of the daughter company and it is not shown in any financial flows - there are no grants, loans, etc. It only helps the daughter to "start-up" its activity – it rents its experienced employees free of charge or against a symbolic payment, several times it rented its car free of charge. Seemingly there is no benefit or distortion of competition involved, etc., hence seemingly it is not a case of State aid.

However, in a similar case to the one described above (the cases pertained to the Italian post) the European Court of Justice stated the involvement of illegal State aid.

If we consider this case in the context of State aid conditions it needs to be stated that all these conditions were met. The post as a State-owned enterprises has **State resources** at its disposal. It is 100% owned by the State thus 100% of the resources at the disposal of the enterprise cover State resources within the meaning of the Act on public finance. When the enterprise provides these resources to another company (regardless of the fact that this company was its daughter or that it was a State-owned enterprise, or the organisational and legal form under which it operates) in the form of renting to this company its employees and machines it provided an illegal **benefit** on its behalf since other companies would have to pay the market price for similar services. Therefore such activities in respect to the competition of the daughter company constitutes **a breach of competition**, i.e. violation of the rules of a free market. Moreover, even if the daughter company did not have competition on the market, it would be necessary to examine whether the support awarded by the Post as the daughter company did not delayed, inhibited or prevented the development of **a potential future competition.** Considering all of the above the external observer should come to a conclusion

that the actions of the Post targeted **selectively** at its daughter company **favoured** the daughter company on the market against other national entities, but also against foreign entities, which may provide or would like to provide similar services within the territory of Poland thereby breaching the condition concerning **trading** between Member States.

The example above shows that it is not at all that easy to state whether the given case involved provision of State aid or not. In a little bit more complicated cases the analysis should cover many elements. Many cases of this type in the end result in a dispute between the Member State and the European Commission.

Let us imagine another example. A technological park implements a project co-financed from the Structural Funds of the European Union. It rents to entrepreneurs using its services the office area, it makes available the infrastructure including expensive research equipment, machinery, and it provides advisory services. Is the park obtaining Sate aid – in other words, does this transfer bears signs of a benefit?

The answer depends on whether it can be said about the park that it **transferred** all the received support to the entrepreneurs in the form of specific services (i.e. the support was calculated in a manner that the park does not obtain any financial benefits from this support, and it only ensures the servicing of costs). In order to illustrate the situation the following question might be asked: whether the park obtaining PLN 100 of the grant rendered services for the entrepreneur for the entire amount of PLN 100? If yes, and at most it covered its own operating costs (referring to the servicing of the provided services) then it is not a case of a transfer generating benefits hence it is not a case involving State aid.

The issue of ownership of the infrastructure established within the framework of the project can also be subject to assessment – if the infrastructure is of public nature and it is made available in an open and non-discriminatory manner then it can be assumed that there is no State aid.

However, another question arises: if the park actually did not obtain any benefit even in the above described situation? And what about the interest that accrued from the above exemplary amount of PLN 100 within the period between its transfer to the account of the park by a State authority and the transfer of the resources by the park to the account of the entrepreneur? How the prices of services provided by the park for the entrepreneur were calculated? Whether this is a price, which fails to generate profit for the park on account of the provision of these services? Who decides on the above?

These are difficult questions, and it is often difficult to find an unambiguous answer to them or to establish rules that would ensure that State aid will never emerge.

This condition also discusses the “distortion of future, potential or existing competition.” As for distortion of future competition – it refers to a situation under which the provision of State aid to one entity will significantly jeopardize or prevent development of competitiveness of another entity on the market. Hence it is easier to carry out economic activity for an entity which obtained State aid than for an entity which only intends to enter the given market without any aid whatsoever from the State.

The thematic scope of the provisions concerning State aid under the EU law covers offering goods and services on a specified (relevant) market. Some new, not entirely clear terms emerge: what **relevant market** is? In line with the doctrine, relevant market is an identical market in respect to the range of products or geography. Without going into details it can be said that that geographically relevant market is the Single European Market, on which the services are rendered according to identical rules ensuring fair competition. The Single European Market is nothing else than the market of the European Union, i.e. of all the European Union Member States. The market identical in respect to the range of goods is a market of goods and services, which are regarded as interchangeable by the recipient (consumer) given their scope, characteristic features and price (e.g. the market of household appliances, courier services, bank services, publishing market).

On the other hand, “offering goods and services” on the relevant market should be understood as trade, i.e. provision of goods and services by entities expecting reciprocity (“I make shoes so you will pay for them"; "I make shoes, and you will make my clothes in exchange"). Provision of goods and services by entities not expecting reciprocity is defined as charity and it stands in opposition to the economic activity – as it is mentioned in the further part of the study. The support for the so-called charity from public resources **as a general rule** does not constitute State aid as it does not relate to the conducted economic activity, it is not carried out on “the relevant market” and it does not refer to competition within the meaning of EU legislation.

What should be the decision in a situation under which two entities compete on a relevant market, one of them carries out economic activity and the other is involved in charity (non-profit activity)? For example, a consulting company provides advisory services within the scope of writing applications for aid from the Structural Funds. The Regional Development Agency renders the same services. Is “rental” of experienced consultants to the Regional Development Agency by a public entity recognised as State aid or not? It may be, but is all depends on the conditions of granting support, recipients of the support, its availability (available against payment or free of charge? available to a few or to all interested entities?), its transfer, etc.

Ref. 3

Preference is closely related to the concept of so-called **selectivity.** If a given action, whose parties cover a public entity on one side, and an entrepreneur on the other, is implemented in such a manner that - at least in theory - it can pertain to every other entrepreneur under the same principles then the condition of selectivity fails to be meet and it is not a case involving State aid. As an example of a non-selective action we can give, e.g. the awarding to an entrepreneur on the basis of general tax provisions an investment deduction, which is available to each entrepreneur regardless of the form and scope of the economic activity conducted by the entrepreneur. However, if the benefit is generated on the basis of such rules / criteria as membership of a given entrepreneur in the given sector or the geographic area, this type of activity constitutes State aid. Another example is the application of an income tax deduction. If such a deduction pertains to all entrepreneurs without exception than there is no instance of favouring of a given entity or group of entities. However, if the same deduction

was targeted only to a group of small and medium-sized entrepreneurs then the condition of selectivity would be met because such activity would be directed to **a selected group of entities** (the selection criterion in this case would be membership in the sector of small and medium-sized enterprises).

Ref. 4

The presence of the fourth condition or rather evidence of lack thereof constitutes the most difficult part. Neither the European Commission nor any other authority have even made an attempt to identify a method of examining if trading between Member States of the European Union has been distorted. A **presumption** is applied that the condition is met in case of each transaction implemented on the geographically relevant market, i.e. on the area of the European Union. Otherwise the entity granting aid would have to prove that such a distortion does not take place which given the absence of clearly defined conditions is impossible. In many decisions the European Court of Justice pronounced that as regards the assessment of this condition it is not significant what the size of the entity is – this condition can be implemented even when a micro-entrepreneur or an entity carrying out economic activity is supported (because, e.g. it conducts cross-border, international economic activity), or the amount of support or the type of the activity or the size thereof or the period of its performance, or even the fact whether the support is provided in a direct or indirect manner. In particular, **the scope** of the potential distortion is also insignificant since the assessment of the existence of this condition is not influenced by the fact if it was distorted in a large or small degree as well whether the distortion actually occurred.

3. Beneficiary of State aid

This part will discuss the following issues:

- The concept of an entrepreneur within the meaning of the provisions of the national law,
- The concept of an entrepreneur within the meaning of the provisions of the EU law,
- The concept of the enterprise within the subjective meaning,
- The concept of an entity carrying out economic activity,
- The concept of economic activity and its elements,
- The non-profit activity, economic entities carrying out non-profit activity.

There are many definitions of an entrepreneur, enterprise and economic activity. According to the Polish law two definitions of an entrepreneur have the greatest practical significance. One of them is a definition included in the Civil Code, in line with which an entrepreneur is a natural person, legal person and an organisational unit referred to in Article 33(1) of the Civil Code that carries out economic or vocational activity on its own behalf. The other is a definition included in the Act on freedom of economic activity, in line with which an entrepreneur is a natural person, legal person and an organisational unit that is not a legal person, which was awarded legal personality by way of a separate legal act that carries out economic activity on its own behalf and partners to a private partnership within the scope of economic activity performed by them. This, in particular, includes self-employed persons (a person carrying out economic activity), family companies dealing with crafts or other activity, as well as companies (within the meaning of commercial law, e.g. limited partnership, limited liability company, joint stock company) or consortia of such entities carrying out regular economic activity.

The provisions of the Act on freedom of economic activity impose on the entrepreneurs certain obligations, e.g. as regards having vocational entitlements when conducting certain types of activity.

Hence as we can see an entrepreneur was defined in the Polish law by way of **the type of conducted activity.** If it is economic activity then we can declare that we deal with an entrepreneur.

On the other hand, the definition of economic activity contained in the Polish law is the following: economic activity is a **gainful** activity consisting in manufacture, construction, trade, services provision and search, identification and extraction of minerals from deposits, as well as vocational activity performed in an organised and continuous manner excluding agricultural production within the scope of agricultural crops, breeding and farming of animals, horticulture, vegetable growing, forestry and inland fishery, renting rooms by farmers and provision of other services, especially tourism-related services, in agricultural households. Economic activity covers production, as well as distribution and services.

The Act of 30 April 2004 on the procedural issues concerning State aid defines economic activity as activity, to which the rules of competition apply which are set out in the provisions of the third part title VI of Chapter 1 of the Treaty establishing the European Community. This feature of “gainfulness” should be understood as “orientation on profit.”

Does it, however, mean that only one entity which obtains profit from the conducted activity should be recognised as an entity carrying out economic activity? Of course, not. Otherwise, a commercial company failing to obtain profit in a given year would not be recognised as an entrepreneur. Hence, it is enough for an entity **to operate with the view of obtaining profit**, i.e. to operate for gainful purposes.

The entrepreneur can be a natural person, legal person and an organisational unit that is neither a natural person nor a legal person, which was awarded legal capacity by way of a separate legal act.

Companies subject to the obligation of entry to the National Court Register cover: commercial law partnerships: unlimited companies, partnerships, limited partnerships, limited joint-stock partnership, venture capital company: limited liability company, joint stock companies, cooperatives, State-owned companies, research and development entities, the so-called foreign enterprises, mutual insurance company, subsidiaries of foreign entrepreneurs operating on the territory of the Republic of Poland and head offices of foreign insurance companies.

However, not every entity subject to the obligation of entry into the National Court Register has the status of an entrepreneur within the meaning of the Act on freedom of economic activity, i.e. it carries out economic activity independently and on its own behalf. This especially pertains to the research and development entities that were, after all, set up for other purposes than gainful activity, i.e. they were established for the purpose of conducting research and development activity as well as venture capital companies of non-profit character. Venture capital companies, which do not aim at conducting economic activity (since they conduct activity which is not aimed at profit, i.e. non-profit activity) will not be recognised as entrepreneurs even though they are subject to the obligation of entry into the National Court Register.

The term entrepreneur can also relate to other legal persons if they carry out economic activity and are subject to the obligation of entry into other registers than the National Court Register or the Business Activity Register that is they are subject to the entry to the register of associations, other social and professional organisations, foundations and public healthcare facilities. This category of entities can, for example, cover associations and foundations carrying out economic activity, cooperatives, craftsmen associated in craftsmen's guilds, chambers of crafts and the Polish Craft Association. Basically associations, foundations or chambers of crafts do not have the status of an entrepreneur since they are not established for commercial purposes and hence, in general, they do not perform economic activity. However, if these entities undertake economic activity then they obtain the status of "an entrepreneur" Also a natural person can be "an entrepreneur" as far as this person meets the conditions provided for in the Civil Code, i.e. is of age, is not subject to legal incapacitation and as far as this person conducts economic activity (under such circumstances this person is subject to entry into the Business Activity Register). Also the legal persons representing the Catholic Church (foundations, associations) that carry out economic activity are subject to the obligation of entry into the National Court Register and they have the status of an entrepreneur.

The structuring of the concept of the entrepreneur in the Act on freedom of economic activity makes it possible to award the status of an entrepreneur to virtually every entity having legal capacity. Entities such as regular associations or housing cooperatives (organisational units other than natural and legal persons) according to the law can be recognised as entrepreneurs although they are not subject to entry to any register (neither to the National Court Register nor the Business Activity Register), however, relevant acts (e.g. Act on ownership to dwellings) provide them with the capacity to perform legal actions.

A special case is a venture capital company in organisation – it is not an entrepreneur and it is not subject to the obligation of entry to any register and despite this it will be recognised as an entity carrying out economic activity. Another special cases cover: a public healthcare facility, which although not being subject to the obligation of entry into the National Court Register can, however, conduct economic activity, church legal persons (metropolises, dioceses, parishes) that can carry out economic activity, private partnership which only represents an obligatory relationship, consortium which is most often established as an agreement aimed at implementation of a specified common economic project, in general, taking on the legal form of private partnership agreement. A gmina is not an entrepreneur within the meaning of Article 4 of the Act on the freedom of economic activity, although it can participate in trading, likewise entities created by it: establishments, companies, other entities. In case of a private partnership its partners are subject to the obligation of entry into the relevant register of entrepreneurs, i.e. natural persons – to the Business Activity Register and legal persons or commercial partnerships – to the National Court Register.

As shown in the above considerations the situation under the domestic law as regards which entity can or should be recognised as an entrepreneur is very complicated. However, regardless of the above each of these entities can be both an entity carrying out economic activity and a beneficiary of State aid, hence gmina, private partnership as well as a consortium can be recognised as an entities carrying out economic activity.

For the needs of State aid the definition of an entrepreneur included in the Act on combating unfair competition seems more relevant, which defines the entrepreneur as a natural person, legal person or an organisational unit that does not have legal personality, which by performing, even **casually**, gainful or vocational activity participate in the economic activity. This definition is the broadest out of the aforementioned and it covers all of the above-mentioned categories of entities, including entities carrying out economic activity (even casually, periodically and in an unorganised manner), professional activity, but also non-gainful and non-profit activity regardless of the fact whether it is subject to the obligation of entry into any register or not.

The EU law covers a very short definition of economic activity: it is simply the act of offering goods and services on the relevant (specified in geographical terms and in respect to the range of products) market, at the same time the "offering" does not have to be conducted for "gainful purposes" as it is required in the definition contained in the Act on freedom of economic activity. Moreover the act of offering does not have to bear signs of "being organised and continuous", which is required in the case of the Polish definition of economic activity. If someone carries out activity, which is not aimed at gain and in a manner other than

organised or continuous, under the Polish law such an entity will not be recognised as an entrepreneur, however, it will be recognised as an entrepreneur under the EU law. Of course, if the activity is carried out on a “specified market”, i.e. on Single European Market (or to put it simply – in the European Union).

This definition does not follow from the provisions of the law, but only from the fixed case law of the European Court of Justice. The relevant (specified, proper) market has already been discussed.

However, what is the definition of an entrepreneur under the EU legislation?

In Annex I to the Commission Regulation (EC) No 800/2008 an enterprise (i.e. de facto it is an entrepreneur within the meaning of the Polish rules of law) is considered to be any entity carrying out economic activity, irrespective of its legal form. The subjective scope of this term remains, in general, analogous to the term entrepreneur under Polish law, however, it needs to be noted that there is a very significant difference: the EU law recognises as an entrepreneur any entity regardless of its legal form that is regardless of the fact whether it is a company, entity carrying out independent economic activity or whether it is a foundation or association, which, **within the meaning of the Polish law, do not carry out economic activity.**

For the needs of State aid the only binding provisions within the scope of defining economic activity and an entrepreneur are the EU provisions. On their basis, three types of entities can be identified, each of which can be recognised as beneficiary of aid with high likeness (case a) or only potentially and with low probability (case b and c):

(a) an entrepreneur within the meaning of the provisions of the national law – commercial law company, natural person carrying out economic activity;

(b) entity not aimed at gain, carrying out socially useful activity or activity of missionary nature and allocating the possible profit on the development of the basic activity not aimed at profit – commercial law company of non-economic purpose, foundations, associations, sanatoriums, museums, sports and recreation centres, budgetary organisations, healthcare facilities (public and non-public), etc.;

(c) public authorities at the central and regional level.

In order for a foundation or an association to be recognised as a beneficiary of State aid it needs to be awarded the very **possibility** to carry out economic activity. If there is such a possibility, and if it is really implemented by the entity and the aid from State resources will be granted within this very scope of activity of the entity, the case will be recognised as award of State aid to a given entity. Hence if the foundation carries out economic activity and it applies for aid for its development (even if the profit from this activity will be allocated in line with the separate provisions of law for the development of the statutory activity and it will not be divided between owners) it will be the beneficiary of State aid bearing all the consequences related thereto. The same will concern all entities determined as “business environment institutions."

The previously drawn conclusion needs to be emphasised one more time: it is not the entity performing a transaction on the market (not its legal form or organisation) that determines the fact whether State aid is involved, this fact is determined by the nature and objective of the transaction.

A foundation, whose statutory objective is fight against homelessness, runs a canteen in which each homeless person can eat a hot meal. In order to obtain financial resources for carrying out this activity the foundation provided in its statute for the possibility to conduct economic activity generating profit, which apart from the income from donations, bequests, etc. will constitute an additional source of resources for the fight against homelessness. This economic activity consists in running a restaurant in the city centre, where the prices are highly uncompetitive, in short which serves sophisticated dishes for high prices.

If such a foundation submits an application for purchase of new equipment - kitchen equipment, then depending on **the purpose for which** this equipment will be used the foundation will be awarded support not being State aid or it will be awarded State aid. To put it simply, if the new oven will be kept in the expensive restaurant and it will be used **in order to maximise the profits** (better dishes = more customers) then regardless of the fact that the entirety of the profits from this activity will be allocated to the development of the statutory activity, the foundation will be recognised as a recipient of State aid. And if the new oven purchased from the State resources will be placed in the canteen for the homeless and it will be used **for the purpose of providing social assistance to the homeless** it can be stated that the granted support is not an instance of State aid.

The view such as the one expressed above (that aid for non-profit activity and charity will never constitute State aid) is sometimes questioned by certain authorities, including the Office of Competition and Consumer Protection. Even in this case precaution and individual approach to each project of this type are recommended. This is caused by the fact that in the case law of the European Court of Justice a view has been shaped that in order to recognise that State aid occurs the entity does not have to conduct gainful activity since on certain occasions even non-profit entities can and should be recognised as enterprises (and more correctly: as entities carrying out economic activity) for the needs of the possibility to obtain State aid.

The provisions of the EU law do not contain a definition of an enterprise (within the subjective meaning). However, such a definition exists in the Polish law – Article 55^1 of the Civil Code. In line with the Civil Code an enterprise is an organized complex of material and non-material components designed for carrying out economic activity. Thus an enterprise constitutes a certain organised entirety of properties used for the purpose of conducting production or commercial activity or providing services, in which all components are combined in a single entirety. Each entrepreneur can conduct economic activity with the use of as many enterprises as it needs to implement the assumed economic objectives.

It needs to be emphasised one more time: for the needs of State aid each entity carrying out economic activity, which was awarded support from State resources, can be recognised as the beneficiary of aid, regardless of its organisational and legal form and the manner of its

financing. A definition formulated in this manner means that not only an entrepreneur will be recognised as the State aid beneficiary – a foundation or association, entity providing medical services, and even a natural person not conducting economic activity can also be recognised as State aid beneficiaries (that takes place e.g. in the case of a grant for an unemployed person for starting up economic activity – the beneficiary of aid at the time of receiving this aid does not conduct economic activity and is a "regular" natural person, however, *de minimis* aid awarded to this person charges the person's account as the account of a future entrepreneur). A budgetary organisation, auxiliary household, the very gmina and even a governmental administration body can be recognised as entrepreneurs. As you can see, it is impossible to state in advance that any of the entities performing transactions on the market is not a beneficiary of State aid because it is not an entrepreneur.

Also the manner of financing a given entity (private capital, public property) has no impact on its status as a potential beneficiary of State aid.

To simplify, it may be stated that within the meaning of the Polish law (economic activity law) only an entrepreneur is an entrepreneur, but for the needs of State aid it would be rather right to refer to an entity carrying out economic activity. Each entrepreneur conducts economic activity, but not every entity carrying out economic activity is an entrepreneur – the above described foundation is not an entrepreneur within the meaning of the Act on the freedom of economic activity but within the scope of the economic activity performed by it – it is an entity conducting economic activity.

This is the last issue of this deliberations: for the needs of the Sate aid (i.e. in order to recognise if a given entity obtains State aid or support that is not State aid) the ownership aspects are insignificant, i.e. it is not significant if the entity is owned by the Sate or a unit/agenda thereof, or by a private owner. Whether an enterprise (or rather: an entity carrying out economic activity) is a private entity or a public one is significant only during the assessment of this entity affiliation to the category of a small or a medium-sized entrepreneur (SME).

4. Assessment of the status of the enterprise as regards its affiliation to the SMEs sector

This part will discuss the following issues:

- Definition of an entrepreneur from the SMEs sector on the basis of EU law,
- The concept of the decisive impact,
- Calculation of the staff headcount in order to determine the status of the entrepreneur,
- Determination of financial indicators,
- Results of miscalculation of the status of the entrepreneur,
- Definition of the day of granting aid,
- Always large entrepreneurs regardless of the criteria,
- The concept of a public entrepreneur.

For the needs of State aid a micro-entrepreneur, small and medium-sized entrepreneur is an entrepreneur, which meets all the requirements provided for in the EU provisions and in particular in Annex I to the Commission Regulation (EC) No 800/2008. For it needs to be noted that the definition of SMEs included in the Act on freedom of economic activity is different from the EU regulations developed for the needs of granting State aid.

One of the main objectives of introducing the definition of SMEs (and the very division of entrepreneurs into these categories) is the wish to ensure that the State resources supporting SMEs activity are awarded only to the entrepreneurs, which really need this type of support. Thus, the definition, apart from the simple indication of the staff headcount and financial results of an enterprise, introduces the methods of calculating the staff headcount and financial thresholds in order to obtain the actual overview of the economic condition of a given entrepreneur.

In order to be included in the category of SMEs an entrepreneur has to meet three conditions, which will be determined as conditions concerning: (1) staff headcount; (2) economic results (values) and (3) level of independence.

The two first conditions can be examined in a rather simple and unambiguous manner: From this perspective:

- **a micro-entrepreneur** is such a small entrepreneur, which in at least one of the two last financial years:

1) employed an annual average of fewer than 10 employees and
2) obtained annual net turnover from sales of goods, products and services and financial operations not exceeding the equivalent in PLN of the amount of **EUR 2 million** or the sum of assets of its balance sheet drawn up at the end of one of these years did not exceed the equivalent in PLN of the amount of EUR 2 million;

- **a small entrepreneur** is such an entrepreneur, which in at least one of the two last financial years:

1) employed an annual average of fewer than 50 employees and

2) obtained annual net turnover from sales of goods, products and services and financial operations not exceeding the equivalent in PLN of the amount of EUR 10 million or the sum of assets of its balance sheet drawn up at the end of one of these years did not exceed the equivalent in PLN of the amount of EUR 10 million;

- a medium-sized entrepreneur is such an entrepreneur, which in at least one of the two last financial years:

1) employed an annual average of fewer than 250 employees and
2) obtained annual net turnover from sales of goods, products and services and financial operations not exceeding the equivalent in PLN of the amount of EUR 50 million or the sum of assets of its balance sheet drawn up at the end of one of these years did not exceed the equivalent in PLN of the amount of EUR 43 million.

The third condition constitutes the independence condition. Regulation No 800/2008 differentiates three levels of independence: autonomy, partnership and relationship (link).

In general, the majority of SMEs constitute **independent** enterprises since they are entirely autonomous or other entrepreneurs have minority shares in them (less than 25%). If the level of these shares increases to a maximum of up to 50% then it is considered that these are **partner enterprises.** Above this threshold (i.e. above 50%) the enterprises are recognized as **linked** enterprises.

Autonomous enterprise is any enterprise which is not classified as a partner enterprise or as a linked enterprise. Therefore the Regulation No 800/2008 defines autonomy of an enterprise in a negative way, i.e. by indicating features that an autonomous enterprise cannot have. In other words, each enterprise, which is not in a partnership relation with any other enterprise or is not linked to any enterprise is an autonomous entrepreneur.

Partner enterprise is an enterprise which is not linked to any other enterprise. Partnership between enterprises means that between them there are specified relationships of the following type: an enterprise (upstream enterprise) holds, either solely or jointly with one or more linked enterprises 25 % or more of the capital or voting rights of another enterprise (downstream enterprise). The provisions determine four exceptions, which – if they occur – cause that even an enterprise being in the above-described relationships will not be recognised as devoid of the feature of autonomy. This concerns such entities as universities or non-profit research centres, institutional investors, including regional development funds.

