



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

**European Union**  
European Regional Development Fund



# STATE AID PRESENTATION WITHIN INTERREG V-A ROMANIA - HUNGARY

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# STATE AID CONCEPT

## EU CATEGORIES OF REGULATIONS

- ✚ Treaty on the Functioning of the EU;
- ✚ Regulations in the field of state aid;
- ✚ Guidelines in the field of state aid;
- ✚ EC communications in the field of state aid;
- ✚ EC instructions in the field of state aid;
- ✚ EC decisions;
- ✚ EC jurisprudence.

**The EU Regulations are directly applicable in Romania**

# PROVISIONS FROM TFEU

## **Article 107 (former 87):**

(1) Except for the derogations foreseen by the current Treaty, there are incompatible with the internal market those aids granted by states or through state resources, under any form, which distorts or threaten to distort competition by favouring certain undertakings or certain production sectors, to the extent they affect trade exchanges among Member States