Linked enterprise is an enterprise which has any of the following relationships with any other enterprise:

(a) an enterprise has a majority of the shareholders' or members' voting rights in another enterprise;

(b) the authorities of an enterprise have the right to appoint or remove a majority of the members of the administrative, management or supervisory body of another enterprise;

(c) an enterprise has the right to exercise a dominant influence over another enterprise pursuant to a contract entered into with that enterprise or to a provision in its memorandum or articles of association;

(d) an enterprise, which is a shareholder in or member of another enterprise, controls alone, pursuant to an agreement with other shareholders in or members of that enterprise, a majority of shareholders' or members' voting rights in that enterprise.

Enterprises drawing up consolidated accounts or included in accounts of an enterprise, which prepares such accounts is usually recognised as linked enterprise. This type of relationship (linked enterprise) corresponds to the economic condition of enterprises creating **a group (cartel)**, in which one enterprise directly or indirectly controls other enterprises or exercises **a dominant influence** on this enterprise. Such cases are much more rare than the two former types of relationships. A typical example of a linked enterprise is a full subsidiary.

The **dominant influence** should be understood as direct (outright) or indirect (via other entities) influence on the activity of a given entrepreneur consisting in (pursuant to the Act on combating unfair competition):

(a) having the majority of votes in the statutory authorities of the subsidiary, also on the basis of contracts concluded with other entities, or

(b) entitlement to appoint or remove most members of the authorities of the subsidiary, also on the basis of contracts concluded with other entities, or

(c) situation, under which more than a half of the members of the board of directors of the second entrepreneur (subsidiary) are, at the same time, members of the board, appointed agents or persons fulfilling managerial functions at the first entrepreneur or another entrepreneur that is in a subsidiary relationship with the former entrepreneur, or

(d) ability to decide in any other manner on the directions of the activity of the entrepreneur (subsidiary), in particular on the basis of a contract providing for management of the entrepreneur.

Enterprises cooperating under the principle of franchising do not have to be recognized as linked by definition. This depends on the conditions of the franchising contract binding for these enterprises. Enterprises are recognised as linked when the above-described relations take place between them.

For example: Enterprise A, which has three investors: B, C and D, each of which has 20% of the capital or votes in the enterprise A, will not be recognised as autonomous but as linked to a group of enterprises (B, C and D) if these three investors will be also linked to each other, directly or indirectly, via one or a few enterprises. In such a situation, since the enterprises B, C and D are linked to each other and as a group they have a total of 60% in our enterprise A, this means that enterprise A is a linked enterprise. This follows from the doctrine adopted in the interpretation of the definition of SMEs included in Annex I to the Regulation No 800/2008. This is one of the examples of the mechanisms established in the Regulation in

order to protect against abuse of these provisions by an enterprise aiming at awarding itself the status of SME in a manner contrary to the idea of these provisions and established rules.

Not without a good reason these three conditions concerning the recognition of an entrepreneur as an SME were enumerated in this order (staff headcount, economic thresholds and the level of independence) – failure to meet the first criterion (exceeding the maximum staff headcount) results in no need to examine further conditions as they are secondary in relation to the criterion of the staff headcount. Likewise, if the conditions concerning the finances of the enterprise are exceeded, i.e. both the balance sheet and the turnover are exceeded compared to those required, there is no need to examine the level of independence (autonomy) of the entrepreneur since it is a secondary issue as it comes to the financial conditions.

In case of economic (financial) conditions one more aspect needs to be mentioned, namely the fact that in order to meet this condition – i.e. the economic condition – it is enough for the entrepreneur to implement one of the two requirements, i.e. either its annual net turnover from sales of goods, products and services and financial operations does not exceed the maximum values (e.g. for a medium-sized entrepreneur – PLN equivalent of the amount of EUR 50 million) or the sum of assets of its balance sheet drawn up at the end of financial year (reference period) does not exceed the maximum value (e.g. for a medium-sized entrepreneur – PLN equivalent of the amount of EUR 43 million). There is no need for both of these economic values to be within the designated limits, it is more than enough if only one of these indicators is kept at the permissible level.

The definition provides for this choice because, in general, enterprises operating in the trade and distribution sectors have higher turnover indicators than manufacturers. By giving the possibility of choosing between the criterion of turnover and the criterion of annual balance sheet total, which reflects the general material condition of an enterprise, the definition ensures fair approach towards the potential SMEs carrying out different types of economic activity.

The above-described situations seem very complicated, but to put it in the most general terms, their primary objective consists in demonstrating that if an entrepreneur is not able to make decisions independently under the regular process of economic activity (as regards entering commitments, concluding contracts, annulling liabilities, or demanding their repayment, division of dividends, appropriating profits and prioritization of objectives) then it cannot be recognised as an autonomous entity and hence it constitutes some form of unity with another entity, with which it is linked or with which it is in a partnership and the support awarded to such an entity should be recognised not only as a benefit of this very entrepreneur, but also – to a certain degree – as a benefit of that other entrepreneur.

At this point let us take a closer look at two other issues listed at the beginning: staff headcount and financial thresholds.

It is already known that the basic data, which need to be examined on determining the size of an enterprise, cover the data concerning staff headcount and finances of the enterprise. The number of **employees and the financial amounts** should be calculated – on an annual basis –

for the last approved financial period. The chosen amount (as a turnover or the sum of the balance sheet assets) is calculated as a net amount.

If on the day of closure of the accounts it turns out that on the annual scale the staff headcount or financial thresholds were exceeded or that – on the contrary – they dropped below these thresholds, the award or loss of the SME status follows with some inertia, i.e. it takes place only if the phenomenon repeats two times (that is during the two subsequent accounting periods).

In case of newly-established enterprises (operating for a period shorter than a year), whose accounts have not yet been closed for the first time, the data come from an estimate made **in good faith** by the entrepreneur in the course of the financial year.

If it comes to the **calculation of the staff headcount** the number of employed persons is presented in the form of the so-called annual work units (AWU), i.e. the number of persons who worked full-time within the enterprise in question or on its behalf during the entire reference year (i.e. in the year in which the status of the SME is examined). In short, the number of employed persons is recalculated into **posts**, this also concerns employees who have not worked the full year (reference period), e.g. because they were employed in the course of the year or they performed seasonal work or worked part-time. This means that the staff headcount is expressed in posts and fractions thereof.

The entrepreneur, who employs 249.8 workers calculated into full-time posts, by virtue of the staff headcount is classified as a medium-sized entrepreneur just like an entrepreneur employing 50.6 workers calculated into full-time employees. The entrepreneur, who employs 250 workers calculated into full-time posts is already a large entrepreneur.

The next question is: how can we count the average annual staff headcount and who should be counted as employed and who should not?

(a) In order to calculate **the average annual staff headcount** the average figures of the persons employed in individual months should be added and the obtained sum should be divided by 12. Hence, in order to calculate the annual average staff headcount it is necessary, first of all, to indicate the level of staff headcount in a month. If an entrepreneur has not operated on the market for a full year, then the sum obtained should be divided by the number of months in the year during which the entrepreneur operated. Dividing the obtained sum by 12 would be incompliant with the facts.

It needs to be remembered that if in some month the staff headcount drops to 0, this month and indicator with the 0 result should not be overlooked in our calculations; this will decrease the result (average staff headcount in a year in a relevant period), but it is necessary given the rules that need to be applied in this type of calculations.

(b) Average staff headcount in a month should be established by adding the staff headcounts (full-time posts expressed in actual persons and persons employed part-time after calculation into full-time posts) in individual working days in a given month together with Sundays, holidays and non-working days (for these days the staff headcount from the previous day is taken, or from the next day if the month begins on a non-working day) and the obtained sum

should be divided by the number of calendar days of the month treated as the reference period.

Who should be calculated as an employed person? The following persons are calculated as employed persons:

(1) persons employed on the basis of an employment contract, appointment selection or nomination,

(2) persons employed for intervention works and public works financed from the Labour Fund (hence co-financed from State resources),

(3) juveniles employed on the basis of an employment contract (not on apprenticeships),persons staying abroad on account of business trips, owners of companies, as far as they perform work. Of course, persons on sick leave are included in the staff headcount regardless of the duration of such a sick leave.

The following persons are no calculated as employed persons:

(1) persons performing home based work (common name: cottage work), students who concluded with the employing institution a contract on apprenticeship or vocational training for a specific work (i.e. not an employment contract), persons using the parental leaves, within the period of duration of this leave,

(2) persons using the maternity leaves, within the period of duration of this leave, persons using the unpaid leaves, within the period of duration of this leave, persons employed on the basis of commission contract or contract for specific works.

Example - average staff headcount in a month

MONTH	DAY OF THE MONTH	DAY OF THE WEEK	EMPLOYED PERSONS	REMARKS
10.2008	1	WED	24.6	
	2	THURS	24.6	
	3	FRI	23.6	Beginning of maternity leave
	4	SAT	23.6	
	5	SUN	23.6	
	6	MON	24.6	Return from unpaid leave
	7	TUES	24.6	
	8	WED	24.6	
	9	THURS	27.1	Employment on account of intervention works

				(2.5 posts)
	10	FRI	27.1	
	11	SAT	27.1	
	12	SUN	27.1	
	13	MON	27.1	
	14	TUES	26.1	Retirement
	15	WED	25.1	Annuity
	16	THURS	25.1	
	17	FRI	25.1	
	18	SAT	25.1	
	19	SUN	25.1	
	20	MON	25.1	
	21	TUES	26.1	Return from unpaid leave
	22	WED	26.1	
	23	THURS	26.1	
	24	FRI	26.1	
	25	SAT	24.6	Completion of fixed-time contracts (1.5 of post)
	26	SUN	24.6	
	27	MON	24.6	
	28	TUES	27.6	Employment of juveniles (3 posts; 6x0.5 of post)
	29	WED	27.6	
	30	THURS	27.6	
	31	FRI	26.6	Decrease in employment (disability annuity of 2 employees; 2x0.5 of post = 1 post)
Total in a month			793.6 793.6/31=25.6	
Average staff headcount in a month			25.6	

Example - annual average staff headcount

Employment in the enterprise in 2007 is shaped in the following manner:

YEAR	MONTH	STAFF HEADCOUNT
2007	JAN	19.1
	FEB	23.4
	MAR	24.1
	APR	24.1
	MAY	25.6
	JUN	24.6
	JUL	20.1
	AUG	22.1
	SEPT	24.1
	OCT	25.6
	NOV	26.1
	DEC	25.6
TOTAL		284.5/12=23.71
AVERAGE STAFF HEADCOUNT		23.71

The annual average staff headcount (in the relevant period) amounts to 23.71.

The entrepreneurs often ask, at what moment of the process of applying for the support or implementation of the supported project they should have the SME status. This issue should be monitored at two moments of time: when submitting the application (application for co-financing) and at the time of signing the contract on co-financing.

The need to conduct the verification at the first stage (i.e. at the application stage) follows from the formal and substantive criteria - some measures of the Operational Programme are directed only at SME, thus the entity assessing the application has to be informed on whether the applicant meets the conditions determined as borderline conditions (conditions of entry into the measure). This issue was made more specific in the document directed at the applicants and developed by the institutions involved in the process of implementing this measure. However, since neither these documents nor the very Operational Programme or the Detailed description of priorities do not have the status of commonly applicable legal acts, it is impossible to declare if the requirement of checking the status of the applicant follows from the rules of law. Making such assessment results from the substantive criteria related to the process of application to the Operational Programme, i.e. from the formal and substantive evaluation of the project.

The need to carry out the verification at the second stage (i.e. signing of the contract) follows from the provisions of the Act on the procedural issues concerning State aid, and more precisely from the provision defining the term of the day of granting support. Since the status of the entrepreneur is closely related to the intensity of support, before it is awarded (in case of OP IE aid is awarded on the day of signing the contract on co-financing) the factors influencing this intensity need to be checked. One of the most important of this type of factors is the status of the entrepreneur.

In the first case the declaration of the entrepreneur has a strictly informative character, but this stage should not be underestimated, as an error at this stage can have a very far-reaching consequences. Since from the perspective of State aid the day of awarding the aid is significant (in case of OP IE beneficiaries it will always be the day of signing the contract on co-financing) and not the day of submitting the application for co-financing, it is easy to underestimate the weight of this stage. This moment is not, probably, significant from the perspective of law, it is, however, extremely important as it comes to practical aspects – since if we make an error at this point we can: (1) receive support that was not intended for us (e.g. if the measure for which we submitted our application for co-financing is intended only for SMEs) or (2) receive support in an excessive amount (e.g. instead of 50% of eligible expenditure we will be granted 70%, which exceeds the maximum permissible limits of State aid thresholds and it can end up in the necessity to return the entire grant amount together with interest).

Day of granting aid is a significant moment if only because of the fact that from that day the entrepreneur obtains the right to resources that are granted to him under the contract (i.e. he obtains this right not as of the day of actual transfer of the grant to the entrepreneur's account but as of the day of awarding to the entrepreneur the right to their payment in the amount defined in the contract). Secondly, as of this day the interest will be calculated in case of a necessity to repay the awarded grant.

What are the consequences of being a partner or linked enterprise?

These consequences can be considered in the context of awarding the SME status (establishing the staff headcount, setting out the financial results).

Example 1. The entrepreneur – limited liability company (A), in which another entrepreneur - limited joint-stock company (B) has 30% of shares, submits an application for co-financing of an investment project. The staff headcount in company A, calculated in line with the applicable rules within the reference period amounts to 27 employees. Its annual net turnover from sales of goods and products amounts to EUR 7 million (converted into PLN: 20 million) and the sum of assets of its balance sheet drawn up at the end of the year amounts to EUR 9 million. At this stage, we can state that the entrepreneur is eligible to be classified in the category of SME, it will have the status of a small entrepreneur as it employs less than 50 employees and it meets one of the two required economic conditions – its annual net turnover does not exceed EUR 10 million.

Entrepreneur B employs 25 persons and its economic values are shaped in the following manner: net turnover EUR 8.5 million, annual balance sheet on the side of assets – EUR 6 million.

In order to correctly calculate the size of company A, the following has to be performed:

(a) add to the value of staff headcount in company A 30% of the staff headcount in company B; the staff headcount established in this manner cannot exceed the maximum values determined for a small entrepreneur, i.e. 50 employees calculated per AWU: 27 + (30% x 25) = 27 + 7.5 = 34.5; for the needs of establishing the staff headcount in order to define the status of partner entrepreneur A it is adopted that the staff headcount for entrepreneur A is at the level of 34.5 AWU;

(b) add to the sum of assets of company A 30% of the sum of assets of company B; the value of the sum of assets established in this manner cannot exceed EUR 10 million: 9 + (30% x 6) = 9 + 1.8 = 10.8; for the needs of establishing the value of the balance sheet with the view to determine the status of partner entrepreneur A it is adopted that the value of its balance sheet on the side of assets amounts to EUR 10.8 million;

(c) add to the sum of the annual net turnover of the company A 30% of the sum of the annual net turnover of company B; the sum of net turnover established in this manner cannot exceed EUR 10 million: 7 + (30% x 8.5) = 7 + 2.55 = EUR 9.55 million; hence for the needs of establishing the sum of turnover with the view to set out the status of partner entrepreneur A it is adopted that the sum of its turnover amounts to EUR 9.55 million (from the permissible EUR 10 million).

Hence the situation is the following:

Entrepreneur A as being in a partnership with entrepreneur B is characterised by the following indicators:

	Staff headcount	Sum of the assets of the company's balance sheet	Sum of the turnover
Entrepreneur A (independently)	27	9	7
Entrepreneur B (relevant part independently)	7.5	1.8	2.55
Entrepreneur A (together with B)	34.5	10.8	9.55

Does these indicators cause that it is not possible to recognise entrepreneur A as an entrepreneur belonging to the SME category? No, and this is because it is enough for one economic value to be within the limits provided for the SME category (the value of the sum of the turnover is within this limits).

Example 2. The same case as in example 1, but entrepreneur A is linked to entrepreneur B – since B has as much as 65% of shares in A.

In order to correctly calculate the size of company A, the following has to be performed:

(a) add to the value of staff headcount in company A 100% of the staff headcount in company B (and not 65%); the staff headcount established in this manner cannot exceed the maximum values determined for a small entrepreneur, i.e. 50 employees calculated per AWU: 27 + 25 = 52; for the needs of establishing the staff headcount in order to define the status of linked entrepreneur A it is adopted that the staff headcount for entrepreneur A is at the level of 52 AWU;

(b) add to the sum of assets of company A 100% of the sum of assets of company B; the value of the sum of assets established in this manner cannot exceed EUR 10 million: 9 + 6 = 15; for the needs of establishing the value of the balance sheet with the view to determine the status of linked entrepreneur A it is adopted that the value of its balance sheet amounts to EUR 15 million;

(c) add to the sum of the annual net turnover of the company A 100% of the sum of the annual net turnover of company B; the sum of net turnover established in this manner cannot exceed EUR 10 million: 7 + 8.5 = EUR 15.5 million; hence for the needs of establishing the sum of turnover with the view to set out the status of linked entrepreneur A it is adopted that the sum of its turnover amounts to EUR 15.5 million.

Hence the situation is the following:

Entrepreneur A as being linked to entrepreneur B is characterised by the following indicators:

	Staff headcount	Sum of the assets of the company's balance sheet	Sum of the turnover
Entrepreneur A (independently)	27	9	7
Entrepreneur B (entirety; independently)	25	6	8.5
Entrepreneur A (together with B)	52	15	15.5

These indicators cause that it is not possible to recognise entrepreneur A as an entrepreneur belonging to the SME category. Of course, on condition that such a situation will take place a second time in a row (year after year), as it was stated above. It stays with entrepreneur B in a linked relationship (it is bound thereto), and this implies that the values necessary to show the status of the examined entrepreneur have to be increased by the values of the entrepreneur having shares in it and they have to be included in 100%.

If there are several partner or linked enterprises the same calculation should be performed for each of the partners or linked enterprises situated directly at the upstream or downstream level in respect to the examined enterprise.

Examination of the status of an enterprise and its correct determination is significant for a number of reasons. First of all, some measures of OP IE are targeted only and exclusively at entrepreneurs from the SME category. Secondly, other and significantly less restrictive are the obligations of an entrepreneur from the SME category within the scope of keeping the project durability (3 years instead of 5 years). Thirdly, some expenditure can be considered as eligible only in the case of SMEs, e.g. costs of purchase of used fixed assets – this is a really great facilitation. Fourthly, an entrepreneur from the SME category can count, as a general rule, on support in higher intensity – this will be discussed in the further part of this paper, at this point it is enough to state that, in general, small and medium-sized entrepreneurs can be sure of higher support (larger grant) both as regards aid for investments, as well as aid for training, research and development and others.

What if the entrepreneur **erroneously** determines its status, i.e. it indicates that it belongs to the SME sector, while in fact, it is not the case? The consequences of misestimating the size of an enterprise can differ, starting from insignificant and ending with very grave.

If after submission of the application but before signing the contract it turns out that the entrepreneur misestimated its own size the proceedings of the implementing authority should depend on whether:

(a) the entrepreneur submitted the application under the measure intended exclusively for SME – if this is the case the contract cannot be signed, the application will be negatively assessed as failing to meet the entry criterion for the measure (in measures intended only for SMEs the fact of being an SME constitutes a borderline criterion, i.e. a criterion considered in the first place);

(b) the entrepreneur submitted the application under the measure intended for large entrepreneurs and entrepreneurs from the SME category – under such circumstances the entrepreneur will be most probably called to correct the application for co-financing and can then submit it again. However, be careful because the following situation can also take place, that although the support under the measure is targeted to all entrepreneurs, SMEs are treated in a preferential manner (e.g. by awarding them more points in the competition). If this is the case, the application of a large entrepreneur will be considered, but additional points will not be granted. This may mean that it will be “dropped” from the list of projects recommended for the support.

Example. An entrepreneur obtained additional 10 points for meeting the criterion of being a small entrepreneur. It resulted in a total of 59 points for the entrepreneur and a good rank on the list. The threshold of 50 points constitutes an entry limit to the list. Next, it turns out that the entrepreneur does not fall under the category of SME and hence the 10 points will be deducted. This means that the project of the entrepreneur was assessed on 49 points and the entry limit to the list was established at the level of 50 points, thereby the entrepreneur will not be placed on the list.

If the mistake will be discovered after signing the contract on co-financing the decision of the institution will depend on whether after establishing the actual status of the enterprise it will be further entitled to obtain the support under a given measure. Two situations can be identified:

(a) if the given measure is directed only for small or medium-sized entrepreneur (situation a) this means that when applying for the support the (large) entrepreneur failed to meet the borderline criteria, i.e. it was not from the SME sector and thereby it obtained the support without legal grounds. Under such circumstances the contract has to be terminated and, unfortunately, the beneficiary will have to return the entire awarded grant along with interest accrued from the date of signing the contract (hence from the date of awarding the grant);

(b) if the given measure will be also available for large entrepreneurs (situation b) the contract could possibly be annexed on the request of the beneficiary and after an approval of a relevant institution. Then the co-financing thresholds would be decreased, e.g. in case of an entrepreneur from Warsaw from 50% (available to small enterprises) or 40% (available to medium-sized enterprises) to 30% of the value of eligible expenditure of the project (available to large enterprises) A problem may arise if the entrepreneur, which claimed to be a small or medium-sized entrepreneur at the application stage obtained additional bonus points during the project assessment on account of belonging to the SME sector. Then additional analysis should be conducted establishing whether the entrepreneur would receive the number of points qualifying it to be awarded support also in the case of not obtaining points for affiliation to the SME sector (the example above illustrates this case very well).

In line with Annex I to the Regulation No 800/2008 enterprises, in which 25 % or more of the capital or voting rights is controlled by one or more public bodies is automatically excluded from the SME category. Public body shall be understood as public law entities. Thus the SME category excludes:

(a) single-member companies of the State Treasury;
(b) public enterprises: State and municipal;
(c) companies, of which 25% or more is owned by the State Treasury or territorial self-government units at each level (gmina, poviat, voivodeship).

At the end of this discussion it would be worthwhile to say some more words – in the context of the entity that is automatically excluded from the SME category – on a **public entrepreneur**.

In line with the EU provisions (Commission Directive 80/723/EEC of 25 June 1980 on the transparency of financial relations between Member States and public undertakings) and the national legislation (Act on the procedural issues concerning State aid) **public undertaking** is any undertaking over which the public authorities may exercise directly or indirectly a dominant influence by virtue of their ownership of it, their financial participation therein, or the rules which govern it.

For example, a public entrepreneur will be a State enterprise, single-member company of the State Treasury, single-member company of a territorial self-government unit, as well as each joint stock company or a limited liability company as far as there are grounds to consider it as a subsidiary within the meaning of Article 4 point 3 of the Act of 15 December 2000 on competition and consumer protection, i.e. if the State Treasury, territorial self-government unit, State enterprise, single-member company of the State Treasury or single-member company of a territorial self-government unit has a dominant position in respect to them (these conditions are enumerated in detail above, on the occasion of the discussion on the issue of independence of an enterprise).

Venture capital companies should be recognised as public undertakings if more than half of the members of the board of directors of single-member company of the State Treasury or the single-member company of the territorial self-government unit, at the same time, are members of the board of directors of these companies.

5. Type of activity of an entrepreneur versus State aid involvement

This part will discuss the following issues:

- Exceptions from the rule – permissibility of State aid on the basis of the Treaty,
- Aid under an aid scheme – definitions and elements,
- Individual aid – rules
- Character of the projects and permissibility of aid compatible with the common market,
- Block (group) exemptions – application rules, applicability, definition.

As it was said previously, in line with the Treaty establishing the European Community "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 common market." The provision of the Treaty establishes a general **ban** on awarding State aid. It is a rule with exceptions. In line with what was stated at the beginning the entire system of State aid – the allowed State aid, is based on **exceptions from the rule** (the ban is the rule). These exemptions were provided for in the same Treaty – they determine the situations, under which it is possible to award State aid.

Two subsequent Paragraphs of Article 87 of the Treaty indicate two types of situations:

(1) situations, in which the aid will be declared compatible with the common market (hence it is unnecessary to even ask the Commission for an approval for granting this type of aid, which is, however, not unequivocal with the fact that it is not necessary to present to the Commission the planned aid measure to be assessed whether it actually complies with Article 87(2));

(2) situations, in which the aid may be declared as compatible with the common market; the decision on the fact if the planned aid measure is permissible or not (i.e. compliant with the common market) is taken by only one body - not the entity awarding the aid, not the Member State only the European Commission (Article 87(3)).

The first category of cases, in which the aid is compliant with the common market covers the following types of aid (support categories):

(a) aid having a social character, granted to individual consumers, provided that such aid is granted without discrimination related to the origin of the products concerned,

(b) aid to make good the damage caused by natural disasters or exceptional occurrences,

(c) aid granted to the economy of certain areas of the Federal Republic of Germany affected by the division of Germany, insofar as such aid is required in order to compensate for the economic disadvantages caused by that division.

None of the above-indicated types of aid (support categories) will be awarded under the OP IE and hence it seems that there is no need to discuss them within the framework of this document intended for the beneficiaries of OP IE.

The second category of cases, in which the aid may be declared as compliant with the common market covers the following types of aid (support categories):

(a) aid to promote the economic development of areas where the standard of living is abnormally low or where there is serious underemployment;

(b) aid to promote the execution of an important project of common European interest or to remedy a serious disturbance in the economy of a Member State;

(c) aid to facilitate the development of certain economic activities or of certain economic areas, where such aid does not adversely affect trading conditions to an extent contrary to the common interest;

(d) aid to promote culture and heritage conservation where such aid does not affect trading conditions and competition in the Community to an extent that is contrary to the common interest;

(e) such other categories of aid as may be specified by decision of the Council acting by a qualified majority on a proposal from the Commission.

Three main categories of aid following from Article 87(3) of the Treaty include regional aid, horizontal aid and sectoral aid. Some of them – regional aid and horizontal aid for training or research and development, will be discussed in the further part of this handbook.

As it was mentioned above it is the European Commission that assesses the permissibility of awarding aid based on one of the exemptions indicated in Article 87(3) of the Treaty. The Commission may perform the assessment in two ways:

- by **assessing the aid scheme** notified under the mode of the so-called notification by the Member State in a procedure that is defined, strictly formalised and provided for in EU and national law. In this case it is, to some extent, the Member State that takes the initiative to inform the Commission on what type of aid it intends to grant by formulating and presenting to the Commission the aid measure (aid scheme or individual aid) and the Member State expects the Commission to confirm and accept the presented conditions as regards their compliance with the Community law. There are two categories of aid measures:
  - **aid scheme** (in other words referred to as the State aid scheme); it needs to be observed that an aid scheme can be notified as some kind of instrument of granting State aid – as an entirety, or notification can concern also individual aid, unit aid granted under this aid scheme – e.g. in case of exceeding the quota limit for a given aid; to a certain threshold the aid within the framework of a given allocation is not subject to individual notification and if the threshold is exceeded, despite the fact that this aid meets the permissibility conditions set out in the aid scheme, it has to be subject to individual notification; this is described in the further part of the chapter. It should be remembered that such scheme can be established on the basis of a Block Exemption Regulation (then such a programme based on such Regulation does not have to be notified to the Commission although the Member State can notify thereof in order to obtain

the so-called legal certainty) or on the basis of the Guidelines and Commission Regulations other than a Block Exemption Regulation (then such a scheme is subject to obligatory notification to the Commission);

- **ad hoc individual aid**; there are two types of individual aid (in line with Article 2(3) of the Regulation No 800/2008: ad hoc aid (awarded outside the aid scheme) and aid subject to notification on the basis of an aid scheme (this type of aid is referred to in the previous indent)

- by establishing general conditions of granting State aid under the so-called **Block Exemption Regulation**, which is applicable in all countries of the Community. The assessment of the aid measure is carried out in this case by way of compatibility assessment of the national ordinance planned by a Member State with the permissibility conditions determined in the Regulation stipulating the block exemption. This assessment is most often performed by the national authority of a given Member State (in Poland – the Office of Competition and Consumer Protection) since the block provisions do not provide for an obligatory notification of the aid schemes compatible with these regulations. However, as it was mentioned previously, the Member State can notify the aid scheme based on the block exemption to the Commission. The name of this type of regulation is determined by their scope – these are block exemptions also referred to as the group exemptions (a popular abbreviation is **BER** or, as in the current case - **GBER**, which stands for General Block Exemption Regulation). This regulation centrally determines the conditions and requirements that have to be met by a given aid measure in order for it to be declared as permissible, compatible with the common market, in line with the rules described in this Regulation.

  In this case it is, to some extent, the Commission that takes the initiative to inform the Member States through formulating and presenting the aid measures possible to be applied and what type of aid the Member States can award and in line with what rules. The Member State is expected only to transpose the rules established by the Commission to the national law by issuing a relevant aid scheme.

- ***Assessment of permissibility of aid allocation – assessment of the aid measure: aid scheme.***

Aid scheme is the most popular method of granting State aid on practical grounds. An aid scheme covers a commonly applicable act of national law (act or ordinance) issued by the authorised bodies of the Member State, which constitutes grounds to award State aid and which included conditions, rules and amounts of the aid and group of beneficiaries specified in an abstract manner. In official terms the aid scheme has to meet the conditions, referred to in the Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 93 of the EC Treaty.

Aid schemes determine the rules, conditions, forms and legal basis for awarding a specific type of support to the entities applying for support. Below we have presented a brief

description of elements, which have to be included in each aid scheme in order for the legal act to be determined as such in line with the provisions of the national and EU law.

1) allocation of aid;

From the perspective of the Operational Programme Innovative Economy the following examples of aid allocation can be differentiated:

a) **horizontal aid** for research, development and innovation, aid for small and medium-sized entrepreneurs, aid for training, aid for consultancy;

b) **regional aid** awarded: (1) in order to support new investments or creating new jobs related to a given investment and (2) for coverage of costs of current economic activity conducted by the entrepreneur.

2) form of aid;

Grant (in a form of advances or refunds), deferment of payment deadline, remission or division into instalments of the payment of taxes or other public and private levy, guarantee, security, contribution of capital, preferential interest rate on loan or credit – constitute only some of the simplest examples of the forms of providing State aid. Within the framework of OP IE the aid is granted in the form of **grants** (both refunds and advances) e.g. grant for investments, conducting research works and in the form of **contribution of capital.**

3) conditions of granting aid;

Depending on the allocation of State aid (i.e. depending on the fact whether it is regional or horizontal aid) the conditions of granting aid are very different and they concern, in particular, the amount of aid and its intensity (i.e. *how high level of the grant, co-financing may be awarded to an entrepreneur and in line with what rules?*).

4) eligible expenditure;

The catalogue of eligible expenditure, i.e. information *on what?* on which purposes, on which expenditure the awarded State support can be allocated depending on the aid allocation (regional on new investments, horizontal on training, on research, development and innovation).

The exemplary eligible expenditure in regional aid for new investment cover purchase of machines, devices, intangible assets, undeveloped property (land), technical infrastructure, apparatus, equipment, as well as costs of gross wages of an employed person incurred by the employer within the period of 24 months and costs of obligatory contributions to social insurance, which currently amount to approx. 18% of the costs of gross wage. In case of aid for training the eligible costs can cover, e.g. the remuneration for the instructor, costs of travel of the instructor and the trainees, costs of making and copying training materials or participation certificates, costs of training evaluation, costs related to the rent of equipment necessary for conducting training such as multimedia projectors, etc. More on eligible expenditure will be stated in the Chapter dedicated to this issue.

5) duration of the aid scheme;

The duration of the aid scheme is given in years; in case of OP IE it will cover the period until 2015 or shorter, if the provisions forming the grounds for issuing the given national aid scheme are amended. In line with the transitional provisions included in Chapter III of the Regulation No 800/2008 along with the end of the period in which the Regulation No 800/2008 applies (i.e. 31 December 2013) all national aid schemes, excluded from the notification obligation under this Regulation, will remain in force for another 6 months of an adjustment (transitional) period. It is possible to grant aid, i.e. sign contracts, during the transitional period (taking into account the legal status as of today, the contracts concluded until 30.06.2014 on the basis of Regulation No 800/2008 will remain applicable). Regional aid schemes constitute an exception here, as they expire on the day of expiry (annulment) of the approved regional aid map. As a general rule, since the national regional aid maps, including the Polish regional aid map, apply until the end of 2013, until that time the State aid awarded on the basis of aid schemes compatible with the current map can be awarded to the beneficiaries, and awarding of State aid is understood as signing contracts on co-financing.

However, there are no obstacles for a contract signed by the end of 2013 (in case of regional aid) or before 31 December 2008 (in case of other aid category) to be implemented in subsequent years (until 2015 inclusive);

6) beneficiaries of the aid scheme;

The beneficiary was very extensively covered in the part of the Vademecum dedicated especially to this issue, hence at this point this topic will not be further discussed; it will be only stated that the beneficiaries under aid schemes should be determined in an abstract manner, and not personally, by their names.

For example, an abstract definition of a beneficiary can cover indication of a target group: “small and medium-sized enterprises”, “food sector enterprises”, "enterprises from the area of the Mazowieckie Voivodeship”, “enterprises carrying out economic activity for less than 1 year), “industrial parks on the territory of the voivodeships of Eastern Poland." An example of incorrect definition of the beneficiary under the aid scheme is its personal indication, e.g. “company Pronto sp. z o.o. (limited liability company)”; individual, personal indication of the aid beneficiary is characteristic for individual aid, which under this respect is contrary to the aid scheme.

When defining the beneficiaries of an aid scheme it is necessary to determine in a specific and as precise as possible manner to whom the aid scheme is addressed taking into account the size of the entrepreneurs (e.g. from the SME sector), legal form (e.g. natural persons carrying out economic activity), territorial scope of the activity (e.g. enterprises conducting economic activity on the territory of the Republic of Poland, enterprises from the Mazowieckie Voivodeship).

7) entities awarding State aid;

In line with the Act on the procedural issues concerning State aid the entity awarding aid will be understood as public administration body or other entity, which is entitled to grant State

aid, including public entrepreneur. The concept of an entity awarding State aid is not synonymous with the concept of the entity issuing the legal act that constitutes aid scheme.

For example, in case of schemes implemented under OP IE entities issuing aid schemes cover the Minister of Regional Development, the Minister of Economy, the Minister of Sport and Tourism, the Minister of Interior and Administration. Entities awarding State aid cover, respectively: Polish Agency for Enterprise Development for aid schemes of the Minister of Regional Development or the Minister of Economy, Implementing Authority for European Programmes for aid scheme of the Minister of Interior and Administration for Measure 8.4 of the OP IE, Polish Tourism Organisation for aid schemes of the Minister of Sport and Tourism for Measure 6.4.

8) principles of State aid cumulation;

The cumulation should be understood at two levels. Firstly, cumulation understood as the possibility to obtain support under different operational programmes for the same project is impermissible. On the one hand, this is guarded by the Regulation No 1083/2006 that forbids to grant support under more than one operational programme, on the other, by the demarcation line, which is more broadly discussed at another place of this handbook establishing the border between the measures of different Operational Programmes and types of projects financed within their framework. Secondly, cumulation concerns State aid, i.e. aid awarded from different aid allocations from different institutions for the same project (and in more specialist terms, for the same eligible costs). However, such aid is permissible only provided that the aid awarded from different sources will not result in exceeding the maximum permissible intensity of State aid. It is also possible to cumulate aid obtained from an Operational Programme and from other public sources, i.e. programmes financed from national sources (not EU), hence there is no risk of overlapping levels of intervention (i.e. distort the demarcation line), the demarcation line does not concern support from sources other than operational programmes.

Example. A small entrepreneur from Wrocław submits an application for co-financing of a new investment. It is entitles to a grant in the amount of 60% of eligible expenditure. The eligible expenditure for the entire investment amount to PLN 4.500 thousand. Thus it can obtain support in the amount calculated according to the formula: eligible expenditure x percentage of intensity, i.e. PLN 4.500 thousand x 60%. The result is the amount of PLN 2.700 thousand of a possible grant.

Unfortunately, the entity awarding this grant adopted a rule – given the limited financial resources that remain at its disposal - that it will not award additional bonuses following from the increased intensity for small and medium-sized entrepreneurs. The basic level of support for an entrepreneur from Wrocław is 40%, a medium-sized entrepreneur can obtain a bonus of 10 percentage points and a small and micro-entrepreneur – a bonus of 20 percentage points. These bonuses will not be awarded to our exemplary entrepreneur. Hence it will obtain a grant in the amount of PLN 1.800 thousand.

However, this grant fails to satisfy the needs of the entrepreneur. It decides to look for another possibility of support, hence it still has the 20 bonus percentage points "in stock", i.e. it has still the possibility to obtain additional grant in the amount constituting the difference between the maximum level of the grant (PLN 2.700 thousand) and the obtained grant (PLN 1.800 thousand). Therefore it can obtain from other entity awarding Sate aid the support in the amount of PLN 900 thousand.

The figure below illustrates the manner of distribution of the aid as compared to the amount of eligible costs.

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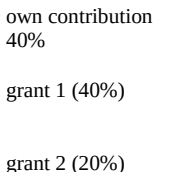
Eligible expenditure (100%) cover the entire figure above. Grant 1 is the part of the figure, which the applicant will obtain 

awarding the aid 1, let us assume that this will be a grant from the Polish Age se Development within the framework of the Operational Programme Innova Grant 2 is the grant, which the entrepreneur will obtain from the entity awar or the same investment, let us assume that this will be the Poviat Starosty within the framework of the local entrepreneurship development programme implemented from the own resources of the gmina. Grant 1 (in the amount of 40%) and grant 2 (in the amount of 20%), despite the fact that they were awarded separately and even at different time (for example one year apart) exhaust the aid intensity ascribed to this type of entrepreneur implementing the project in Wrocław. It cannot obtain a higher amount of grant. Hence the blue part of the figure illustrates the own contribution of the entrepreneur in the project.

The own contribution will be further discussed in a separate part, at this point let it be said only that the own contribution is the part of eligible expenditure, which is covered by the very beneficiary from the own resources and the own contribution will always refer to the eligible expenditure and not to the total project expenditure; each project consists of eligible and ineligible expenditure, for the needs of awarding State aid only the former are significant, hence the level of the grant and the size of the own contribution is calculated on their basis.

Of course, the ineligible expenditure in their entirety have to be covered from the own resources of the beneficiary.

In summary if the aid awarded under a given programme can be combined with the aid granted under other programmes (non-EU), there has to be a guarantee that each subsequently granted aid will not result in exceeding the eligible aid intensity.

The entrepreneur documents the above by meeting the obligation imposed on it by the provisions of law, i.e. to each application for co-financing from State resources (not only EU resources) the information on obtained State aid other than *de minimis* aid is attached. This is a document comprising of three parts. In the second part the entrepreneur presents the information on the project and on the State aid previously obtained for the project or the aid, for which it is applying in parallel from another source for the implementation of this project. In the situation described in the example, the entrepreneur should submit to both entities granting aid – the Polish Agency for Enterprise Development and the Starosty – an application together with this form informing that it is applying for (or received) aid from

another source. Proper presentation of this data lies in the interest of each entrepreneur since if these data are not presented (from any reason whatsoever: lack of knowledge, wish to obtain higher grant or any other reason), the entity awarding the aid will not be able to calculate its correct amount, which may result in exceeding the maximum permissible aid intensity (in our case: 60%) and obtaining of aid by the entrepreneur in an excessive amount, which will have to be repaid together with interest rate accrued from the day of signing the contract on co-financing until the day of repayment. Moreover, if the controlling entity states that the entrepreneur acted in order to mislead then it has to be prepared for serious consequences, including a ban on the possibility of obtaining any grants from the State resources within three years.

9) territorial scope;

The aid scheme should define the recipients in respect to "geography" hence it should determine whether the support under the scheme is addressed to entrepreneurs conducting activity within a specified area (e.g. gmina, voivododeship) or is it possible for the entrepreneurs from the area of the entire country to apply for aid.

Finally, it needs to be emphasised that the aid scheme can comprise of provisions of different legal acts. Hence there can occur a situation under which a single legal act will include in itself several aid schemes, as well as a situation when several legal acts will constitute one aid scheme, since e.g. the act will contain the legal basis to provide aid and the ordinance (one or several) other of the above-described conditions.

- ***Assessment of permissibility of aid allocation – assessment of the aid measure: individual aid.***

On some occasions there is no possibility of granting aid under an aid scheme. Three situations are determined within this scope, which require individual notification.

Taking into account the potential distortion of competition the notification obligation covers so-called **large investment projects**, within the meaning of Regulation No 1083/2006, i.e. projects, whose eligible expenditure constituting the basis for calculating the possible grant exceed EUR 50 million counting as of the day of granting aid (i.e. singing the contract on co-financing).

Individual aid forwarded to the assessment of the European Commission is also awarded in certain cases provided for in the aid schemes.

In case of **aid exceeding the determined thresholds** indicated in Regulation No 800/2008, separately for individual aid category, it cannot be granted on the basis of block exemptions. This aid should be subject to individual notification – this means that despite the fact that the given aid meets the conditions described in the aid scheme in line with the provisions of Regulation No 800/2008 in case of exceeding the established thresholds a separate individual notification will be required. These thresholds are the following for individual allocations of State aid (we indicate only some of them, which are relevant for the aid category awarded under OP IE):

(a) SME investment and employment aid: EUR 7.5 million per entrepreneur per investment project;

(b) aid for consultancy in favour of SMEs: EUR 2 million per entrepreneur per project;

(c) aid for SME participation in fairs: EUR 2 million per entrepreneur per project;

(d) aid for research and development projects and feasibility studies:

- in case of fundamental research as the main or only research under the research project: EUR 20 million per entrepreneur per one project/feasibility study;
- in case of industrial research as the main or only research under the research project: EUR 10 million per entrepreneur per one project/feasibility study;
- in case of all other projects: EUR 7.5 million per entrepreneur per one project/feasibility study;

(e) aid for industrial property rights costs for SMEs: EUR 5 million per entrepreneur per project;

(f) training aid: EUR 2 million per training project.

Moreover, individual notification can be required when we want to grant aid which has not been regulated under the aid scheme. It can be the case, that for example, the aid scheme foresees granting aid for small entrepreneurs, and medium-sized entrepreneur is applying for the support. In such situation individual notification should be made since the project of the beneficiary cannot be integrated within the framework of any aid schemes remaining at the disposal of the given entity awarding State aid. It is the so-called ad hoc aid.

- ***Assessment of permissibility of aid allocation – assessment of the aid measure: issuance of Block Exemption Regulation.***

The conditions and requirements of the aid scheme concern such aspects of aid as: eligible expenditure; intensity or amount of aid (i.e. the value of the grant that can be granted for a given project); exemptions (areas, where the given aid referred to in the regulation cannot be granted, e.g. exemptions in the coal mining sector, shipbuilding industry, agriculture, fisheries, etc.); principles of aid cumulation, i.e. indication whether and according to what rules the aid granted for the same project (for the same eligible expenditure) should be summed; initial and final dates of Regulation validity, i.e. establishing until when on the basis of this regulation aid can be granted; the group of target beneficiaries – do these beneficiaries cover all enterprises or only the enterprises from the SME sector, and maybe any other entities?

EU Regulation within the scope of State aid, with which the given national aid scheme adopted by the central or regional authorities has to be compatible is the General Block Exemption Regulation (No 800/2008). A national ordinance based on the block exemption has to meet one basic condition - its scope (scope of the support planned within its framework) has to be compliant and cohesive with the scope of the Regulation No 800/2008. Under no circumstances can the national ordinance **improve** (mitigate) the provisions and

principles determined in the Block Exemption Regulation issued by the European Commission but it can **tighten** these rules.

The aid scheme issued by the Member State (by the government of a Member State, e.g. by the Minister of Regional Development) does not have to be based on the block exemptions, however, they are the most common as they are the fastest to proceed with (adopt), they require the least formalities and they almost do not need the involvement of the European Commission in the process of adopting them.

The Regulation No 800/2008 entered into force on 29 August 2008. This Regulation – in line with the provisions set out in Chapter III – repealed the following Regulations: 68/2001 (training aid), 70/2001 and regulation 364/2004 amending it (aid for SMEs), as well as 2204/2002 (employment aid) and 1628/2006 (regional aid), and in line with Article 44 of Regulation No 800/2008, aid awarded before 31 December 2008, which does not meet the conditions determined in this Regulation but is compatible with one of the repealed Regulations can be awarded during that time (it is possible to sign the contract on co-financing). Therefore, despite repealing as of 30.06.2008 the above-mentioned block exemption regulations forming the grounds for the validity of the national ordinances based on them, the aid awarded on the basis of these very national ordinances can still be granted within the transitional period until 31 December 2008.

Within the scope of adjustment and transitional provisions one more exemption was adopted, in this case under aid schemes based on the Regulation No 1628/2006. However, together with repealing the Regulation No 1628/2006 as of 30 June 2008 it will be possible to further implement the existing national regional investment aid schemes under the conditions provided in this Regulation (i.e. 1628). This means that in case of the national aid schemes based on the Regulation 1628/2006 there is no obligation to adjust the provisions of these regulations to the Regulation 800/2008; these provisions are to some extent equitable at least until the time the up-to-date regional aid map remains biding.

Hence given the expiry of the “old” Regulations as of 30 June 2008 the national aid schemes expire after a defined lapse of time – that is as of 31 December 2008. This means that all the national aid schemes have to be amended and adjusted to the new General Block Exemption Regulation since if it is not done until 31 December 2008, after this deadline it will be impossible to award aid based on the “old” aid schemes – they will not be binding anymore – and there will be no "new" aid schemes under the national legal system.

Example. The Regulations binding from 2000 to 2006 (in Poland given the accession of our country to the European Union in May 2004 the regulations were binding in the years 2004-2006) pursuant to the provisions contained therein should expire as of 31 December 2006. However, on the basis of the European Commission decision the binding force of the regulations was extended until 31 December 2007 with a transitional period until 30 June 2008. During that time Commission issued new legal acts binding in the so-called “new financial perspective”, i.e. in 2007-2013 (with a postponement concerning the initial date).

The Ordinance of the Minister of Regional Development on granting financial aid under Operational Programme Innovative Economy 2007-2013 by Polish Agency for Enterprise

Development is an aid scheme based on the "old" block exemptions – not binding already as of 1 July 2008 – Regulations 70/2001, 68/2001 and 1628. Within this scheme the conditions of awarding State aid under Measure 4.4 of OP IE have been defined. The round for this Measure was launched and completed in 2008. The project assessment is ongoing. The projects assessment must be completed within the time limits which will make it possible to sign all the contracts with the beneficiaries selected under the competition at the latest until 31 December 2008 hence in line with the repealed block exemption regulations – State aid under the national aid schemes based on the Regulation 70/2001 and 1628/2006 can be awarded only until 31 December 2008; award – i.e. sign a contract for the projects selected under the competitions, which rules were based on the regulations that were repealed on entry into force of the Regulation No 800/2008. New rounds starting after 31 December 2008 already have to be in line with the General Block Exemption Regulation (GBER) No 800/2008.

It needs to be emphasised that an aid scheme can be subject to the need of notification to the European Commission if it is not based on Block Exemption or the Regulation on *de minimis* aid. If it is based only on the block exemption or *de minimis* aid then it is not subject to the notification obligation to the European Commission.

An entrepreneur submits an application for co-financing of an investment project under Measure 4.4 of OP IE. The project is compatible with the Ordinance on granting financial aid under OP IE by Polish Agency for Enterprise Development constituting an aid scheme. After examining the above fact and positive assessment of the application the implementing authority can sign the contract without the need to forward the case to the opinion of other bodies. Hence, the waiting time before signing the contract between the Implementing Authority and the applicant is the time that the national institutions engaged in the project assessment have to dedicate to activities provided for in their internal procedures for its verification in respect to compliance with the Operational Programme and relevant aid scheme. Each project submitted in the competition round for Measure 4.4 that is compliant with the Ordinance determining the rules of granting State aid under Measure 4.4 will not have to be forwarded to the assessment of the Commission or – in certain cases – of the Office of Competition and Consumer Protection.

Let us now imagine a different situation – there is no such aid scheme concerning granting aid under Measure 4.4 of the OP IE under the legal system. Then, after the project assessment conducted by the national institutions, the entire documentation would have to be sent via formal channels to the European Commission (via the Office of Competition and Consumer Protection and the Permanent Representation of the Republic of Poland to the European Union) in order to assess it in the context of compliance with the conditions of State aid. Such an assessment often lasts six months or longer. Each individual, single project, submitted in the competition round to the Measure 4.4 would have to be assessed in respect to its compliance with the provisions within the scope of State aid. The lack of point of reference to conduct such an assessment – the lack of an aid scheme under the national legal order

according to which it would be possible to check whether the eligible expenditure and intensity were correctly assessed and whether other conditions are met – would result in the need to conduct an individual assessment by authorised bodies.

As a consequence, within the framework of OP IE aid schemes have been established for all measures in which State aid is involved.

6. Project durability

This part will discuss the following issues:

- Obligation of project durability – genesis, notion
- Definitions of durability – description of components
- Substantial modification of a project
- Notion of a region
- Relocation as violation of the durability principle
- Definition of maintaining an investment
- Definition of completion of an investment
- Durability in the context of monitoring indicators and maintaining objectives of the project
- Replacement of old plant or equipment
- Substantial modification of a project
- Change in beneficiary's legal form

According to the Council Regulation (EC) No 1083/2006 of 11 July 2006 laying down general provisions on the European Regional Development Fund, the European Social Fund and the Cohesion Fund and repealing Regulation (EC) No 1260/1999, "to ensure the effectiveness, fairness and durable impact of the intervention of the Funds, there should be provisions guaranteeing that investments in businesses are long-lasting and preventing the Funds from being used to introduce undue advantage. It is necessary to ensure that investments which benefit from assistance under the Funds can be written off over a sufficiently long period".

These words from the preamble to the regulation were reflected in Article 57 "Durability of operations". According to this provision:

„1. The Member State or managing authority shall ensure that an **operation retains the contribution from the Funds** only if that operation does not, within five years from the **completion of the operation** or three years from the completion of the operation in Member States which have exercised the option of reducing that time limit for the maintenance of an investment or jobs created by SMEs, undergo a **substantial modification**:

(a) affecting its nature or its implementation conditions or giving to a firm or a public body an undue advantage; and

(b) resulting either from a change in the nature of ownership of an item of infrastructure or the cessation of a productive activity."

The subsequent passages of this article provide an obligation to inform the European Commission by the Member States and the managing authority of any cases of violating the durability of a project co-financed from EU funds; in the case of Poland this is the obligation of the Minister of Regional Development who in the annual implementation report on Operational Programmes should submit information of this type to the European Commission; furthermore, they provide an obligation to reimburse the subsidy from structural funds if such a case (failure to fulfil the durability obligation) occurs in a specific project.

In accordance with the Regulation 800/2008, “the investment must be **maintained in the recipient region** for at least five years, or three years in the case of SMEs, after the whole investment has been **completed**. This shall not prevent the **replacement** of plant or equipment which has become out-dated due to rapid technological change, provided that the economic activity is retained in the region concerned for the minimum period. For the lease of land and buildings, the lease must continue for at least five years after the anticipated date of the completion of the investment project or three years in the case of SMEs.”

What is the failure of keeping project durability? Why is such a rule obligatory?

Failure to maintain project’s durability may be related to a violation of the provisions of the Regulation 1083/2006 (structural funds) and to a violation of the provisions of the Regulation 800/2008 (State aid). It may refer to a “co-financed operation” or to an “investment”. It may sometimes relate also to a "project" (e.g. obligation to maintain jobs). This principle is, however, **always the same** and the simplest way to describe it is as follows: every intervention using public funds must give something more than just an immediate benefit for the individual entrepreneur who receives the support. Projects and investments co-financed from the structural funds and other public funds shall not terminate on the date of their settlement with the entity granting support, then such intervention would not make sense from the point of view of managing public funds and principles of the Cohesion Policy. Every public intervention should be a contribution to better development of the supported entrepreneur’s business and, therefore, it cannot have only a short-term perspective of one-time support for "here and now." Improving implementation of business and its development have a positive effect on the economic situation of a smaller or larger region of the entrepreneur provided with support (gmina, voivodeship, country). Each investment co-financed from State resources (and therefore by tax payers from Poland and Europe) should generate other investments, implementing the so-called leverage effect, which would be financed from entrepreneur’s own funds. The idea of structural funds is to spend financing from them in a way which would ensure **durable**, positive changes in the economy of the region and country. And since there are regional differences, reflected in the adoption of the so-called regional aid maps (more about it later), the durability of an investment is **closely linked with the prohibition of relocating** it (in a geographical sense), and **substantial modifications** (in terms of the content).

Failure to keep project’s durability may include both "transfer of a productive activity within a Member State" and "transfer of a productive activity to another Member State". It is stipulated in the Regulation 1083/2006. This latter case, generally known as "relocation", is a much less common phenomenon. Relocation is related to a prohibition on relocating economic activity. We deal with relocation when an entrepreneur, in a planned and purposeful way stops entirely or partially carrying out production or service activity in one European Union country and starts conducting it (simultaneously) in another country. In practice, it was accepted that only a relocation which involves a loss of at least 33% of jobs in the mother plant situated in an EU country other than Poland and which had previously been supported by funds from the structural funds, will be considered illegal. Under the OP IE, relocation relates only to large entrepreneurs, so even if a small or medium-sized entrepreneur in the

territory of an EU country other than Poland moves the production or service activity to Poland and it involves a loss of at least 33% of jobs, such investment could be supported by the OP IE (because in this case we do not deal formally with relocation).

If an entrepreneur carrying out relocation applies for aid from EU funds in the country to which the production or service activity is transferred, support will not be granted, the previously received support (in the previous place of conducting production activity) must be returned along with interest, such an entrepreneur will also be prohibited from receiving support from the funds for some time. Relocation is unacceptable, in order to prevent violating the principle of project durability on the one hand and on the other – to prevent slowing down development of the economies of the "old EU" States, because a phenomenon of transferring investments from France or Germany to more attractive in terms of investments countries of the “new EU” – Slovakia, Czech Republic or Poland is observed. Mass activities of this type, although positive for countries to which investments are transferred, are undesirable on the scale of the European Union.

A few phrases were highlighted in the paragraphs above. They need to be clarified:

Maintaining an investment – it means carrying out the economic activity for a specified time after the project financing has been completed. This time varies for various enterprises; for micro, small and medium-sized entrepreneurs - 3 years, for other entrepreneurs (so-called large) - 5 years. Since the regulation requires to maintain an investment, this duty should be understood broadly, i.e. as the necessity to maintain both the project and the entire investment, while the "co-financed project" may be one of its elements. Although the regulation does not say this explicitly, the individuality and identity of the project or investment must be determined which means that in order to state that an investment has been maintained (by implication: investment co-financed by public funds), the investment from the end of the period must be identifiable with the co-financed investment.

For example, the subject of investment which received a subsidy, is building a research laboratory for testing effects of a drug. The investment will not be maintained, if after 3 or 5 years it appears that the lab was turned into a production hall, laboratory equipment was replaced by lathes and, for example, corrugated sheet metal is now produced in this place. This is an example of failure to maintain the investment, although the effects of the very investment (production, conducting business activity) are still visible, and the investment has not been moved (there was no transfer of the investments between regions).

Maintaining an investment in the **region receiving aid** – at this point the prohibition to transfer (physically) the investment in the durability period (i.e. within 3 or 5 years) between regions was expressed. The entrepreneur cannot freely move the investment from Kraków to Warsaw nor Bydgoszcz. This is closely related to *ratio legis*, i.e. the reasons for regional aid, since this assistance is awarded in relation to weaker development of specific regions of the European Union. If, therefore, the aid is admissible and justified in a particular region, it is because it should meet its objectives in this region. "Region" in Poland is understood as a voivodeship (a region designated on the basis of the Nomenclature of Territorial Units for Statistics), i.e. NUTS II region.

There is, therefore, an absolute prohibition on transfer of investment between regions. For poviats the situation is slightly different. It is allowed to move investments between poviats within one voivodeship, provided that they are poviats with the same intensity of support (with the same intensity of State aid, according to the current regional aid map for Poland). Thus, if the investment was implemented in Toruń and we want to transfer it to Bydgoszcz, it is possible (both cities have the same State aid intensity, both cities-poviats are located in the Kujawsko – Pomorskie Voivodeship and this entire voivodeship has the highest intensity of 50%). It is also allowed to transfer investments from poviats where the intensity is lower, to poviats, where the intensity is higher.

It can be illustrated with the following example: if an investment was implemented in Gdańsk (intensity of 40% according to the map for 2004-2006), it may be transferred to Malbork (intensity of 50% according to the map for 2004-2006). At present, i.e. for the new regional aid map and support granted under the Operational Programme Innovative Economy, this example has no practical significance since both Malbork and Gdańsk have the same intensity: 40%. Of course, transfer of investments is permitted between these cities since they are situated within the same region – the Pomorskie Voivodeship, and they have the same aid intensity.

In accordance with the current law, however, is not permitted to transfer an investment from a poviat with a higher intensity to a poviat with a lower intensity (e.g. if an investment was originally situated in Malbork, it cannot be moved to Gdańsk). Nevertheless, legislative works are conducted to change this situation. The basic assumptions of this system are as follows:

a) transferring an investment to a poviat of the same or higher maximum support intensity shall not cause an increase in the support intensity and does not entitle the entrepreneur to claim such increase;

b) transferring an investment to a poviat of a lower maximum support intensity shall be possible only if the project related to the investment received an appropriate number of points required to be covered with support in the poviat the investment is transferred to;

c) in the case of transferring an investment to a poviat of a lower maximum support intensity, the entrepreneur shall reimburse to the Agency the properly calculated amount which is the difference – generally speaking – between the amount received (higher) and the due amount (lower);

d) transferring an investment to a poviat of a lower maximum support intensity under the conditions specified in the Regulation shall be possible only in the period of maintaining the investment (i.e. it is not possible in the period of implementing the investment project).

Activities related to permissible transfer of investments to a poviat with a higher intensity are allowed both in the project implementation period (until its completion) and in the durability period (3 or 5 years from the date of the project completion), i.e. in the period of compulsory maintenance of an investment without changes.

One exception should be mentioned at this point: Warsaw, as the only area among all Polish regions was set at a level lower than NUTS II, i.e. at the subregion level - NUTS III, according to the Nomenclature of Territorial Units for Statistics. It was said above that it is permissible to transfer investments between poviats in a particular region - which would mean that an investment situated in various cities-poviats of this region can be transferred. Nevertheless, due to the fact that until the end of 2010 the Mazowsze region has two maximum State aid intensities - the capital city of Warsaw as a poviat and subregion has 30% intensity and the remaining sub-regions of Mazowsze - 40%), Warsaw and the remaining part of the Mazowieckie Voivodeship should be treated as two distinct subregions and provisions for transfer of investments between regions should be applied. Thus, there is (at least theoretically) a possibility to transfer an investment from Warsaw (Mazowsze region, intensity of 30%) to Radom (Mazowsze region, intensity of 40%) i.e. from a "region" with a lower intensity to a "region" with a higher intensity, as well as vice versa - from Radom to Warsaw but only during the period of the project durability.

The provisions stipulate that the subsidy once given is not to be changed because of transferring an investment from a poviat with a lower intensity to a poviat with a higher intensity. If, therefore, an entrepreneur located the investment in Warsaw and after some time moved it to Radom, the entrepreneur cannot seek an increase in the subsidy.

For example: When situating a project in Warsaw, an entrepreneur obtained support in the amount of PLN 30 thousand (eligible costs of this investment were PLN 100 thousand, intensity for Warsaw is 30%). Moving the project/investment to Radom, where the intensity is 40%, the entrepreneur cannot require further PLN 10 thousand (so that the subsidy increases to PLN 40 thousand, i.e. 40% of PLN 100 thousand).

An investment must be maintained for at least five years or, in the case of SMEs at least three years **from the date of completing its implementation**.

The moment of the project completion was defined in the agreement on co-financing, indicating that this is the day of submitting the application for final payment together with a final report on the project (this is one summary document). The day of filing the document ends the eligibility period – from then on no expenditure can be regarded as incurred in relation to the project implementation and therefore it cannot be considered eligible for a refund. The above indicates that this document should, therefore, be filed after incurring all expenses, i.e. after their actual payment.

If an investment implemented by an SME was completed on 20 March 2008 (on this day the entrepreneur submitted the application for final payment with the report), durability within the meaning described in this chapter must be maintained from 21 March 2008 to 20 March 2011. For large enterprises this period ends on 20 March 2013.

Durability of the project is subject to monitoring. Allocated and paid funds will stay at the beneficiary only if the project survives a certain time after its completion. The durability can also be understood as **maintaining the project effects**. The project effects are described by project indicators, especially by indicators of output and result. Project durability can thus be

measured by means of monitoring by the entity providing support but also by beneficiaries themselves who can monitor the level of maintaining the achieved output and result indicators declared in the application form.

If purchase of machines or equipment or certain intangible assets is a part of the project, maintenance of the output indicator means that it is necessary that the beneficiary of the project owns machines, equipment and assets purchased from the support funds throughout the entire period of the project implementation and the minimum durability period (3 or 5 years).

These machines, equipment and assets purchased under the project and from the support funds are the **outputs** of this project and determination of the number of the outputs forms the monitoring indicator at output level.

For example: an entrepreneur's project includes implementing a new article into production and for this purpose the entrepreneur buys a new technological line. This technological line, when purchased, is an **output** of this project (something that was a result of direct implementation of the project), and specification of the number of lines purchased (e.g. 2) forms the indicator (defined as the **output indicator**) through which the Implementing Authority can examine the project durability in the period of the project implementation and throughout 3 or 5 years after the completion.

If in the course of the project implementation or within 3 or 5 years after its completion, the purchased assets will wear, be damaged, stolen, or depreciated, the company will be required to replace them with equipment of similar properties, characteristics and parameters which would allow to maintain the objective of the project (the quantified objective i.e. measured by monitoring indicators). It can be concluded that disposing of machines or devices (or any other assets) purchased from the support funds (e.g. selling them) is not permitted and constitutes a breach of the principle of durability.

The project result is formed by direct and immediate project's effects which inform about changes that have occurred as a result of the investment implementation such as expanding the product offer, creating new jobs, etc. The result indicators are effects and consequences of the achieved output, e.g. reducing exhaust emission by 10% (result indicator) is the result of purchasing two new filters (output indicator).

A classic output indicator is job indicator. For example, 5 jobs have been created as a result of the implemented project. These jobs must also be maintained for the required period of time.

The output and result indicators are important because the entrepreneur may receive on the basis of them additional points in the process of applying for co-financing. In a situation when such points are granted, the failure to achieve (to implement) the indicator at the planned level may cause a necessity of full or partial refund of the awarded support.

The impact of the project is identified in the longest time perspective as effects of project implementation (i.e. achieved result indicators determine impact indicators) such as reduction of unemployment in the region, attracting additional markets, establishing cooperation with suppliers). As a matter of principle, the entrepreneur is not obliged to achieve the impact

indicator, which stems primarily from the fact that its achievement does not depend to a large degree on the beneficiary but rather on the socio-economic situation in the region and country which will have place in some time from the date of granting the support and on the fact that the impact indicators suggested by the entrepreneur are not scored in the project assessment. Thus, failure to achieve the intended impact indicators will not lead to termination of the agreement and will not be a breach of the durability principle.

The durability principle does not exclude **exchange of old installations or equipment**. If in the course of the project implementation or during its durability period, the assets purchased will become obsolete technologically, then the beneficiary can dispose of these assets (e.g. by selling them) and buy new assets to replace the old ones, ensuring that the objective of the project is maintained, while the project objective must be maintained irrespective of whether the replaced assets have been purchased from the support or were non-eligible expenditure. This conclusion was drawn from the definition of project durability (the necessity to maintain the project objectives and not individual assets which are eligible expenditure). If, however, the assets that were not included in the catalogue of eligible expenditure and **their maintenance in the project is not relevant to the maintenance of investment objectives**, will be sold, such action will not constitute a breach of the durability principle because the objectives of the project will be maintained anyway.

The investment cannot undergo **substantial modifications** within the meaning of the Regulation 1083/2006. The substantial modification is understood as a modification which affects the investment nature or conditions of its implementation or gives to a firm or a public authority an undue advantage and results either from a change in the nature of ownership of an item of infrastructure or the cessation of a productive activity. The substantial modification cannot be made either during the project implementation (from its start until completion) or in the period of compulsory maintenance of the investment (3 or 5 years). That, what is going to happen with it after that period, is irrelevant from the point of view of applicable law (whether the activity will be maintained, expanded or closed), although of course in terms of improving coherence of the Polish economy with the rest of Europe, it is desirable to develop the greatest number of supported projects, even after the end of their durability period.

Failure to observe the durability period, particularly introducing a substantial modification, may lead on the one hand to termination of the agreement on co-financing without notice, i.e. immediately. Immediate termination shall give rise to reimbursement of the grant together with the interest calculated from the date of granting the support. These provisions are included in the agreement on co-financing the project. Durability – within the meaning of the provisions concerning structural funds – relates, therefore, not only to investment projects but all projects co-financed from EU funds.

Also a change of ownership may be treated as a substantial change, i.e. when the beneficiary transforms in a manner that is not allowed i.e. a manner that does not ensure continuation of the project implementation by the very definition.

What is more, project durability follows directly from **financial forecasts of the investment**, submitted by the applicant in the application for co-financing or business plan. They should

be formulated in a way which would provide the donor entity with confidence that the entrepreneur is able to do business for a minimum period of 3 or 5 years, the activity will not be liquidated at this time and the entrepreneur will not become a bankrupt and even more – he or she will expand the business.

The authority granting support should be informed about every event that could lead to a breach of the durability principle. This obligation arises directly from the concluded agreement on co-financing and its execution is in the entrepreneur's interest.

7. Expenditure eligibility – general part

This part will discuss the following issues:

- Eligibility of the Operational Programme
- Eligibility of projects
- Eligibility according to the agreement on co-financing
- Provisions in guidelines concerning expenditure eligibility
- Non-eligible expenditure
- Eligibility of advance payments and security
- Security for correct performance of the obligations at reimbursement
- Cross-financing
- Definition of starting project implementation

According to the Regulation 1083/2006, under operational programmes "the starting and closing dates for the eligibility of expenditure should be defined so as to provide a uniform and equitable rule applying to the implementation of the Funds across the Community." In accordance with further provisions of this regulation, eligibility of expenditure under Operational Programmes starts as a matter of principle on 1 January 2007.

In the current financial perspective, this is the Member State which at national level determines the rules of eligibility of expenditure and establishes its catalogues, taking account of provisions which already exist in this area. For example, general principles for recognising expenditure as eligible are set out in regulations relevant for particular funds, in the Regulation 1083/2006, national legislation relating to public finance concerning documentation and principles of incurring and also, above all, in the rules on State aid.

As regards eligibility of expenditure, this system is formed by two separate systems: structural funds and national rules for documenting on one hand, and State aid in the scope of determining the expenditure catalogue on the other. In other words, support granted under the structural funds, to which rules on State aid apply - because of the nature of the supported projects - must be in a way "crammed" in these provisions, in particular when it comes to the possibility of recognising particular expenditure incurred within the project as possible to be refunded from public funds.

The Regulation 1083/2006 provides one more principle, i.e. the principle of non-overlapping of programmes and measures and such preparation of operational programmes which would distinctly and unequivocally separate the scope of support among them in a way to ensure that a particular project submitted by an applicant could be eligible under only one programme. In accordance with Article 54 (3) (b) of the Regulation 1083/2006, within the eligibility period, a project may receive assistance from only one operational programme. This is the purpose of the document prepared by the Ministry of Regional Development which sets out the so-called **demarcation line**. This document, adopted by the Coordination Committee of the National Strategic Reference Framework, sets a kind of boundary (demarcation line) between projects generically similar to one another and likely to receive funding under more than one operational program. The demarcation line describes usually what can be done under a particular national programme and complementary support from regional operational programs. The scope of the intervention is most often similar for the national programme (e.g.

investment, training, activities related to environmental protection) and relevant priorities of regional programmes, which provide the same or very similar scope of intervention. For example, for supporting entrepreneurs' innovative investments (Measure 4.4 of the OP IE) a demarcation line was adopted between the Operational Programme Innovative Economy and regional programmes in the form of the amount of eligible expenditure: projects with the value of eligible expenditure of over PLN 8 million may receive support under the OP IE and projects with a lower amount of eligible expenditure - under regional programmes which provide such support (i.e. support for innovative investments). Demarcation relies the most often on either the amount of eligible expenditure or on the scope of support (other types of projects can obtain support under the OP IE, other under the ROP).

In the process of applying for support, a beneficiary signs a declaration attached to the application for co-financing that he or she does not apply for support under another operational programme. This is undertaken to prevent double financing of the project, i.e. a situation in which the entrepreneur applies for support under, for example, a national and regional programme and receives support from both these programmes, thus violating the principles set out by the demarcation line and provisions in the scope of State aid.

Pursuant to Article 56 of the Regulation 1083/2006, the period of expenditure eligibility starts on 1 January 2007 or the date of submission of the operational programmes (depending on which date is earlier) and finishes on 31 December 2015. For particular projects submitted under the Operational Programme Innovative Economy it means that the implementation schedule of these projects must be within in the above time period, i.e. they must begin no earlier than on 1 January 2007 and end no later than on 31 December 2015.

In addition, projects implemented in the regime of State aid must comply with the rules established in these provisions in the scope of the starting date of expenditure eligibility. The supported investment may not start before the date of submitting the application for support (as for example in regional aid but not only). The most controversial and practical problems are caused at this point by determination of the catalogue of events and activities that can be considered as the start of the project.

The fact that the project is eligible for support under the OP IE - after completion of the above described procedure - does not mean that all expenditures incurred during this project will be considered eligible. Applicants should determine in the prepared projects both expenditure eligible for financing (i.e. eligible expenditure) as well as expenditure which is not eligible for financing (i.e. non-eligible expenditure).

Expenditure eligible under the OP IE, because of the principle of single funding of the Operational Programme mentioned above, must comply with EU provisions relating to the European Regional Development Fund. The principle of flexibility (cross-financing) allows to recognise under the OP IE categories of expenditure eligible under other funds in particular the European Social Fund. The issue of whether a particular measure provides a possibility of cross-financing is determined primarily in the Particularisation of the OP IE.

How does the cross-financing function in practice? Imagine a project relating to an investment – an entrepreneur buys new machines and equipment, intends also to recruit staff to operate

them. Such activities are permitted and eligible for financing under the European Regional Development Fund (i.e. the fund under which support is granted under the OP IE). If, however, an entrepreneur wanted to train new employees so that they could operate the purchased machines and equipment, he or she would have to submit a separate application for co-financing from the programme co-financed by the European Social Fund, i.e. OP Human Capital - were it not for the principle of cross-financing according to which up to 10% of funds allocated for a particular priority axis within the OP IE can be used for activities specific for the ESF e.g. for training. In this way, the entrepreneur saves time and money, does not have to submit to the OP HC a separate application to train workers after he or she submits an application for a new investment and employment of workers to the OP IE. Bearing in mind the principle according to which up to 10% of public funds allocated for a particular priority axis can be used to support expenditure characteristic for a fund other than the ERDF, i.e. ESF, the managing authority determines the acceptable limits in this regard. This means that, for example, under one measure of a specific priority axis, cross-financing of 20% can be acceptable but under another measure within the same priority axis such possibility has not been provided at all (the most important is that non-specific expenditure for the ERDF and OP IE does not exceed 10% at the level of the particular axis).

It should be emphasised that under the OP IE one cannot apply only and exclusively for training because the OP IE does not provide funding for such projects. According to the principle of single funding (one operational programme co-financed only from one EU fund) and the aforementioned demarcation line, training at the central level as **separate stand-alone projects** can be co-financed only in the framework of another national operational programme - Human Capital.

Eligibility of a project has also a geographic dimension. Expenditure eligible for co-financing is incurred under a project implemented in the Republic of Poland, unless the nature of a project allows for its execution outside the country - and therefore it is allowed to incur eligible expenditure outside Poland.

For an expenditure to be considered eligible, the following preconditions must be met:

(1) Expenditure must be actually incurred, the expenditure is incurred when an invoice is paid and not only issued;

(2) Expenditure must be incurred during the general period of eligibility (between 1 January 2007 and 31 December 2015) and during the specific period provided for the project, as defined in the agreement on co-financing the project and in the material and financial schedule. State aid occurring in most measures of the OP IE imposes more restrictive in terms of general rules provisions concerning eligibility of project expenditure arising from the provisions of granting State aid. In the case of investment projects (regional aid), expenditure may not be incurred before the date of submitting the application and before the entry into force of the Regulation 800/2008, expenditure could be incurred only after receiving a preliminary eligibility confirmation (more about it later). In some justified cases, the confirmation remained in force, for example in Measure 4.5 the support is to be granted in accordance with the Regulation 1628/2006, or in Measure 8.4; in the case of

projects where there is no State aid, the project could be launched before the date of submitting the application for co-financing, but it can never go beyond the initial date of eligibility for the operational programme (1 January 2007).

Incurring expenditure associated with the project before submitting the application will usually **be considered as the start of the project implementation**, and this leads to **recognising the entire project as non-eligible** (and not only to recognising this expenditure to be non-eligible). This is a very far-reaching consequence, compliant with provisions of State aid and it disqualifies the entire project from the possibility of receiving any State aid (whether under the OP IE or under any other operational programme or from other public funds not related to structural funds).

Within the period provided in the agreement, all expenditure forming the material and financial scope of the project must be implemented. Implementing the material scope is understood as implementation of all phases of the project (all substantive tasks described in the schedule such as purchase of machines, employment of staff, etc). Financial implementation of the project means completing all payments under the project i.e. incurring expenditure and obtaining financial documents proving that it was incurred, as well as submitting the application for final payment under the project.

Expenditure incurred after the period of eligibility provided by any date set forth above will be deemed non-eligible, but - in contrast to expenditure incurred before the day of submitting the application or receiving confirmation that the project is in principle eligible for support - does not cause that the whole project is non-eligible, it will only result in recognising this specific expenditure as non-eligible and exclude it from co-financing.

The final date of eligibility for the project indicated in the agreement on co-financing may be amended in justified cases. In such situation, the entrepreneur should submit a written application indicating the proposed new final date for the project eligibility and the justification which will be evaluated by a competent institution. In the case of a positive decision, the eligibility period is extended by concluding an annex to the agreement on co-financing. But under no circumstances may the final date of expenditure eligibility for the project extend beyond the date of expenditure eligibility for the OP IE, .i.e. beyond 31 December 2015.

A very important term which has practical relevance to entrepreneurs applying for support was indicated above: **start of the project implementation**.

Let us stop at this term for a while. Unfortunately, the official definition of starting the project implementation does not clarify many doubts as to which specific project-related activity can be regarded as the start of the project implementation and which cannot.

According to the Guidelines on national regional aid for 2007–2013, it is essential to ensure that regional aid will be an incentive for implementing projects (investments), which would not otherwise (if regional aid was not granted) have been carried out.

The start of the project implementation means taking any actions leading directly to implementation of the investment, in particular starting construction works or the first

applicant’s order of equipment or services (e.g. concluding a contract with a contractor, advance payment), excluding preliminary feasibility studies.

The OCCP interpretations based on decisions of the European Commission and the Ministry of Regional Development guidelines help determine what action or commitment may be regarded as the start of the project implementation. The following list does not include, however, all possible cases:

(a) in relation to the "first applicant’s order of equipment" - conducting market research, initiating and conducting public procurement for delivery (if applicable) is not a project start, however, the project start is: signing a contract with the awarded contractor, delivery of goods, performance of services or making advance payment or deposit;

(b) in relation to "commencement of construction work" - conducting market research or instituting and conducting public procurement procedure and signing the contract under this procedure with the contractor is not a project start, however the project start is: physical beginning of works such as geodetic setting out of buildings (performed independently or outsourced to an external entity); development of the construction site (performed independently or outsourced to an external entity); providing connections to technical infrastructure for the construction purposes (performed independently or outsourced to an external entity); levelling of the land (performed independently or outsourced to an external entity) as well as fencing the construction site and placing information boards, making advance payment or deposits;

(c) in terms of “purchase of intangible assets" - the first applicant’s commitment to order them should be considered the start of works (signing a contract for their implementation; and advance payment or deposit as a consequence). Training contract, legal and advisory contracts related to the project do not constitute the start of the project because they are not closely related to the investment project and are only a support for its implementation.

In addition, the following applicant’s activities are not considered the start of the project implementation:

(d) preparing a feasibility study, business plan, technical documentation;

(e) purchase of land (undeveloped property) for investment;

(f) preparation of documentation to obtain a construction permit and the very fact of obtaining this permit;

(g) preparation of documentation to obtain an environmental permit (environmental impact assessment) and the very fact of obtaining this permit;

(h) preparatory studies (technical, financial, economic);

(i) advisory services related to preparation of investment under a project of a large entrepreneur;

(j) preparation of tender documentation and carrying out the procedure (as indicated above);

(k) preparation of architectural documentation and green planning documentation;

(l) making an offer inquiry or submitting an offer by a supplier/contractor.

To sum up. According to the OCCP, the activities listed below are the start of the project implementation, regardless of whether they are performed by the applicant or are outsourced to an external contractor. Preparation of the following catalogue is based on the definition of commencement of construction works within the meaning of the Act of 7 July 1994, Construction Law:

(a) geodetic setting out of buildings;

(b) development of the construction site and construction of temporary facilities;

(c) providing connections to technical infrastructure networks;

(d) fencing the construction site and placing information boards;

(e) first order to buy intangible assets;

(f) levelling of the land;

(g) signing the contracts with the contractors selected in the process of market research or public procurement;

(h) start of keeping a construction log;

(i) reclamation of land for the construction;

(j) demolition of buildings on the site;

(k) remuneration for the construction manager;

(l) advance payment or deposit.

(3) The expenditure must be directly related to the project, necessary for its implementation and, above all, actually incurred and documented, i.e. it must be indispensable for the successful implementation of the project in the entire planned scope, and a purchased device must be used for purposes related to the project.

Does it mean that if for example, a machine is purchased from the support it must be used - during the project implementation and within 3 or 5 years after its completion - only for the purpose of the project and cannot be used outside the project, under another project implemented by the entrepreneur nor in his regular current business activity?

It seems that you cannot accept such a position, since it would be illogical and would oblige an entrepreneur to purchase two or more machines where one would suffice - one for the project and one for purposes not related to the project. It would be better to assume that the purchase of a machine or equipment is eligible **in an appropriate part**. The entrepreneur should determine what part of the device will be used for the purpose of implementing the project co-financed from public funds. If it is less than 100%, the price of this device should be only partially recognised as eligible, taking into account the restrictions arising from State

aid. The applicant should indicate in the application for co-financing the method for calculating the amount of eligible expenditure and provide a way of verifying the share of the proper production for the project and the remaining share in the control phase of the project which will be held during the period of 3 or 5 years after the project completion.

Note: partial eligibility principle applies only to State aid, it should not be automatically transferred to measures under which a business environment institution receives support and then settles this support in order to prove that it did not receive any benefit (did not receive State aid). More about it later.

An entrepreneur buys a machine that costs PLN 30 thousand. The machine is supposed to be used for the purpose of the project in 60% and in the remaining part - for other purposes. The entrepreneur is from Warsaw and runs a small enterprises which can receive, according to the regional map, the support of maximum 50% of the total eligible expenditure. If the machine was used in 100% for the project, the entrepreneur would receive support for its purchase in the amount of PLN 15 thousand (50% from PLN 30 thousand). Nevertheless, since the machine will be used only in 60%, he or she receives for the purchase co-financing in the amount of PLN 9 thousand (60% of the price of the machine will be eligible, i.e. PLN 18 thousand, the entrepreneur will receive 50% of PLN 18 thousand, i.e. PLN 9 thousand). The obligations in the scope of the project durability including in particular the prohibition on selling the machine before the expiry of the durability period, relate obviously to the "entire machine" rather than to a part corresponding to the amount of the received co-financing (the entrepreneur cannot sell 60% of the machine nor the entire machine).

(4) Expenditure must be planned in the material and financial schedule attached to the agreement on co-financing;

(5) Expenditure was properly documented in accordance with separate legislation,

The incurred expenditure must be documented with a paid invoice, a document of equivalent probative value or other acceptable proof of payment accepted by the donor of aid and the Managing Authority. A document of equivalent probative value means any document submitted by the beneficiary in order to confirm that the accounting entry provides a true and fair view of the actually carried out transactions in accordance with the Act on accounting. Furthermore, the agreement stipulates that the expenditure should be based on legally binding contracts, agreements or accounting documents and should be consistent with the National and Programme guidelines for expenditure eligibility.

What is more, the agreement provides that the expenditure must be in accordance with the provisions of the national and Community law and made according to the principle of sound financial management, i.e. must be incurred maintaining the principle of achieving the most favourable effect with the most advantageous expenditure. In a word, the expenditure must be efficient. In order to ensure this efficiency, the entrepreneur should make, for example, a comparison of prices of purchased goods and services with market prices and have evidence of this comparison in the case of a control.

The guidelines stipulate that the expenditure must be confirmed by an abstract of the entrepreneur's bank account which means a general prohibition on cash payments (they will be considered non-eligible), however also this rule has exceptions - in justified cases there is a possibility of paying in cash provided that a single expenditure does not exceed PLN 2 thousand. Not all expenses can be covered in this way but only some - the guidelines provide examples of purchasing tickets or business trips, it can, therefore, be assumed that also other expenses paid in cash may be considered eligible.

To prevent double financing of one item of expenditure, accounting evidence confirming the incurred expenditure should also be signed on the back by an authorised person within the enterprise of the beneficiary, accepting the document and the document should include the accounting number, the number of the agreement on co-financing and information about co-financing of expenditure by the OP IE.

(6) The guidelines allow for incurring expenditure in the form of contributions in kind. The document confirming incurring the cost associated with the contribution in kind are in particular accounting documents or abstracts of accounting books showing the amount of incurred costs.

(7) The guidelines allow some flexibility as regards the possibility to change the originally planned expenditure, namely, under certain conditions, transfers between different categories of eligible expenditure are permitted up to 10% of the amount attributable to each category; the level of 10% is defined as the amount within the category from which the transfer takes place regardless of the level of growth of expenditure category to which the transfer occurs.

(8) The eligible expenditure must be reduced by the value added tax except for when the beneficiary is not entitled to its refund or deduction from the VAT due in accordance with separate provisions. Therefore, in accordance with the general rule, the VAT is not eligible and the refund relates to the net amount but in a situation when a beneficiary is not entitled to recover VAT in any form, any manner and any time under separate provisions of law, this expenditure can be considered eligible.

(9) Expenditure eligible for support incurred in foreign currency shall be calculated into the Polish currency at the selling rate applied by the bank making the payment, on the day of such payment. Negative difference of exchange rate do not constitute non-eligible expenditure (this change is suggested in amendments to all aid schemes for the OP IE).

Security for correct performance of the obligations in the case of advance payments. Regulation 1083/2006 provides a possibility to recognise advance payments paid to beneficiaries of assistance from structural funds to a maximum amount of 35% of the support. Support provided in the form of advance payment must be settled by the beneficiary within the maximum period of three years following the year of payment of the advance (i.e. its transfer to the beneficiary), which means that the amount of the advance must be included in the invoices reflecting the expenditure actually incurred. This is a significantly different approach than in the previous period. Unfortunately, the national law in this case is much stricter than the EU law, appropriate Ordinance of the Minister of Regional Development of 7

September 2007 *on expenditure related to implementation of operational programmes* allows for granting advance payments to entrepreneurs in a very limited extent in relation to principles laid down in the Regulation 1083/2006.

Co-financing of projects implemented by beneficiaries of support from the OP IE is made in two forms:

(1) through a refund of a part of or all the eligible expenditure incurred by the beneficiary, a refund means that the payment is in arrears i.e. after a particular stage of the project has been completed (intermediate payment) or after completion of the whole project (one payment - final), incurring certain expenditure for its implementation from the beneficiary's own funds, confirming these costs by accounting documents recognised by the Implementing Authority and submitting to this Authority an application for payment;

(2) through providing an advance payment for all or a part of expenditure planned to be incurred under the agreement on co-financing; the first tranche of the advance payment should be settled in at least 70% to enable the authority to provide a further tranche, this settlement includes confirming by documents the expenses already covered by the advance payment (invoices or other acceptable accounting evidence).

An entrepreneur implementing an innovative project is supported in the form of an advance payment. On 8 February, he or she signed an agreement on co-financing which contained provisions on the amount of the advance payment tranche, the date of its transfer (15 February), settlement conditions and forms of security of the advance payment and the entire agreement. The entrepreneur establishes a security necessary for the proper performance of the obligation in one of the forms provided in the Ordinance on expenditure described in detail in the agreement signed by him or her and the Implementing Authority. Then, the Implementing Authority transfers to the entrepreneur's bank account run separately for the ongoing project, the first tranche of the advance payment in the amount of PLN 100 thousand. With this amount the entrepreneur buys the machines, equipment, facilities and services described in the application for co-financing and agreement which constitute eligible expenditure. The payment is made without cash, by bank transfer from a bank account or by payment card or credit card. These payments are carried out in the period between February and November.

Before transferring the second tranche of the advance payment, the entrepreneur submits to the Implementing Authority the application for intermediate payment, which shows the purchase performed under the project and includes documentation in the form of invoices attached to the application for intermediate payment. At least 70% of the advance payment granted i.e. at least PLN 70 thousand should be "settled" this way. The settlement is made on 12 December. If by 31 December of the calendar year in which the tranche was received, the entrepreneur has not spent the entire amount of the advance payment granted, i.e. the remaining PLN 30 thousand, he or she will have to pass the remaining part to the bank account of the Implementing Authority. Only in the next year the entrepreneur will be able to

get the next tranche of the advance payment, in accordance with provisions of the Public Finance Act relating to development subsidies and the mode of their transfer and settlement.

According to the Ordinance of 7 September 2007, development subsidy in the form of advance payment may be granted to a beneficiary who carries out activity in order to achieve a profit (e.g. entrepreneur) if the project meets one of five conditions set out in the ordinance, while three of these conditions relate to projects that could be implemented under the OP IE. The remaining two relate to projects co-financed by the European Social Fund (which allows for the provision of advance payments under the Operational Programme Human Capital) and the so-called individual or system projects implemented by the State-owned companies or State banks. What is more, in some specific circumstances, advance payments may be received by entities that carry out infrastructure projects related to environmental protection, transport, energetics, culture, health care and higher education (which allows for the provision of advance payments under the Operational Programme Infrastructure and Environment).

Implementing the types of projects indicated below, an OP IE beneficiary may receive co-financing in the form of an advance payment (this reference relates to measures of Priority 4 intended to the largest extent for direct support for entrepreneurs) for the following:

(a) projects based on conducting research and development works and/or implementing their results (which allows for receiving an advance payment under the following measures: 1.4, 4.1, 4.2 and 4.4 of the OP IE as well as under other measures of the OP IE);

(b) projects relating to initial investment which includes the use of new technologies and implementing solutions with innovative characteristics at European level at least (which allows for receiving an advance payment e.g. under the Measure 4.3, 4.4 and 4.5 of the OP IE).

We mentioned above, when discussing advance payments, the need to establish proper security for performance of the obligation. In accordance with the ordinance, if the value of co-financing awarded in the agreement on co-financing does not exceed PLN 1 million, the security is established in the form of a blank promissory note together with the blank promissory note agreement, and if the value of the co-financing awarded in the agreement on co-financing exceeds PLN 1 million, the security is established in one or more of the following forms:

(a) cash;

(b) bank guarantees or guarantees of a cooperative savings and credit union, while the liability of the union is always a cash liability;

(c) bank guarantees;

(d) insurance guarantees;

(e) guarantees granted by entities referred to in Article 6b (5) (2) of the Act of 9 November 2000 on the establishment of the Polish Agency for Enterprise Development (by delivery funds);

(f) promissory notes with a guarantee of a bank or cooperative savings and credit union;

(g) pledge on securities issued by the Treasury or territorial self-government unit;

(h) registered pledge according to provisions of registered pledges and the register of pledges;

(i) assignment of rights under the beneficiary's insurance policy;

(j) assignment of beneficiary's goods to the security;

(k) mortgage;

(l) guarantees according to the civil law.

Security for correct performance of the obligations at reimbursement. In accordance with terms of the agreement on co-financing, the entrepreneur is obliged in investment projects to establish and provide a security of proper performance of obligations resulting from the agreement (promissory note). The security must be lodged no later than by the time of submitting the application for final payment. Security can be refunded no sooner than after the period of 5 years and in the case of SMEs - after the period of 3 years from the date of the project completion, i.e. after the expiry of the project durability (this means that if the beneficiary violates provisions of the agreement and fails to keep the project durability, the public institution granting support will be entitled to satisfy its claims from the security lodged.)

For advance payments the security costs are borne entirely by the beneficiary (since in measures including State aid it is not, unfortunately, eligible expenditure) and it is established in one or more forms provided in the ordinance and mentioned above as well as in accordance with provisions of the ordinance, to the amount not smaller than the sum of co-financing. If reasonable doubts are raised in relation to the amount and form of the security for proper performance of obligations under the agreement, the institution granting support may require additional security.

Non-eligible expenditure. According to the "Guidelines concerning eligibility of expenditure under the Operational Programme Innovative Economy 2007-2013", non-eligible expenditure include expenditure:

a) for purchase of advisory services, such as tax, legal or advertisement advisory services, which form a component of permanent or periodic activity of an entrepreneur, or are related to current operational expenditure of the beneficiary;

b) for purchase of means of transport by the beneficiary carrying out economic activity in the transport sector, with respect to measures in which support constitutes regional investment aid, or in road freight transport sector with respect to measures, in which support constitutes *de minimis* aid;

c) incurred on the basis of cross-financing (flexibility) principle, after the ceiling projected for a given project has been exceeded;

d) related to leasing a given good, excluding the capital repayment of the leased good, and in particular: tax, margin of the financing entity, interest on costs refinancing, overheads, insurance charges or transport costs.

It should be added obviously, that it is not a full catalogue of non-eligible expenditure since non-eligible expenditure is every item of expenditure not provided in the particular aid scheme. Thus, only such expenditure which has been mentioned explicitly in the aid scheme may be considered as eligible, provided of course that it meets the remaining eligibility conditions, i.e. it is actually incurred, necessary for the project and properly documented. At the same time, it should be borne in mind that one cannot use a broad interpretation and presume that the expenditure in question, although not mentioned in the aid scheme, is eligible because another similar expense was considered eligible.

For example, one cannot presume that if the aid scheme provides eligibility of purchasing new assets, the purchase of used assets will also be eligible. It will be eligible only if a particular aid scheme includes directly such expenditure in the catalogue of eligible expenditure.

Evaluation of expenditure eligibility. Under the OP IE, evaluation of eligibility of a particular project is carried out at the stage of selection and assessment of the application and consists of verifying whether the proposed project can generally be co-financed under the OP IE, i.e. most of all whether the project is consistent with the OP IE objectives, whether the applicant is entitled to file the application within a given measure, whether the project complies with the criteria adopted for selection of projects for the measure. The basis for evaluation are primarily provisions of individual acts constituting aid schemes but also other provisions such as Regulation 1083/2006 and the Act on public finance. Expenditure considered eligible are described in detail in the application documentation and indirectly in the material and financial schedule which is attached to the agreement on co-financing.

Territorial aspect of eligibility. According to the "Guidelines concerning eligibility of expenditure under the Operational Programme Innovative Economy 2007-2013" expenditure incurred as a part of the project implemented in the Republic of Poland are eligible for co-financing.

There are, however, exceptions involving implementation of the project outside the country, e.g. outsourcing expertise, research carried out by foreign contractors, trainings. This possibility relates to projects implemented under measures which, because of their nature, allow for implementing the project outside the territory of the Republic of Poland, for example in Measure 5.4 or 6.1, and the effects of the project (the direct output) will be available in Poland and the applicant will be able to prove this fact at the stage of applying for support.

As already mentioned, transfers between different categories of eligible expenditures are possible during the project implementation as set out in the annex to the agreement on co-financing, amounting to 10% of the sum attributable to each category; the level of 10% is calculated from the amount under the category from which is shift occurs. Upon the approval of the Implementing Authority, it is permitted to shift the amount of more than 10% between different categories of eligible expenditure.

Example. An entrepreneur implements an investment project. This project included, *inter alia*, the purchase of land for investment and purchase of machines. The amount of PLN 2.500 million was allocated for purchase of land, and PLN 800 thousand for machines. According to

the rules on expenditure eligibility, the price of land may be considered eligible in only 10% of the total eligible expenditure of a project. Price of a machine is always eligible in 100%.

So here is the situation:

1. eligible expenditure for purchase of land – PLN **88**.**89 thousand**

2. eligible expenditure for purchase of machines – PLN 800 thousand

It turned out that the machine cost less than planned, since only PLN 600 thousand. In order not to "lose" the possible subsidy, the entrepreneur could shift 10% from PLN 600 thousand (the actual price of the machine), i.e. the amount of PLN 60 thousand and apply for a refund of PLN 148.89 thousand for payment of the price of land purchase (instead of only PLN **88**. **89 thousand**). Can this be done? It can, but only theoretically because if the entrepreneur really made such an operation, it would break the rule, which says that the purchase price of land is eligible in only 10% of the total eligible expenditure. It would be an undue advantage (granting a subsidy for non-eligible expenditure) because only 10% of total eligible expenditure may be allocated for purchase of land (this is the eligible expenditure), while the remaining part of the expense which must be spent to purchase real estate is non-eligible expenditure incurred necessarily by the beneficiary.

If, however, in the example above describing the principles concerning the shift of expenditure between categories, the category of "land purchase" was replaced by the category of "construction of a production hall" (100% of the purchase price of both items of expenditure is the basis for calculating the amount of the subsidy, not 10% of the total eligible expenditure as in the case of land). In this case, 10% of the costs associated with construction of the production hall, assuming that this expenditure “costs" PLN 700 thousand – i.e. PLN 70 thousand - can be “added” freely to the purchase price of the machine and the entrepreneur can spend on it more than initially planned, i.e. PLN 870 thousand. In total, the level of subsidy will not be changed, although it will vary in each category. This kind of shifts can be performed repeatedly in the project, unless it is justified by a necessity.

8. Expenditure eligibility – selected detailed issues

This chapter discusses in short the most important issues related to particular types of eligible expenditure.

- Principles of purchasing fixed assets

Acquired fixed assets must be new except for assets purchased by an SME while they must comply with the following conditions:

(1) the price of the used fixed assets shall not exceed their market value established as of the day of purchase and it is lower than the price of similar new fixed assets;

(2) the seller shall make a declaration determining the vendor of fixed assets as well as the place and date of their purchase;

(3) within the period of 7 years preceding the date of purchase, they were not co-financed either by the Community funds or by national State aid or *de minimis* aid.

Cost of installing machines and devices. In accordance with the Act on accounting, acquisition price is the purchase price of an item of assets covering the amount due to the seller without deductible value added tax and excise and increased in the case of import by liabilities of public and legal nature plus costs directly linked with purchase and adaptation of assets to make them proper for usage or introducing to the market, including costs of transport as well as loading, unloading, storage or introducing to the market and minus discounts, deductions and other similar reductions and recoveries.

The cost of installing devices may constitute eligible expenditure if it is an element of the acquisition price of the fixed asset.

Conversion of the acquisition price of asset expressed in foreign currency. As a matter of principle, competition documentations for individual measures of the OP IE intended for entrepreneurs do not indicate the exchange rate according to which the planned purchase of fixed assets from foreign suppliers should be converted to PLN. It should be, therefore, considered that generally speaking the entrepreneur converts to PLN on the basis of own assumptions relating to the foreign exchange rate.

- Principles of purchasing lundeveloped property

Costs associated with the transfer of ownership of land or acquiring rights to perpetual usufruct of land are eligible only in a relevant part, i.e. these costs can be regarded as possible for refund only up to 10% of total expenditure eligible for support other than this exact cost of purchasing the land.

Example 1. An entrepreneur buys the land for PLN 1 million and the remaining eligible expenditure (e.g. acquisition of machinery and equipment) amounts to PLN 5 million. Only 10% of the total eligible expenditure, which is from PLN 5,555,555.55, may be considered

eligible, of course, not more than the actual price of the land purchase (or acquiring rights to its perpetual usufruct). In this case, therefore, the basis for calculating the amount of the subsidy is not 100% of the purchase price (PLN 1 million) but only a part of the purchase price, i.e. PLN 555,555.55 (10% of PLN 5,555,555.55) which results from carrying out relevant calculations, that is we calculate the appropriate percentage of intensity from this diminished amount.

Example 2. A large entrepreneur from Warsaw buys under a project (implemented in Warsaw) machines and equipment for the amount of PLN 5 million. 100% of this price, i.e. PLN 5 million, will form the basis for calculating the intensity for the project (which for this entrepreneur is 30%). What is more, he or she purchases land where a new production hall will be constructed for the amount of PLN 1 million. According to the assumptions described above we calculate the level of eligible expenditure for purchase of land – PLN 555,555.55 (10% from PLN 5,555,555.55 which is the sum of the total eligible expenditure of the project). The amount calculated in this way is used to calculate the intensity:

PLN 555,555.55 x 30% = PLN 166,666.66

This is the maximum amount the entrepreneur can receive as a refund of the price of purchasing the land (or perpetual usufruct).

Additional conditions that must be met to consider purchase of land or acquiring the right to perpetual usufruct as eligible are:

a) the land is necessary for implementation of the project; it should generally be a feature of any eligible expenditure but for the land it should be particularly emphasized since it is rare to purchase land for the project only because of the value of the expense and scope of its potential use. In such a situation, if the land is planned to be used for the project **only in part**, the subsidy for its purchase should be reduced accordingly.

Example 3. In the above example, if one determines that the subsidy for the purchase of land amounting to PLN 166,666.66 is a **full** subsidy (although calculated in accordance with the imposed restrictions) which can be obtained by this entrepreneur in this project, then in the case of partial use of the land for the purpose of the project, the subsidy should be reduced accordingly. The entrepreneur estimates that 60% of the purchased land will be used for purposes related to the project, and 40% used for other purposes. In this case, the subsidy for the purchase of land should be 60% of PLN 166,666.66.

PLN 166,666.66 x 60% = PLN 100,000.00

b) the entrepreneur shall present an opinion of a property valuer confirming that the price of purchase does not exceed the market value of the land determined as of the day of purchase,

c) within the period of 7 years preceding the date of purchase, the land was not co-financed either by the Community funds or by national State aid or *de minimis* aid.

- Principles of purchasing buildings

Covering costs of transferring the ownership of a structure or a building is eligible provided that:

a) the property is necessary for the project implementation;

If only a part of the property is necessary for the project, only this part of its price which represents the value of the building in the part required for the project may be reimbursed. If an entrepreneur recognises that a building purchased for PLN 20 million will be used for the project purposes in only 30%, only 30% of the price should be the starting point for calculating the amount of the subsidy (although essentially 100% of the price of buildings and structures is used to calculate the amount of the subsidy but not in this case).

PLN 20 million x 30% (percentage of the usage for the project purposes) = PLN 6 million

Only from the amount of PLN 6 million calculated in this way one can determine the amount support:

PLN 6 million x 30% (percentage of intensity) = PLN 1.8 million

The amount of PLN 1.8 million is a correctly calculated subsidy for this expenditure, assuming a partial use of the purchased building for the purpose of the project.

(b) the entrepreneur presents a property valuer's opinion confirming that the price of purchase does not exceed the market value of the property determined as of the day of purchase,

c) the entrepreneur presents a construction valuer's opinion confirming that the property may be used for a given purpose which is in accordance with the purposes of the project covered with support, or specifying the scope of necessary modifications and facilitations,

d) in the period of 7 years preceding the date of property purchase, it was not co-financed either by Community funds or by national State aid or *de minimis* aid,

(e) the property will be used solely in accordance with the purposes of project covered by support,

- Principles of acquiring intangible assets

The price of purchasing intangible assets in the form of patents, licences, *know-how* or non-patented technical knowledge may be considered eligible expenditure in the case of regional aid if the intangible assets meet cumulatively the following conditions:

(a) they will be used solely for the purposes of the project covered with support,

(b) they will be subject to depreciation pursuant to separate provisions,

(c) they will be purchased from third parties under market conditions, without the buyer being in a position to exercise control over the selling party, within the meaning of Article 3 of the Council Regulation (EC) No 139/2004 or vice versa,

(d) they will constitute the assets of an entrepreneur who obtained support and they will remain in his or her enterprise for at least 5 years, and in the case of a micro-entrepreneur, small or medium-sized entrepreneur for at least 3 years, from the day of completing the project implementation.

Only for an entrepreneur from the SME sector the total amount spent on the acquisition of intangible assets will be considered eligible.

A small entrepreneur from Poznań (implementing the project there) acquires a patent for PLN 200 thousand. In a situation where the patent is purchased in relation to the project and 100% of it will be used in the project, the possible subsidy for the purchase of this patent would be the following (assuming the intensity of the maximum allowable level, i.e. 60%):

PLN 200 thousand x 60% = PLN 120 thousand

If the patent is used for the project only in a part (e.g. in 20%), then the subsidy should amount only to PLN 24 thousand:

PLN 200 thousand x 20% = PLN 40 thousand x 60% = PLN 24 thousand

In the case of an entrepreneur other than an SME, expenditure for purchase of intangible assets will be considered eligible for support in the amount not exceeding 50% of the total expenditure eligible for support under the project.

A large entrepreneur from Warsaw implements an investment project. He or she purchases land for the price of PLN 1 million, machines and equipment for PLN 5 million, a building for PLN 20 million and intangible assets for PLN 200 thousand.

1	2	3	4	5	6
Expenditure	Purchase price (general costs)	% of use for the project	Eligible amount	Intensity for the project	Amount of the subsidy
*Land	1,000,000.00	60%	600,000.00	30%	180,000.00
Building	20,000,000.00	80%	16,000,000.00	30%	4,800,000.00
Machine	5,000,000.00	100%	5,000,000.00	30%	1,500,000.00
**Patent	200,000.00	100%	200,000.00	30%	60,000.00
	26,200,000.00		21,800,000.00		6,540,000.00

*Land: expenditure eligible for purchase of land cannot exceed 10% of the total eligible expenditure.

**Patent: expenditure for purchase of intangible assets for large entrepreneurs will be considered eligible for support in the amount not exceeding 50% of the total expenditure eligible for support under the project.

- Principles of leasing

Leasing is an acceptable form of incurring eligible expenditure in respect of the acquisition of land and building as well as fixed assets and intangible assets.

The relevant act provides that leasing means leasing within the meaning of the International Financial Reporting Standards, adopted to the Acquis Communautaire of the European Union by way of the Commission Regulation (EC) no 1725/2003 of 29 September 2003.

In the case of regional aid sale-and-lease-back and any other form of leasing are not allowable lease forms of tangible and intangible assets if they do not provide a possibility of transferring ownership of these assets to the lessee. Leasing payments (value of the capital without interest or fees payable to the lessor) for the period from the date specified in the agreement on co-financing until the date of completion of the project (also in accordance with the provisions of the agreement) are eligible for a refund, provided that the leasing contract is concluded for a period of at least 5 years, in the case of a micro, small or medium-sized entrepreneur - at least 3 years after the expected date of the project completion. **When planning the project completion date, the entrepreneur should take into account the deadline for paying off lease instalments** (this date may not exceed 31 December 2015 - the planned closure of the entire OP IE).

- Principles in the scope of consultancy

For regional aid such expenditure is eligible only for SMEs. The following conditions must be fulfilled:

(a) covering the purchase price for consultancy services related to the investment which are not a part of entrepreneur's permanent or periodic activity (e.g. it cannot be a permanent legal or accounting service for the entrepreneur) and are not related to entrepreneur's current operating expenses,

(b) up to 50% of this expenditure.

In some measures of the OP IE, expenditure on consultancy services can be included in the eligible expenditure also in the case of large entrepreneurs, it is possible but only on the basis of the *de minimis* principle, and not – as for SMEs – based on the Regulation 800/2008. The degree to which it is important for a large entrepreneur is that the potential support for consultancy reduces his or her limit of *de minimis* aid (EUR 200 thousand within at least 2 years and at most 3 years, details are included in the chapter devoted to the *de minimis* aid).

- Expenditure on training aid

Training aid is a separate aid category and is relatively rarely granted under the OP IE. One should remember that the training aid cannot be implemented as a separate project under the OP IE, it can at most cover expenses suplementing primary expenditure relating to investment or research and development works. The possibility of including and financing them in the project under the OP IE was introduced because it often happens that an entrepreneur after having implemented an investment (e.g. purchase of machines) wants to and should train employees in terms of their operation. Were it not for the principle of cross-financing, which allows the action described herein, the entrepreneur – beneficiary of the OP IE would have to submit a separate application for training to another operational programme - in this case to the OP Human Capital.

The OP IE accepts generally only specific training (with the exception of two measures which include also the possibility of considering general training to be eligible) i.e. those that rely on the transmission of knowledge and skills related mainly or solely with current or future job for the employer and whose use for another employer would be either very difficult or impossible – as opposed to general training in which more general, wider knowledge is provided. For example, a general training will be training on Excel or the Act on accounting and a specific training - training on software developed by the employer for the purposes of the system registering personal data or training on the existing employer's rules of procedure. It is sometimes difficult to assess whether the training is general or specialist - for example, a training in occupational safety and health can be considered as general (discussing the Polish law in this respect) or specialist (discussing principles of safe handling of a specific type of machines situated in the undertaking). If the discussion of the principles of safe handling of a specific type of machines located at the enterprises is combined with a discussion of the Polish law in this area and this will be done within one training, the training will have a nature of both types of training. If it is not possible to precisely define what kind of training it is, one should assume that it is a specific training and apply the lower maximum intensity for training aid which is appropriate for specific training (the Commission considers that specific training distorts in a more evident manner the competition between companies and, therefore, granted a lower intensity for these trainings).

There is the following catalogue of expenditure under training aid, allowable under the OP IE:

(1) employment of the training staff (trainers, lecturers),

(2) travels of the training staff and trained persons, including accommodation costs,

(3) other current expenses, including expenses on materials and supplies;

(4) depreciation of tools and equipment as far as they are used solely for the purpose of the training,

(5) counselling services with regard to the training project,

(6) remuneration of participants in training along with non-wage labour costs, including social and health insurance contributions, calculated for the period of actual participation in the training as well as administrative and rental costs up to the sum of the remaining expenditure eligible for support.

9. State aid level and own contribution

This part will discuss the following issues:

- Definition and calculation of own contribution
- State aid level: intensity and value
- Regional aid map for Poland
- Regional aid - definition and rules for granting
- Total project costs

The term "state aid level" is comprised of two elements, which also constitute its definition. The state aid level is the amount of state aid which a beneficiary can obtain, and it is expressed:

(1) as a **percentage** of the total eligible project cost - in which case the proper term is state aid **intensity** (usually in terms of maximum intensity, as per the regional aid map);

(2) as a **monetary total**, expressing the **value** of the granted state aid.

The aid equivalent in EUR is established based on the average currency exchange rate announced by the National Bank of Poland, valid on the date of granting the aid. This is significant in the case of *de minimis* aid, where we are not dealing with intensity *per se* (since this kind of aid has no limitations resulting from intensity), but which must always be converted into EUR, since the maximum level of this kind of aid (expressed as a monetary total) has been set as a general rule by the European Commission, as EUR 200 thousand per entity, during a maximum period of three years. The *de minimis* aid shall be discussed later in a separate chapter, dedicated only to this kind of aid and containing descriptions of its governing rules.

Aid intensity is always related to the location of project implementation, not to the location of the beneficiary's seat.

A medium-sized enterprise is implementing a new investment in Warsaw. The investment consists in the opening of a new branch of a spinning machine manufacturing company, the purchase of equipment and the equipping of workstations. Total project costs amount to PLN 58 million, PLN 51 million of which are eligible. Since the investment is to be implemented in Warsaw, the entrepreneur is not eligible for the intensity valid for Toruń (40% + 10% as a

bonus, i.e. 50%), but for the intensity valid for Warsaw (30% + 10% as a bonus, i.e. 40%). Non-eligible expenditures in this project are, i.a. employment and training costs (although occasionally employment costs and, under cross-financing, also the training costs, can be considered as eligible; however in this case they are not), costs of moving some of the equipment from the current location, current costs related to the construction. Eligible costs are the costs of land tenure for the new factory, and the purchase costs of machinery, equipment and technological lines.

Therefore:

- the **total project costs** (PLN 58 million) are comprised of **eligible costs** (PLN 51 million) and **non-eligible costs** (PLN 7 million).
- the **eligible costs** are comprised of the entrepreneur's **own contribution** (being the difference between the eligible costs and the amount of the subsidy) and the **subsidy**; if the subsidy amounts to the maximum of 40%, then the own contribution must constitute the remaining part of the 100% of eligible expenditures, i.e. 60%; although according to regulations the minimal own contribution in such projects is only 25%, in practice it must always be equal to the difference between eligible costs (100%) and the subsidy (as per the regional map - max. 70%), meaning it can never drop to 25%; the minimal own contribution for an investment project is 30% (the difference between 100% and the maximum subsidy of 70%), which will apply to small enterprises from voivodeships with a base intensity of 50%, after applying the bonus for small enterprises. This is illustrated in the following charts.

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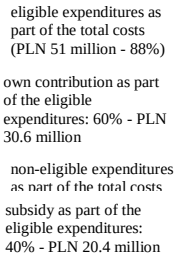

Subsidy: PLN 51 million (eligible costs) x 40% (maximum intensity) = PLN 20.4 million;

Own contribution: PLN 51 million - PLN 20.4 million = PLN 30.6 million;

Own contribution = eligible costs - subsidy

Aid intensity is the aid amount expressed as a percentage of eligible costs.

Own contribution is the part of the eligible costs borne (or planned to be borne) by the applicant in relation to the total planned amount of eligible costs. The own contribution must be covered from the entrepreneur's own resources, i.e. resources which do not constitute state aid. Own resources are not only those actually held by the entrepreneur, but also loaned, e.g. bank loans obtained under market (non-preferential) conditions, loans from other entrepreneurs (mother company, co-owner). Preferential loans (with an interest rate lower than the one available on the market) may be considered State aid if they are granted from non-private sources. For example, a loan from the National Fund for Environmental Protection and Water Management, which is a public institution, may be a preferential loan, and should therefore be considered part of the State aid, rather than the entrepreneur's own contribution. However, whenever a preferential loan or credit is granted, the State aid shall not be the amount of the loan granted, but the difference between the market interest rate of the given loan or credit and the granted preferential interest rate, calculated in accordance with separate legal regulations (in accordance with the ordinance of the Council of Ministers of 11 August 2004, on the detailed means for calculating the amount of various forms of State aid).

The applicant must provide his own resources for financing the investment project. The planned investment funding sources should be outlined in the business plan. This information shall be verified at the stage of signing the contract on co-financing. At this stage the entrepreneur shall have to document both the resources necessary for the project and their level (i.e. document his possession of an appropriate level of own contribution), e.g. by presenting a loan commitment or a leasing contract.

The form of the own contribution is primarily financial resources (own, obtained through a credit e.g. operating credit, or coming from the capitalisation of the applicant by the company's shareholders or stakeholders), intended for partial funding of the project. Own contribution may also be derived from a loan granted by a foreign bank, but in such a case the loan commitment should be issued on a model document prepared for the given measure by the implementing authority in Polish, or translated into Polish by a certified translator. According to the loan commitment model, the document must be valid for a period no shorter than 6 months from the date of its issue. The competition documentation does not mention, however, any regulations concerning the validity term for the loan commitment - although it appears that this shall be at least 6 months from its issue date.

Generally, if the legal regulations or other documents allow for such a possibility, fixed assets owned by the entrepreneur may be considered his own contribution (own in-kind contribution). Other forms than cash or in-kind fixed assets (including land, buildings and structures) should not be taken into account, as they cannot contribute to co-financing the project. In particular, the introduction of intangible assets into the project, especially when the estimation of their value is not possible (making it impossible to determine whether a correct level of own contribution, i.e. usually 25% or 30%, has been achieved) cannot be considered an own contribution.

The applicant should present in his business plan the full financial engineering for the project, keeping in mind that the payments shall be made in tranches and so far there's no plan in the measures aimed at entrepreneurs (except for measure 1.4) to grant advance payments, and that the project must have smooth funding. A full view of the funding sources is always included in the financial data and the estimates presented in the business plan. It cannot therefore be assumed that the subsidy (added to funding sources by the Application generator) combined with the entrepreneur's own contribution shall ensure smooth funding for the project. This should be evidenced by proper financial engineering.

Let us return to our example. In order to calculate the own contribution as a percentage, we must first determine it as a monetary amount (as was done above - the own contribution amounts to PLN 30.6 million).

PLN 30.6 million is therefore the part of the eligible costs planned to be borne by the applicant, in relation to the total amount of eligible costs (PLN 51 million).

PLN 30.6 million / PLN 51 million = 0.60 = 60%.

The above calculations clearly show that the sum of the amount of the subsidy expressed as a percentage (40%) and as a monetary amount (PLN 20.4 million), and the amount of own contribution expressed as a percentage (60%) and as a monetary amount (PLN 30.6 million) equals the total amount of eligible expenditures for the project (100% and PLN 51 million).

It is also apparent that the total project costs are not taken into consideration in these calculations. Therefore, it is important to properly determine the total eligible cost amount - no non-eligible expenditures may be included, since this could lead to the calculation of a subsidy amount higher than the one which should be granted. In case of an inspection, this could lead to issuing a decision on the return of the entire aid granted for the project.

To exemplify the above, let us assume that the entrepreneur from Toruń miscalculates the eligible expenditures by adding to them the costs of employing a new workforce, amounting to PLN 4 million. This would bring the total amount of eligible expenditures to PLN 55

million. The maximum subsidy would therefore amount to 40% x PLN 55 million = PLN 22 million, which is nearly PLN 2 million higher than the allowable subsidy for this project.

Mentioned several times before was the regional aid map. We will now explain what it is and what rules it introduces.

The regional aid map is a legal act adopted by a Member State after being agreed upon with the European Commission. It is adopted for the period of financial perspective for structural funds. Each Member State of the EU adopts, in cooperation with the European Commission, a regional aid map. Since regional aid is granted based on **regions**, not **states**, a situation may occur in which some regions of a Member State are eligible for regional aid, while others are not. For a region to be eligible for aid, its GDP must be appropriately low. This is because regional aid may only be granted in those regions of the EU, in which the economic development level is lower than the average Community level, i.e. in the regions, in which the GDP per capita does not exceed 75% of the Community average. Currently all regions (voivodeships) in Poland meet this condition, and are therefore eligible for regional aid (which is guaranteed until the end of 2013, at which point the regional aid map will be subject to change, which, following a recalculation, may result in some of the regions in Poland being "exempt" from the possibility of being granted regional aid, or, more likely, entering the phasing out mechanism).

The previous regional aid map for Poland was in force in the years 2004 - 2006 and was related to the 2000 - 2006 financial perspective. The current map, adopted as an ordinance of the Council of Ministers of 13 October 2006 on the establishment of the regional aid map, is in force from 1 January 2007 till 31 December 2013 and indicates the amounts of regional aid in Poland. It sets the **maximum intensities** of State aid for particular regions and the time limit for aid schemes, within the scope of which regional aid is granted (the time perspective cannot be longer than until the end of 2013, since it is highly probable that the regional aid map for Poland will be changed after that date).

The areas constituting a basis for the designation of regions eligible for aid are determined based on the ordinance of the Council of Ministers on the introduction of the Nomenclature of Territorial Units for Statistics (NTS). The aid regions have been determined on the NUTS II level (regions meaning voivodeships), except for Warsaw, which is the only area set at a level lower than NUTS II, i.e. at the subregion level - NUTS III, according to the Nomenclature of Territorial Units for Statistics.

Currently, the regional aid map is formed as follows:

(1) **50% in the area of the Lubelskie, Opolskie, Podkarpackie, Warmińsko-Mazurskie, Podlaskie, Świętokrzyskie, Małopolskie, Lubuskie, Łódzkie, and Kujawsko-Pomorskie Voivodeships;**

(2) 40% in the area of the Pomorskie, Zachodniopomorskie, Dolnośląskie, Wielkopolskie, Śląskie Voivodeships, and during 1.01.2007 - 31.12.2010, also in the Mazowieckie Voivodeship, with the exemption of Warsaw.

(3) 30% in the area of the capital city of Warsaw and during 1.01.2011 - 31.12.2013, in the Mazowieckie Voivodeship.

The European Commission pays special attention to supporting the development of undertakings in the SME sector, and therefore entrepreneurs in this sector are granted bonus percentage points.

(a) 10 percentage points for medium-sized enterprises;

(b) 20 percentage points for micro and small enterprises, provided that they do not conduct economic activity - mainly or solely - in the transport sector.

An entrepreneur from Warsaw begins an investment project whose implementation is to take place in Radom (Mazowieckie Voivodeship). Implementation begins in June 2010. According to the regional aid map, aid intensity for Radom amounts to 40% on this date. The contract is signed in August 2010. Although the aid intensity is due to change to a less favourable one (from 40% to 30%) in 4 months, the entrepreneur shall not have to return any part of the funds received, since aid intensity is calculated and assigned on the day of granting aid, which in this case is the day of signing the contract. Therefore, if the contract is signed by 31.12.2010, the higher, more favourable intensity shall apply for the project.

Regional aid is the basic type of State aid, granted not only under the OP IE, but also under most operational programmes co-financed from the EU structural funds, since regional aid is, in practical terms, the crucial instrument in the implementation of the Cohesion Policy, i.e. the policy aimed at balancing the socio-economic differences across the individual EU Member States and regions.

The basis for permissibility for this aid category is Article 87(3)(a) and (c) of the Treaty establishing the European Community, according to which aid may be granted for:

(a) aid to promote the economic development of areas where the standard of living is abnormally low or where there is serious underemployment;

(b) aid to facilitate the development of certain economic activities or of certain economic areas, where such aid does not adversely affect trading conditions to an extent contrary to the common interest.

The basic kind of regional aid is investment aid; another less popular kind is operating aid, which cannot be granted within the scope of structural funds and is generally subject to strict

regulation by the Commission. Operating aid may be granted in exceptional cases, in order to complement regional aid, should it prove insufficient. This type of State aid is aimed at reducing the beneficiary's current business activity costs.

The basic terms in regional aid are: investment, large investment project, incentive effect, starting the project implementation.

And investment should be understood as investment in tangible or intangible assets, related to setting up a new plant, expansion of an existing plant, production diversification in an existing plant or a fundamental change of the overall manufacturing process in an existing plant. An investment is the opposite of a replacement investment, often referred to as the modernisation investment.

Granting regional aid for large investment projects is largely limited and is subject to specific rules specified in the Guidelines on national regional aid for 2007 – 2013. There is also a meaning for the term "large investment project" other than "regional", defined by the provisions for structural funds (regulation 1083/2006). The entities granting aid must keep in mind both of these regimes and the obligation for separate procedures for large projects in terms of regional aid and large projects in terms of structural funds.

Other terms specific to regional aid shall be explained further in the study, including the exemptions (sectors exempt from aid).

10. Incentive effect

This part will discuss the following issues:

- Incentive effect – verification based on the entrepreneur's status
- Incentive effect vs. confirmation of expenditure eligibility
- Mode of evaluation of the occurrence of the incentive effect in case of large enterprises
- Incentive effect in OP IE measures

As per Article 8(3) of Commission Regulation No 800/2008, aid for enterprises resulting from the regulation may only be granted if it causes the so-called **incentive effect.**

The requirement for assessing the occurrence of the incentive effect has replaced the requirement for preliminary confirming expenditure eligibility, introduced in earlier Commission Regulations on granting State aid.

The incentive effect should occur in the case of aid granted to micro, small and medium-sized enterprises, as well as in the case of aid granted to large enterprises; however in both cases the methodology for assaying the occurrence of this effect is different.

In both cases, i.e. in the case of aid for an SME and aid for a large enterprise – **the application for co-financing should be submitted prior to starting the implementation of the project.** This is mentioned in Article 8(2) of the General Block Exemption Regulation (800/2008). Otherwise (i.e. if the project implementation begins prior to the submission of the application), the entire project will become ineligible for aid.

In the case of SMEs, the incentive effect is considered to have occurred once the application for co-financing has been submitted. Therefore demonstrating the occurrence of the incentive effect in the case of projects implemented by SMEs is relatively easy. According to point 28 of the preamble of Regulation 800/2008, in the case of any aid covered by this regulation and granted to an entrepreneur from the SME sector, the incentive effect should be considered as present if the small or medium-sized enterprise submitted an application for co-financing prior to taking any actions related to project implementation or actions subject to aid.

This is different for large enterprises. Apart from submitting an application for co-financing prior to starting the project implementation, the large enterprise must prove that the state aid granted for the planned project shall meet the requirements specified in Article 8(3).

Documentation prepared by the beneficiary (large enterprise) should indicate that the requested aid is indispensable to the implementation of the project in the desired scope, time, or at the specified cost. The documentation should assume meeting at least one of the following criteria in the implemented project:

(1) a material increase in the size of the project/activity due to the aid,

(2) a material increase in the scope of the project/activity due to the aid,

(3) a material increase in the total amount spent by the beneficiary on the project/activity due to the aid,

(4) a material increase in the speed of completion of the project/activity concerned,

(5) as regards regional investment aid, that the project would not have been carried out as such in the assisted region concerned in the absence of the aid.

Moreover, point 29 of the preamble to the regulation specifies the way in which a large enterprise may prove the occurrence of the incentive effect. The large enterprise should prepare an internal document with a **viability analysis for the project subject to state aid, in two variants**: with and without state aid. Analysis of the two variants should indicate that the implementation of the project without State aid would have a narrower scope than if the aid were granted, would take longer, or would cause the entrepreneur to spend less money on the implementation.

The analysis is an internal document of the entrepreneur. This document must, however, be presented to the entity granting the aid, since the regulation obligates the Member State (meaning *de facto* the entity granting the aid) to verify whether the prerequisites specified in Article 8(3) have been met.

According to the position of the authorities involved in the implementation of the Operational Programme Innovative Economy, and keeping in mind the above-mentioned legal regulations, it is planned that the verification of the incentive effect in the case of projects submitted for co-financing under this Programme by large enterprises shall occur by means of indicating the results of the above-mentioned analysis in the business plan, whose model shall be appropriately modified. The appropriate modification of the business plan model, containing two variants of project implementation, i.e. with and without state aid, shall allow the occurrence of the incentive effect to be evaluated. The business plan is an integral part of the application for co-financing and an integral document of the enterprise, presenting a current evaluation of its financial situation and data showing the goals of the company and the means of their achievement, considering the existing financial and market conditions, through an appropriate collation of documents, analyses and programmes. According to the declaration of authorities involved in the implementation of the OP IE, the evaluation of the occurrence of the incentive effect shall be verified during the formal and substantive evaluation of the application for co-financing.

Commission Regulation No 800/2008 applies to all allocations of aid enumerated therein. Therefore every aid scheme, national or regional, within the scope of which aid is granted based on the General Block Exemption Regulation must contain within its regulations rules for demonstrating the occurrence of the incentive effect, both by SMEs (submission of the application for co-financing prior to starting the implementation of the investment) and large enterprises.

This does not apply to aid schemes based on regulation 1628/2006, which defines a preliminary expenditure eligibility confirmation requirement (but does not define a requirement for verifying the occurrence of the incentive effect).

Expense eligibility confirmation requirements have been removed from the aid schemes issued by the Minister of Regional Development and for which the Minister is responsible, which means that entrepreneurs may begin project implementation on the day following the

day of the submission of the application for co-financing, making all expenditures borne between the day of application submission and the day specified in the aid grant contract eligible for aid. In some cases, however, the requirement for preliminary expenditure eligibility confirmation remains (e.g. ordinance of the Ministry of Interior and Administration for measure 8.4 of OP IE).

In the case of regional aid, demonstrating that the investment in the given form would not be implemented in the region without aid is sufficient.

The authority evaluating the application for co-financing together with its attachments shall not verify whether the large enterprise can afford the implementation of the project. This matter shall not be looked into (solely) in the context of the enterprise's financial status. The goal is to verify whether the aid granted to the large enterprise for project implementation will result in added value in the form of increased project scope, accelerated implementation or the purchase of better, more advanced materials, merchandise and services (resulting from assigning more funds for project implementation). Therefore the requirements set forth by the provisions of regulation 800/2008 should not be interpreted as an additional burden, hampering the large enterprises, but rather as safeguards, ensuring that public funds are spent properly and reach the areas of actual need. It is not a problem of obliging the large enterprises to prove that they cannot implement their projects without state aid, but rather that state aid would enable their faster and better implementation.

The incentive effect should also be considered in types of aid other than regional. This means that apart from investment projects, entrepreneurs should indicate the occurrence of the incentive effect in research and development, training, consultancy and other projects. This position seems justified and is supported by the provisions of regulation 800/2008 (as the rules concerning the incentive effect are defined in general regulations, rather than regulations concerning specific aid purposes, e.g. regional aid).

11. Aid transparency

This part will discuss the following issues:

- The transparency principle in the context of aid monitoring and control
- Forms of transparent aid
- Publication and information requirements in the context of the transparency principle

The principle of transparency can be considered in the light of two aspects. First of all, being one of the main principles in granting aid, the transparency principle means that the granted aid should be easy to control and monitor and should be public. Another meaning for the aid's "transparency" is that the unambiguous determination of the aid level should be easy.

Regulation 800/2008 allows only such aid to be granted, which is transparent both in terms of easy control and monitoring, as well as easy level determination.

In order to ensure transparency and effective monitoring, Member States are obliged to deliver summary information to the Commission in the case of granting *ad hoc* aid or aid under an aid scheme in accordance with regulation 800/2008. Whenever an aid scheme issued under regulation 800/2008 enters into force, the Commission must be notified of such fact by filling in and submitting a standard form. The electronically submitted form shall be published in the *Official Journal of the European Union* and in the Internet. The Internet publication should contain the full text of the information on the given aid measure. Information such as the name of the beneficiary, the level of aid granted and the date of granting, the title of the project, the purpose of the aid, and the name of the aid scheme are not secret and may be published. It is possible, however, to remove the enterprise's trade secrets from the text of the publication.

Considering the latter of the above-mentioned aspects, such aid is considered transparent, in whose case an earlier calculation of a gross subsidy equivalent without the need for risk assessment is possible. As per Article 5 of regulation 800/2008, the following aid categories are specifically considered transparent:

(1) Aid in the form of subsidies;

(2) Aid in the form of interest rate subsidies;

(3) Aid in the form of loans, in which the gross subsidy equivalent is calculated based on the reference rate valid on the day of granting the aid;

(4) certain types of aid granted in the form of guarantee schemes;

(5) certain types of aid granted in the form of fiscal measures.

For the purposes of OP IE, point 1 is the most important, since in most OP IE measures aid is granted in the form of subsidies, and therefore meets the criteria of transparency, which means that it may be granted under an aid scheme based on the 800/2008 block exemption. A subsidy is a transparent form of granting aid, since its amount can be determined in advance, without the need for risk analysis.

Pursuant to Article 9 of regulation 800/2008, Member States should send summary information on an aid scheme based on the 800/2008 block exemption to the Commission within 20 working days of the enforcement of such scheme. In addition, Member States are to publish in the Internet the full text of the implemented aid measure immediately after the entry into force of an aid scheme based on the 800/2008 block exemption.

12. Exemptions and limitations

This part will discuss the following issues:

- Main area of economic activity
- Agriculture
- Products intended to imitate and substitute milk
- Fisheries and aquaculture
- Coal mining sector
- Steel sector
- Synthetic fibres sector
- Shipbuilding sector
- Prohibited export activities
- National merchandise preference
- Road transport sector
- Entrepreneurs in difficulty
- Entrepreneurs subject to a recovery order of the granted aid

Main area of economic activity.

Entrepreneurs rarely engage in only a single area of business activities. Most often, even those entrepreneurs who conduct activities in an exempt sector also conduct activities in one or more non-exempt sectors. For example, an entrepreneur conducting activities in the black coal mining sector could also conduct business activities consisting in brown coal processing, which are not exempt. Alternately, an entrepreneur could conduct business activities in the shipbuilding sector, e.g. by modernising seagoing vessels of more than 1000 GT, while manufacturing at the same time tourist vessels of less than 100 GT. In such a case, does conducting business activities in an exempt sector prevent the entrepreneur from receiving regional aid?

It is generally accepted that it is types of activities that are subject to exemption – not the entities conducting these activities. Therefore the evaluation should consider the **project**, not its implementing **entity**. If the project is related to non-exempt activities, the entrepreneur may receive co-financing for its implementation under general rules (in the above examples: for brown coal processing or manufacturing of tourist vessels of less than 100 GT). If the project is related to exempt activities, aid may not be granted.

In order to indicate that aid received for non-exempt activities will not be "transferred" to exempt activities (e.g. that machinery meant for motorboat manufacturing will not be used for the modernisation of seagoing vessels), the entrepreneur should be able to present his cash flow, e.g. by demonstrating separate income and expenditure reports for each type of activity (exempt and covered by the project).

According to the established jurisdiction, if the implemented project is related partially to exempt and partially to non-exempt activities, it is possible to isolate the costs for these types of activities and only cover these costs by the co-financing, which belong to the non-exempt activity (e.g. in the above example: "part" of the machine used for constructing tourist vessels may be considered as an eligible expenditure. This is, of course, a simplification. What is

meant here specifically is that the cost of the machine used both for manufacturing tourist vessels and modernising seagoing vessels should be divided proportionally to the machine's operation within the scope of exempt and non-exempt activities). In practice this is very hard, however, as most entrepreneurs in Poland usually do not have income and expense records based on PKD (Polish Classification of Activities) codes, which additionally refer to activities exempt under EU law (these exemptions do not agree with the PKD).

Another method of determining the possibility of granting aid is the **main business activity methodology.** The main (primary) business activity is determined based on the prevalent percentage share of various types of business activities in the total sales income in the last financial year, or, if this indicator cannot be applied (e.g. in cases where the entrepreneur has conducted business activities for less than a year), based on the number of employees performing the various types of business activities, in relation to the total number of employees.

This method may prove effective, but only in the case of reliable calculations, and is best used when the entrepreneur keeps the above-mentioned income and expense records for his various areas of business activity.

Agriculture. The Operational Programme Innovative Economy does not allow for aid in business activities related to primary production of agricultural products.

The General Block Exemption Regulation allows for aid supporting the processing and marketing of agricultural products, except for the following cases:

- when the amount of aid is determined on the basis of the price or quantity of such products purchased from producers of raw materials or marketed by enterprises covered by aid, or
- when granting of aid depends on providing it in part or entirely to producers of raw materials.

In order to correctly understand what is not allowed in the case of agriculture and in what scope, several definitions must first be provided.

The prohibitions concern **agricultural products.** "Agricultural products" are products derived from plants, produced via land cultivation, animal products from stockfarms and fisheries, as well as first-stage processing products directly related to the above (of animal and plant origin), i.e. (according to Article 32(1) of the Treaty establishing the European Community) – products of the soil, of stockfarming and of fisheries, as well as their derived first-stage processing products (according to the ruling of the Court of Justice – such products, in whose case there is a correlation between the basic and the processed products):

(a) products listed in Annex I to the Treaty establishing the European Community, except fishery and aquaculture products;

(b) cork and cork products;

(c) products intended to imitate or substitute milk and milk products.

The above definition is contained in Article 2(22) of regulation 800/2008.

Three actions related to agricultural products are subject to exemption or limitations and are not allowed to be granted regional or *de minimis* aid:

(a) primary production,

(b) processing,

(c) marketing agricultural products.

Primary production is entirely exempt from aid under the Operational Programme Innovative Economy. There is no legal definition for “agricultural product production”. It is generally considered to be the overall process of agricultural product generation – raising stock, land cultivation, fruit culture. In addition, legal acts do not contain a definition of the “agricultural producer” (only the rulings of the Court of Justice define the producer as “an entity generating agricultural goods” or "a natural or legal person, or organisational unit without legal personality, owning an agricultural holding or an animal”).

A definition of agricultural product **processing** can be found in regulation 800/2008. According to the regulation, the processing of an agricultural product is “any operation on an agricultural product resulting in a product **which is also an agricultural product**" (i.e. a product listed in Annex I to the Treaty establishing the European Community, except fishery and aquaculture products, cork and cork products, and products intended to imitate or substitute milk and milk products), except on-farm activities necessary for preparing an animal or plant product for the first sale.”

Agricultural product processing and marketing (except for cases resulting from regulation 800/2008 and the demarcation line) is eligible for co-financing under the Operational Programme Innovative Economy (as opposed to the production of these products).

Agricultural product marketing (also eligible for co-financing within the scope of regional investment aid and *de minimis* aid, along with processing) has been defined in regulation 800/2008 (Article 2(24)). It means the “holding or display with a view to sale, offering for sale, delivery or any other manner of placing on the market, except the first sale by a primary producer to resellers or processors and any activity preparing a product for such first sale". Sale of a product by a primary producer (usually the farmer) to final consumers is also considered to be marketing if it takes place in separate premises reserved for that purpose (e.g. a market).

As mentioned before, on-farm activities necessary for preparing the product for first sale, as well as the first sale to reselling or processing entities are not considered processing or marketing.

Fisheries and aquaculture. According to Council Regulation No 104/2000 of 17 December 1999 on the common organisation of the markets in fishery and aquaculture products, fishery products are products caught at sea, in inland waters and the products of aquaculture. They are products and processing operations carried out on these products, specified in an Annex to the regulation, including: catching of fish, crustaceans and molluscs, catching of aquatic animals at sea and in inland waters (except for pearl, sponge, coral, algae and whale fishing), aquaculture,processing and preservation of sea and freshwater fish, clams and molluscs

(freezing, smoking, drying, boiling, salting, canning, fish meal production), production of pasta, noodles and similar products, if they contain more than 20% of fish or shellfish, as well as fish by-products.

The fishery and aquaculture sector is not eligible for regional aid, just for *de minimis* aid – only as *de minimis* aid in fisheries and agriculture, under separate rules defined in legal acts and documents regulating these sectors (therefore Regulation 1998/2006 excludes the possibility of *de minimis* aid in these sectors under this legal act – Regulation 1998/2006).

Products intended to imitate and substitute milk. These are agricultural products, but of a special kind. A product intended to imitate or substitute milk is any product whose name suggests that it might be milk or a milk product, but does not contain milk (e.g. soy milk, coconut milk, products in which milk fat has been replaced with vegetable fat, such as diet cheese).

“Milk” should be understood as animal breast secretion, without any additives or extraction, while “milk products” are products obtained solely from milk, with the addition of substances necessary for their production, but not replacing milk, in part or in whole, as the primary product, or any of its natural components.

Granting aid for products intended to imitate or substitute milk as agricultural products is subject to the same exemptions as in the case of agricultural products.

Coal mining. Supporting coal mining projects is not allowed in the scope of both regional and *de minimis* aid. Pursuant to regulation 800/2008, aid in this sector is only permissible in training aid, aid for R&D and aid for environmental protection; however these exceptions have no practical application in terms of aid granted under OP IE. The coal sector has been defined in regulation 1407/2002. According to Article 2(a), the term "coal" means high-grade, medium-grade and low-grade category A and B coal. Specifically exempt is black coal mining. Brown coal production is not exempt.

Steel sector. Regional aid is not allowed in the case of steel sector projects. This sector has been defined in Annex I to the Guidelines on national regional aid for 2007-2013 and encompasses the enterprises producing the products listed in this annex, e.g. pig iron, ferro-alloys, cast iron, rolled products, other metallurgical products, bars and ingots, stainless steel, rails and ties, tubes, pipes, shaped sections, connectors, cold flat rolled products. Recently, a definition of this sector also appeared in regulation 800/2008, and according to this definition, the steel sector means all activities related to the production of one or more of the following products (presented below are only 5 basic categories – they are detailed in Article 2(29) or regulation 800/2008):

(a) pig iron and ferro-alloys;

(b) crude and semi finished products of iron, ordinary steel or special steel;

(c) hot finished products of iron, ordinary steel or special steel;

(d) cold finished products;

(e) tubes.

Synthetic fibres sector. Synthetic fibres are obtained from synthetic organic materials and products of simple chemical compound polymerisation. The most significant synthetic fibres are: acrylic fibres, polyester fibres, polyurethane fibres and polyamide fibres.

Regional aid is not allowed in the case of synthetic fibre production projects. This sector has been defined in Annex I to the Guidelines on national regional aid for 2007-2013. An identical definition is contained in Article 2(30) of regulation 800/2008. This definition is not very specific. It describes the synthetic fibres sector as:

(1) extrusion (pressing) and texturisation (elastication, softening) of all generic types of fibre and yarn based on polyester, polyamide, acrylic or polypropylene, irrespective of their end-uses,

(2) polymerisation (including polycondensation) where it is integrated with extrusion in terms of the machinery used,

(3) any ancillary process linked to the contemporaneous installation of extrusion/texturisation capacity by the prospective beneficiary or by another company in the group to which it belongs and which, in the specific business activity concerned, is normally integrated with such capacity in terms of the machinery used.

The synthetic fibre sector does not, however, include enterprises whose production process precedes polymerisation (e.g. monomer production) or occurs after the pressing and texturisation process, if those processes do not use the same equipment and machinery, and enterprises, which conduct the process of yarn pressing, after which the resulting yarn, following twisting and interlacing, shall be used in the production of non-weaving products.

As mentioned earlier, the above definition is so unclear that it raises many doubts, both among the aid granting entities and the entrepreneurs applying for aid. Based on the rulings of the Court of Justice in individual cases, it may be concluded that the synthetic fibre sector comprises the following operations: production of cut polypropylene fibres, production of polypropylene fibres used in carpet manufacturing, production of polyamide yarn and production of polyester yarn for airbag and car tarpaulin manufacturing.

Shipbuilding sector. According to the Framework on State aid to shipbuilding, its provisions apply to four types of entities:

(a) shipyards,

(b) ship owners (even when conducting business activities unrelated to the shipbuilding industry, as entrepreneurs from outside the shipyard),

(c) related entities (natural or legal persons controlling or owning the enterprises engaged in the shipbuilding industry, ship repairs or adaptation, or owned or controlled, directly or indirectly, by enterprises engaged in the shipbuilding industry, ship repairs or adaptation), and

(d) third parties.

Framework provisions apply within the scope of activities carried out by either of the entities listed above (together or separately):

(a) **shipbuilding,** meaning: construction, within the Community, of self-propelled seagoing merchant vessels (with their own control systems), i.e. vessels capable of independent navigation in the open sea. These include the following units:

- ✓ vessels with a capacity of no less than 100 GT, used in passenger and/or freight shipping,
- ✓ vessels with a capacity of no less than 100 GT, used for the performance of specialised services (e.g. dredgers, icebreakers),
- ✓ tugboats with a power of no less than 365 kW,
- ✓ fishing vessels with a capacity of no less than 100 GT, in relation to export credits and development aid, when they meet the provisions of the 1998 OECD Arrangement on Guidelines for Officially Supported Export Credits, and its Sector Understanding on Export Credits for Ships, or any other agreement amending or replacing it, as well as Community regulations concerning state aid in the fishery and aquaculture sector,
- ✓ unfinished hulls of the four vessel types listed above, provided they are launched and portable.

(b) **ship conversion,** meaning the conversion, within the Community, of self-propelled seagoing merchant vessels with a capacity of no less than 1000 GT, provided that the conversion results in significant changes in the merchandise shipping layout, the design of the hull, the propulsion system or passenger accommodation,

(c) **ship repairs,** meaning the repairs or renovations, within the Community, of self-propelled seagoing merchant vessels.

The shipbuilding industry definition does not include naval vessels (warships, other vessels used for defensive or offensive purposes).

Granting regional aid is not allowed in the shipbuilding sector.

Prohibited export activities. In both regional and *de minimis* aid, certain operations related to promoting exports by entrepreneurs engaging in export activities are not allowed to be supported. Aid may not be granted in the case of activities related to export to third countries or EU Member States, i.e. activities related directly to:

(a) amounts of exported goods,

(b) setting up and operation of a distribution network,

(c) other ongoing costs related to export activities.

Export subsidies are also not allowed.

Types of aid other than those listed above, also aimed at the entrepreneur conducting the exporting activities and in the scope of export activity, are generally allowed. “Generally” – because in individual cases the Commission may decide that the granted aid bears the features of prohibited export aid. The Commission itself uses the phrase “generally allowed”, in order to allow for such an eventuality.

According to the regulations, the following **does not** constitute prohibited export aid:

(a) aid intended for covering the costs of participating in trade fairs and foreign missions, related to renting, setting up and operating an advertising stand, but only for first-time participation in fairs and missions per entrepreneur (participation in subsequent fairs and missions, if financed, must be covered from the entrepreneur's funds),

(b) costs of studies, analyses and consultation services provided by external consultants, in order to market a new product or introduce an existing product into a new (foreign) market (note: these cannot be ongoing consultation services, e.g. permanent legal, accounting, tax or advertising services).

Example operations considered export aid are: repeated co-financing of the entrepreneur's participation in foreign fairs, setting up representations outside of the country in which the company has its main seat, applying a preferential interest rate for export credits, lowering the export credits interest rates.

A detailed study of this topic, including examples of (prohibited) export subsidies can be found in the "Study of the types of business activity exempt from applying for co-financing under OP IE, resulting from the prohibition for State aid within an identified type of State aid," pages 19-20, drawn up by the Ministry of Regional Development.

National merchandise preference. State aid contingent upon the use of domestic over imported goods, is not allowed. Introduction and maintenance of subsidies favouring national over foreign products is prohibited. This kind of aid is prohibited in the case of all aid purposes, also in regional and *de minimis* aid.

Road transport sector. Aid for entrepreneurs conducting business activity in the road transport sector is subject to specific **limitations** (although it is not exempt), both in the case of regional and *de minimis* aid.

In the case of regional aid, micro, small and medium-sized enterprises carrying out business activity in the road transport sector cannot receive additional bonus points resulting from increased aid intensity (20 percentage points for micro and small enterprises, 10 percentage points for medium-sized enterprises). Bonus points are awarded only to SMEs outside the road transport sector.

De minimis aid may not be granted to an entrepreneur conducting business activities within the scope of road transport for the purchase of vehicles for such transport. Additionally, the aid amount for *de minimis* aid for road transport sector entrepreneurs is limited. Normally, *de minimis* aid for a single entrepreneur reaches a level of EUR 200 thousand during a maximum of 3 years. If *de minimis* aid is granted to an entrepreneur from the road transport sector, its maximum level is half of the above amount, i.e. EUR 100 thousand during a maximum of 3 years.

The Community law does not have a definition of the road transport sector. Such a definition, based on national law, has been specified in the Act on road transport. This Act differentiates between national and international road transport, defining these terms as:

(1) undertaking and performing of business activities within the territory of the Republic of Poland consisting in transporting persons or goods using road vehicles registered in the Republic of Poland, including also vehicles consisting of cars pulling trailers or semi-trailers, with the place of start, destination and the transport route located within the territory of the Republic of Poland (national road transport); national road transport is comprised of passenger transport (e.g. taxi services) and goods transport (e.g. shipping services).

(2) undertaking and performing of business activities consisting in transporting persons or goods using road vehicles, including also vehicles consisting of cars pulling trailers or semi-trailers, with the route between the vehicle's place of start and destination crossing the borders of the Republic of Poland (international road transport); international road transport is comprised of passenger transport and goods transport.

The road sector **does not include** non-profit road transport (also called private road transport). According to the above Act, this includes every passage along public roads, with or without passengers and/or cargo, conducted by the entrepreneur free of charge and of auxiliary nature in relation to the entrepreneur's primary business activities, meeting the following prerequisites:

(1) the road vehicles used for the transport are driven by the entrepreneur or his employees;

(2) the entrepreneur is legally entitled to use the road vehicles (e.g. he is their owner or lessee);

(3) the transported goods are the property of the entrepreneur or have been sold, bought, rented, leased, produced, extracted, processed or repaired by him, or the purpose of transport is the transport of persons or goods from or to the enterprise, for its own purposes, including the transport of employees and their families;

(4) the transport is not related to business activities consisting in tourism activities.

Undertakings in difficulty. All of the OP IE aid schemes provide for a prohibition of State aid and *de minimis* aid for undertakings in difficulty. A definition of undertakings in difficulty can be found in the Community Guidelines on State aid for rescuing and restructuring firms in difficulty. According to regulation 800/2008, however, a definition of an undertaking in difficulty simpler than the one in the above Guidelines applies to undertakings from the SME sector.

According to regulation 800/2008 (Article 1(7)), SMEs can be considered as undertakings in difficulty when they meet the following conditions:

(1) in the case of limited liability companies operating for a period exceeding 3 years - if more than half of the company's registered capital has been lost, including ¼ during the preceding 12 months;

(2) in case of companies operating for a period exceeding 3 years, in which at least some members are fully liable for the company's debt – if, according to the financial

statement, more than half of the company's capital has been lost, including ¼ during the preceding 12 months;

(3) regardless of company type, if the company is subject to collective insolvency proceedings under national legislation.

According to the above, undertakings from the SME sector cannot be considered as being in difficulty if they have conducted business activities for less than 3 years (except for SMEs meeting the criteria defined in point 3).

In the case of large enterprises, the full definition specified in the Guidelines applies. Additionally, even if they have conducted business activities for less than 3 years, large enterprises can be considered as being in difficulty and therefore ineligible for regional aid. Therefore, large enterprises are considered to be in difficulty when they meet the criteria for entities in difficult financial situations or subject to restructuring with the use of State aid (detailed criteria for evaluating the occurrence of these states can be found in the Guidelines on state aid for rescuing and restructuring firms in difficulty).

The draft amendment to the ordinance on granting aid by the Polish Agency for Enterprise Development under OP IE states that financial aid may not be granted to SME entities meeting the criteria of an undertaking in difficulty, as per Article 1(7) of Commission Regulation 800/2008, and to non-SME entities if they meet the criteria for entities in difficult economic situations or subject to restructuring using state aid, as per the Community Guidelines on State aid for rescuing and restructuring firms in difficulty.

Entrepreneurs subject to a recovery order of the granted aid. According to the ordinance on granting financial aid by the Polish Agency for Enterprise Development under OP IE and to regulation 800/2008, financial aid may not be granted in favour of an undertaking which is subject to an outstanding recovery order following a previous Commission Decision declaring an aid illegal and incompatible with the common market.

If the entrepreneur has been charged with returning the granted aid by a decision of the European Commission, resulting from the fact that the State aid has been granted by the granting entity without legal basis, has been excessive or undue, the entrepreneur may not receive further State aid until the provisions of the decision have been implemented and the amount whose return has been requested in the Commission decision has been returned, with all interest accrued from the day of granting the aid.

13. Selected issues concerning the de minimis aid

This part will discuss the following issues:

- *De minimis* aid: definition, exemptions, rules of cumulation
- Documenting the *de minimis* aid
- Statements on *de minimis* aid
- Declarations on *de minimis* aid
- The amount and scope of *de minimis* aid, calculation period

De minimis aid is called the minor aid due to quota restrictions (limits), to which it is subject. Commission Regulation No 1998/2006 applies to aid granted to businesses in all sectors, except in the following:

(1) in the fisheries and aquaculture sectors covered by Council Regulation No 104/2000 on the common organisation of the markets in fishery and aquaculture products;

(2) for activity related to primary production of agricultural products listed in Annex I to the Treaty establishing the European Community;

(3) for activity related to processing and marketing of agricultural products listed in Annex I to the Treaty establishing the European Community if:

- the amount of the aid is determined on the basis of the price or quantity of such products purchased from producers of raw materials or marketed by enterprises covered by aid,
- when granting of aid depends on providing it in part or entirely to producers of raw materials;

(4) in the coal sector within the meaning of the Council Regulation No 1407/2002 on State aid to the coal industry;

(5) to an undertaking which is subject to an outstanding recovery order following a previous Commission Decision declaring an aid illegal and incompatible with the common market;

(6) to entrepreneurs from SME sector who fulfil the criteria of entrepreneur in difficutly and large entrepreneurs who fulfil the criteria of undertaking in a difficult economic situation or in the period of restructuring carried out with the use of State aid;

(7) for aid granted for the activity related to export, i.e. aid directly related with the quantity of the exported products, to the establishment and functioning of the distribution network or with other current expenditures related to running export activity. Aid to cover the costs of participation in fairs or of consultancy services needed for the introduction of a new or existing product in the new market, does not generally constitute export aid;

(8) for aid contingent upon the use of domestic over imported goods;

According to the Regulation, it is considered that the aid granted as the *de minimis* aid does not meet all the criteria of Article 87(1) of the Treaty establishing the European Community

and is therefore exempt from the notification requirement of Article 88(3) of the Treaty, provided that it meets the conditions set out in the regulation. It is considered that the relatively small amount of *de minimis* aid does not distort competition within the common market. Therefore, such aid may be granted on relatively milder conditions than other State aid.

When a Member State intends to grant *de minimis* aid to a business entity, it notifies the entity in writing of the estimated amount of the aid (expressed as equivalent of gross grant - that is converted to a grant, in the case of any other form of aid than a grant) and of its *de minimis* character. To this end, entities granting aid issue **a declaration** to the beneficiary, stating that the granted aid is *de minimis* aid or *de minimis* aid in agriculture or fisheries.

Currently, i.e. since 1 January 2007, *de minimis* aid may be granted to an entrepreneur provided that, together with other *de minimis* aid received from various sources and in various forms in the same calendar year and over two preceding calendar years, it will not exceed the amount of EUR 200 thousand, and in the case of an entrepreneur conducting activity in the road transport sector – EUR 100 thousand. *De minimis* aid, as opposed to any other aid (e.g. regional aid), cumulates - for **the project** (within the meaning of eligible expenditure) – and also for a given **entity** who is the recipient of that aid. So if the investment project will be granted *de minimis* aid and regional aid, both of these aids - if they are granted for the same eligible expenditure - may not exceed the maximum State aid intensity appropriate for the project and the beneficiary, and in addition, the granted *de minimis* aid "cumulates" with the other *de minimis* aid granted 3 (calendar) years back (even if it was the aid given for completely different projects and other eligible expenditure). Tax years are the years that an entrepreneur has established for tax purposes; the tax year may be from 1 January to 31 December of a given year; but there could be also entrepreneurs who have established the tax year in the period from 1 August to 31 July.

Example. Entrepreneur (small) from Gdansk is implementing an investment. He or she purchases machinery and other fixed assets for the amount of PLN 300 thousand. The entrepreneur receives regional aid in the amount of 40% of eligible expenditure (i.e. 40% x PLN 300thousand or PLN 120thousand). But according to the regional aid map, small entrepreneur from Gdańsk is entitled to intensity of 60%. Thus the “missing” 20% can be obtained from the *de minimis* aid (even from a completely different public entity). It is important that this will be aid for the same eligible expenditure (purchase of machinery and fixed assets) made within the same project. Thus, the *de minimis* aid and regional aid cumulate with each other (their values should be added, after they have been calculated to the equivalent of gross grant in case of aid other than a grant) and together cannot exceed the maximum State aid intensity. In addition, for the amount of *de minimis* aid (in this case 20% from PLN 300 thousand or PLN 60 thousand) the entrepreneur will receive a declaration on *de minimis* aid. This aid, including other *de minimis* aid received for any projects in the period of up to 3 years back, may not exceed, as of the date of granting the aid, EUR 200 thousand (or EUR 100 thousand in the road transport sector). It is estimated on the basis of all declarations on *de minimis* aid or *de minimis* aid in agriculture or fisheries, issued to the

entrepreneur in this period of time, which contain information on the amount of *de minimis* aid granted each time, calculated to EUR, as of the day of its granting.

Combining two sources of aid is acceptable only if it is ensured that the maximum level of intensity is not exceeded (in this case - 60% of eligible expenditure).

Under the new rules of accumulation, the Act on the procedural issues concerning State aid requires that the entity applying for *de minimis* aid should present the entity granting aid an application for granting aid along with:

1) all declarations on *de minimis* aid in relation to the aid granted in the year in which it applies for aid, and within preceding 2 calendar years or **a statement** on the volumes of *de minimis* aid received in this period;

Statements about the amount of the *de minimis* aid are new, because until now the granted *de minimis* aid could be documented in only one way: by presenting all declarations on *de minimis* aid received in the reference period (up to 3 years); currently the Act allows for the possibility of preparing a declaration in which the entrepreneur presents aggregated information on received *de minimis* aid (states its total amount in the reference period).

2) statements on the amount and allocation of State aid received for the same eligible costs.

If an entrepreneur had **previously** received State aid (i.e. other than *de minimis* aid - for example, regional aid) for eligible expenditure, for which he is now seeking support under the *de minimis* aid (situation as in the example above), then he submits the declaration referred to in point 2 above to the entity granting *de minimis* aid.

In addition, the revised ordinance on information on received State aid and information about non-receipt of aid (concerning documenting aid other than *de minimis* aid, i.e. the State aid) introduces a possibility of presenting by the entity which did not receive support (any - neither *de minimis*, nor State aid) to cover the costs of the project currently implemented, for which support is currently sought – the declaration of non-receipt of State aid. Otherwise (if it received aid for the same eligible expenditure for which it currently seeks additional support), it provides a completed form on received State aid, which is an annex to the above regulation.

Declarations on *de minimis* aid are issued in each case by the entity granting *de minimis* aid. According to the recent change in the Act on the procedural issues concerning State aid, where the value of *de minimis* aid actually granted is different than the value indicated in the declaration, within 14 days from the discovery of this fact, the entity granting *de minimis* aid issues a new declaration on granted *de minimis* aid, which indicates the proper value of aid and invalidates the previous declaration.

Example. The entrepreneur receives *de minimis* aid intended for guidance in obtaining ISO certificate. He or she signs the contract and on the same day receives a declaration on receipt of *de minimis* aid in the amount of PLN 50 thousand. Then the entrepreneur incurs the expenses, which turn out to be lower than foreseen in the contract, and therefore he or she does not apply for the payment of the final tranche of co-financing in the amount of PLN 7 thousand. Either the entrepreneur or the entity providing aid after noticing this fact, strive to

amend the declaration, because the amount of actually received *de minimis* aid is PLN 43 thousand and not PLN 50 thousand. Obtaining a new declaration with the correct amount is in the interest of entrepreneur, because it increases the available limit of *de minimis* aid (it amounts generally to EUR 200 thousand).

Declarations on *de minimis* aid are issued ex officio (now also the correction declarations - previously the application for correction should be submitted by the entrepreneur who received *de minimis* aid, because the entity providing aid had no such possibility to correct ex officio the issued declaration by itself). The rules of issuance, deadlines, pattern and content are defined in the Ordinance of the Council of Ministers concerning declarations on *de minimis* aid and *de minimis* aid in agriculture and fisheries.

Pursuant to Article 3 of the ordinance concerning declarations on *de minimis* aid and *de minimis* aid in agriculture and fisheries, the above declaration must contain: date of issuance, the seal of the granting authority, the name, tax identification number and address of the granting authority, the indication of *de minimis* aid beneficiary, the value of gross aid in PLN and EUR, a statement that the granted State aid is *de minimis* aid, an indication of the legal basis for granting State aid (i.e., the so-called substantive law for granting support) and the person authorized to issue the declaration. Paragraph 4 of the ordinance on *de minimis* aid also specifies the dates of issuance of the above declaration. As a rule, this occurs on the day of granting the aid which is *de minimis* aid, i.e. in the case of aid under the OP IE, it will be the day of signing the contract on co-financing by both parties.

An interesting feature of the *de minimis* aid is that it does not prejudge the fact what (in the case of other types of aid, always restricted to a closed catalogue) eligible expenditure may be refunded under this aid. Therefore, the decision about what will be financed under the *de minimis* aid, depends only on the granting authority or the authority issuing the aid scheme based on *de minimis* aid. De facto, *de minimis* aid can finance **all** the expenditure in line with the law. Of course, if the *de minimis* aid is granted under the the programmes financed by Structural Funds, the restrictions indicated in the provisions on the Structural Funds should be remembered and applied.

Example. In accordance with the principles of EU law, the purchase of undeveloped real estate can be financed only up to 10% of the value of the total eligible expenditure under the project, and in accordance with the principles of aid for consultancy, advisory services can be financed up to 50% of their costs. For the first item of expenditure we cannot, granting aid from the Structural Funds, allow 100% financing of land acquisition, this is forbidden by the relevant EU regulations. But in the second case, if we base the purchase of consulting services not on regional aid but on *de minimis* aid, then we could finance 100% of their price. The same applies to the purchase price of intangible assets.

In addition, by combining *de minimis* aid and regional aid in a single project, one can finance expenditure, which may not be eligible for regional aid, such as interest on loans, insurance and lease premiums and operating expenditure of an entrepreneur.

A second characteristic feature is the lack of intensity - in other words, the expenditure financed under *de minimis* aid can be covered by public funds up to 100% of its value.

In regional aid or aid for employment, we use the map of regional aid, which significantly reduces the possibility of obtaining high subsidies. The same expenditure financed under the *de minimis* aid, may be financed in full.

However, we should remember that, apart from all the above-mentioned advantages, the *de minimis* aid has one major drawback – it can rarely finance large investment, since the quota limit of *de minimis* aid is not high.

14. Obligation to return aid and recovery of aid

This part will discuss the following issues:

- Misuse of aid
- Aid granted without legal basis
- Obligation to return aid under the Commission's decision - the procedure, the legal basis
- Competent authorities in the national proceedings

Aid granted to an entity must be - above all - granted (by granting authority) in accordance with the provisions of EU law and national law, the relevant procedures and rules on State aid. In addition, correctly granted state aid must be used by the beneficiary for its intended purpose (without prejudice to the law, in accordance with the contents of the contract or issued decision).

From the content of the Council Regulation (EC) No 659/1999 of 22 March 1999 follows that the aid unlawfully granted or paid in excessive amounts, should be returned with interest calculated from the date of granting the support (although there are exceptions) to the date of payment, according to the so-called reference rate announced by the Commission.

According to the above-mentioned regulation, the Commission shall decide on the need for return of the aid, and the implementation of this decision is carried out under national law. If the beneficiary refuses to return the aid, then the provisions on enforcement proceedings are applied.

In Polish law, the continuation of the provisions of Regulation 659/1999 are the provisions of the Act on on the procedural issues concerning state aid. In accordance with the provisions of Chapter 3 of this regulation – "the proceedings before the Commission", after receiving a copy of the Commission's decision, obliging to suspend granting of state aid, the granting authority immediately suspends provision of aid, and after receiving a copy of the Commission's decision requiring the return of state aid, the entity providing the aid immediately issues, applying provisions of the national law, the decision on the need to return the aid.

In accordance with the provisions of Chapter 4 of Regulation 659/1999 - the "return of the aid granted in breach of the common market rules and misused aid" - the beneficiary is obliged to return the amount equivalent to granted state aid, regarding which the Commission issued the decision on the obligation to return the aid, unless as the result of appeal (by a Member State or by the beneficiary) the execution of the Commission's decision will be suspended.

The obligation to return the aid also includes interest calculated at an appropriate rate - reference rate - determined by the Commission. Interest shall be payable from the date on which the unlawful aid was made available to the beneficiary until the date of its recovery (i.e. the actual date of payment of all receivables.) The rules for calculating the interest rate are determined in Article 11 of Regulation 794/2004.

Interest shall be payable from the date on which the unlawful aid was made available to the beneficiary until the date of its recovery. It is unclear what is meant by "making available" - rather it should be assumed that this is the day of giving the recipient the right to dispose of the funds, than the actual day they become available, so that it will rather be a day of signing the contract on co-financing, than the day of transferring the funds to the account of the beneficiary.

Since it is not the Commission which takes steps for claiming the return of the aid by the beneficiary, the Commission's decision on the return of aid will be the basis for issuing by the Member State its own decision on the return of aid. Then, the designated authority of a Member State (in the case of Poland - the President of the Office of Competition and Consumer Protection) will carry out the case under national law.

Until the performance of the obligation to return the aid by the beneficiary, i.e. the time of repaying all receivables (amount of aid together with interest and possibly other costs), no other aid can be provided to that beneficiary.

Admissibility of the Commission decision on the return of aid is limited in time. Under Article 15(1) of the Regulation No 659/1999, this right can be implemented within 10 years. Beginning of this period is set by the date on which the illegal aid was granted to the beneficiary.

Compulsory recovery of an amount equivalent to the granted aid together with interest is carried out respectively under the provisions for administrative enforcement proceedings or under the provisions on judicial enforcement proceedings.

It should be noted that an undue contribution from public funds shall be subject to return **regardless of whether caused by the body granting the aid or the beneficiary.** Even in situations where the beneficiary does not take blame for the fact of unlawfully granted aid, all the support needs to be returned by the date specified in the decision of the Commission or the competent state authority executing the decision of the Commission, in accordance with the conditions of return set out in the decision, together with interest from the date of granting the aid.

Such situation can occur for example if the entity granting the aid, by the negligence (lack of knowledge, insufficient check) considers that the aid granted to entrepreneur does not constitute state aid, and the subsequent decision of the Commission finds that the entrepreneur in fact had been granted state aid.

Of course, the same principles apply when the recipient deliberately misled the entity granting the aid - or even did not do this deliberately, but by negligence (e.g. where an entrepreneur has stated that at the date of signing the contract he had the status of SME, and in fact he never had such status or lost it).

15. Obligations of the state aid beneficiary

This part will discuss the following issues:

- Reporting obligations
- Archiving obligations
- Control obligations
- Obligations to provide information
- Obligation to return the aid

Reporting obligations. With regard to reporting, state aid beneficiaries are not subject to any obligations.

Until April 2007 the Act on the procedural issues concerning state aid imposed on public entrepreneurs (and certain other public bodies) who benefit in the scope of their business activity from exclusive or special rights, or performing public functions receive state aid, the obligation of reporting. However, following the entry into force of the Act on transparency of financial relations between public bodies and public entrepreneurs and on financial transparency of certain entrepreneurs, those provisions of the Act on the procedural issues concerning state aid have been repealed, which means the removal of the obligation to submit reports on granted state aid by these entrepreneurs and by those bodies. The new Act on transparency imposes new reporting obligations, identifying two categories of entrepreneurs obliged to report (the entrepreneur with special or exclusive rights and the entrepreneur performing services of general economic interest and the public entrepreneur), which will not be discussed here in detail.

Once required reports prepared by beneficiaries of state aid have been replaced in recent years by a system of information for aid granting entities about the state aid which those beneficiaries have received (but only for the given costs and not on state aid received at any time) or by a system of collection and presentation of declarations on received *de minimis* aid (or *de minimis* aid in agriculture and fisheries, but this aid is excluded in the OP IE). Let us recall once more: the entity applying for *de minimis* aid is obliged to present the entity granting the aid an application for granting aid along with:

(1) all declarations on *de minimis* aid it has got in the year in which it applies for aid, and within preceding 2 years or a statement on the volumes of *de minimis* aid received in this period;

(2) statements on the amount and allocation of state aid received for the same eligible costs.

Whereas the entity applying for aid other than *de minimis* aid is required to submit to the entity granting the aid, along with an application for co-financing, the information on received state aid, containing in particular an indication of the day and the legal basis of its granting, form and purpose, or information about non-receipt of aid.

Until the time the entity applying for aid submits declarations, statements or information on granted aid or aid for which it applies, no aid can be granted to this entity.

Archiving obligations. The law imposes an obligation on the beneficiary to archive documentation related to granted state aid, including the *de minimis* aid for the period of 10 years from the date of grant, i.e. from the date of signing the contract on co-financing. This obligation is imposed on both the aid granting entity and the entrepreneur who is the recipient of state aid and *de minimis* aid.

Taking into account these obligations, the model contracts for each of the OP IE measures were introduced with provisions on the obligations for the retention of documentation relating to the project, and therefore - to the granted aid. The agreement, which will be signed by an entrepreneur, there will be a provision requiring the beneficiary to retain "in a way that ensures adequate security of information, all data and documents related to the project, in particular the documentation relating to financial and technical management, contractual procedures with contractors, within the period of at least 10 years from the date of contract entry into force".

Control obligations. In accordance with the provisions of the Act on the procedural issues concerning state aid, each beneficiary of state aid is required to submit to inspections by authorized entities. The control concerns of course the granted state aid or *de minimis* aid. If the beneficiary objects to the inspection, the President of the OCCP may be assisted by officers of the governmental authorities that are authorized to carry out the inspection or officers of the Police units with jurisdiction over the seat of the beneficiary.

Much more detailed provisions regarding the control can be found in the contract on co-financing under the OP IE. According to the model contract, a beneficiary who has received support from the OP IE, undertakes to submit to inspections in the scope of the implemented contract, carried out by: the managing authority, the intermediate body, the implementing authority, the certifying authority, the audit institution, the European Commission, or other institution authorized to carry out checks on the basis of separate regulations or mandates, and provide, at the request of these institutions and the European Court of Auditors, all documentation related to the Project and the implemented Contract. The beneficiary must provide all explanations and information regarding the implemented project at the request of the inspection body. Controls may be carried out at any time during the implementation of the project and its durability period (3 or 5 years). Controls may be carried out both at the seat of the beneficiary and at the project site, and refusal to submit to inspection or obstructing its conduct constitutes grounds for termination of the contract with immediate effect. Controls are always announced - at least 5 days before the control, the institution intending to carry out the control sends a written notice to the entrepreneur about the planned control.

After the control has been carried out, the inspection body formulates recommendations, which should be implemented by the inspected entrepreneur in the scope and within the time described by the inspection body.

These provisions do not apply, however, to the inspection of the state aid in the strict sense of the word, and directly, because they are carried out even if the aid was not granted for the project, only the support which is not state aid was granted. Nevertheless, these provisions are important enough to mention them here.

Obligations to provide information. These obligations are set out in three acts:

(1) the Act of 30 April 2004 on the procedural issues concerning state aid,

(2) the Ordinance of the Council of Ministers of 20 October 2007 concerning declarations on *de minimis* aid and *de minimis* aid in agriculture and fisheries,

(3) the Ordinance of the Council of Ministers of 20 March 2007 on information about the received state aid and information about failure to obtain aid,

The Article 39(1) of the Act states that the beneficiary of aid (the one that has already received aid, both *de minimis* and State Aid) and the entity applying for aid (i.e. the applicant) are obliged to provide information about their state aid to the President of the OCCP or to the entity granting the aid - at their request, to the extent and within time limits specified in the request. This time limit may not be shorter than 30 days, unless the information on granted aid is requested by the Commission.

This provision gives – especially to entities granting the aid – a general basis to **ask questions and seek clarifications, documents and answers** in matters related to state aid for which an entrepreneur applies or which was already received. The time limit specified for answering questions or submitting documents or explanations, in general, should not be shorter than 30 days. If the entity granting the aid raises the question under this procedure, provided for in Article 39(1) of the Act, it should clearly indicate this in a letter directed to the applicant or the beneficiary. To the question raised under this procedure the applicant or the beneficiary must provide true and accurate explanations and information, under pain of refusing the support or the necessity of returning the granted support.

The other two acts (as indicated above in points 2 and 3) and the resulting obligations of providing information (on the received state aid or on not receiving state aid or on the received *de minimis* aid or *de minimis* aid in agriculture or fisheries submitted in the form of declarations or statements) are discussed in Chapter 13, relating to *de minimis* aid.

Obligation to return the aid. These obligations are discussed in Chapter 14 of the guide.

STATE AID UNDER OPERATIONAL PROGRAMME INNOVATIVE ECONOMY - SPECIFICATION

No.	Aid programme – Act of national law	Measure in OP IE	Legal basis in EU law	Purpose / type of aid
1.	Ordinance of Minister of Regional Development of 7 April 2008 on granting financial aid under Operational Programme Innovative Economy 2007-2013 by Polish Agency for Enterprise Development (Dz. U. No 68, item 414).	1.4	800/2008	Aid for entrepreneurs (SMEs and large entrepreneurs) for research, development and innovation, to be used for purposes of industrial research and development works, the first stage of the goal-oriented project
		3.1	1998/2006	I level of support: to entity conducting activity for innovation – no state aid II level of support – SMEs: *de minimis* aid, for the purpose of acquisition of shares and transfer of fixed assets and intangible assets to the entrepreneur.
		3.3	800/2008	I level of support: to entity conducting activity for innovation – no state aid II level of support – SMEs: aid for consultancy with the purpose of purchasing advisory services in relation to preparing documentation and analyses necessary for acquiring external sources of financing based on participation, in order to implement innovative undertakings.
		4.1	800/2008	Regional aid for new investments for the entrepreneur, to be used to implement the results of industrial research and development works carried out under measure 1.4; the second stage of the goal-oriented project. Aid for consultancy services for SMEs
		4.2	800/2008 1998/2006	Regional aid for investments (all entrepreneurs) Aid for consultancy services for SMEs Aid for specific training (all entrepreneurs) *De minimis* aid (intended for consultancy, only for large entrepreneurs).
		4.4	800/2008	Regional aid for investments (all entrepreneurs) Aid for specific training (all entrepreneurs) Aid for consultancy services for SMEs
		5.1	800/2008 1998/2006	I level of support: for the coordinator of the cooperative relation – no state aid II level of support: for the entrepreneur who is a member of the cooperative relation: - aid for consultancy in accordance with Regulation 800/2008 for SMEs, the *de minimis* aid for large entrepreneurs in accordance with Regulation 1998/2006 - specific training in accordance with Regulation 800/2008 - *de minimis* aid in the scope of using by an entrepreneur – member of the cooperative relation of services, materials, intangible assets, fixed assets and equipment purchased or produced by the coordinator of the cooperative relation under the project in accordance with Regulation 1998/2006.

		5.2	1998/2006	I level of support: to entity conducting activity for innovation – no state aid II level of support: for the entrepreneur who uses the services provided by the entity conducting activity for innovation, previously supported by public funds - *de minimis* aid under Regulation 1998/2006
		5.4	800/2008	Aid for SMEs, in accordance with Regulation 800/2008, is granted for the purpose of covering the cost of industrial property rights in respect of: obtaining the protection of industrial property rights and covering the cost of the protection of industrial property related to conducted economic activity
		6.1	1998/2006	Aid for SMEs; (1) advisory assistance for the preparation of export development plan in accordance with Regulation 1998/2006 (2) aid for the implementation of export development plan in accordance with Regulation 1998/2006
2.	Ordinance of the Minister of Economy of 15 June 2007 on financial support granted by the National Capital Fund (Dz. U. No 115, item 796).	3.2	Community guidelines on State aid to promote risk capital investments in small and medium-sized enterprises (OJ.EU.C. 06.194.2).	(1) support to NCF individual project (I level of support), (2) support for risk capital funds by the NCF (II of level support) Aid for risk capital
3.	Act of 30 May 2008 on some forms of support for innovative activity (Dz. U. No 116, item 930).	4.3	1628/2008 70/2001	(Aid for SMEs only): Regional aid for new investments Aid for consultancy
4.	Ordinance of the Minister of Economy of 2 April 2008 on granting financial aid for investments of high importance to the economy under Operational Programme Innovative Economy 2007-2013 (Dz. U. No 61, item 379).	4.5	1628/2006 800/2008 1998/2006	Regional aid for new investment (1628/2006; all entrepreneurs) Aid for specialist training (800/2008; all entrepreneurs) Aid for consultancy (for SMEs – under 800/2008; for large entrepreneurs – under 1998/2006)
5.	Ordinance of the Minister of Regional Development on granting financial aid	5.3	800/2008 1998/2006	**I level of support: for innovation centres - no state aid** II level of support: (1) aid for consultancy - in the case of SMEs, according to Commission Regulation (EC) No 800/2008, - in the case of large enterprises in accordance with Commission Regulation

	for Measure 5.3 Support for innovation centres of the Operational Programme Innovative Economy 2007-2013 by the Polish Agency for Enterprise Development (draft).			(EC) No 1998/2006 on *de minimis* aid (2) training aid (general and specific training) - aid for training in accordance with Commission Regulation (EC) No 800/2008; (3) in the scope of the rest of the activities referred to in the ordinance consisting in the provision by the innovation centre for the benefit of an entrepreneur of research and development services, sale of intangible assets and services concerning the lease or rent of real estate or the technical infrastructure for the conduct by an entrepreneur functioning within the innovation centre, of research, development or innovation activities - in accordance with Commission Regulation (EC) No 1998/2006 on *de minimis* aid.
6.	Ordinances of the Minister of Sport and Tourism (drafts): **(1) on detailed allocation, conditions and procedure of granting State aid in the scope of regional investment aid and de minimis aid under the Operational Programme Innovative Economy, 2007-2013** (2**) on detailed allocation, conditions and procedure of granting State aid in the scope of supporting culture and cultural heritage under the Operational Programme Innovative Economy, 2007-2013**	6.4	800/2008 1998/2006 TEC	Aid for all entrepreneurs: - regional aid and *de minimis* aid intended to support projects in the area of tourism, with the exception of support for the creation of accommodation and catering facilities in accordance with Commission Regulation (EC) No 800/2008 and No 1998/2006 (1) - aid to promote culture and cultural heritage, notified to the European Commission under Article 87(3)(d) of the Treaty establishing the European Community (2)
7.	Ordinance of the Minister of Regional Development of 22 August 2008 on granting financial aid for the support of the creation and development of e-Commerce under the Operational Programme Innovative Economy 2007-2013 by the Polish Agency for Enterprise Development (Dz. U. No 153, item 956).	8.1	1998/2006	Aid only for micro and small entrepreneurs, according to the principle of *de minimis*
		8.2	800/2008 1998/2006	Aid for SMEs: - regional aid for investments, for the acquisition of intangible assets (purchase and lease) and the purchase of new and used fixed assets - aid for consultancy, to be used for the acquisition of preparatory studies and expert and advisory services related to the project - aid for training intended for the purchase of specific training - *de minimis* aid in respect of expenditure on implementation of information and promotion activities, as well as in the scope of the expenditure on salaries for persons involved in the project

8.	Ordinance of the Minister of Interior and Administration of 29 October 2008 on granting financial aid by the Implementing Authority for European Programmes for provision of a broadband access to the Internet under the Operational Programme Innovative Economy 2007-2013 (Dz. U. No 204, item 1280).	8.4	800/2008	Aid for SMEs only: for investments, employment, specific training - in accordance with Regulation 800/2008.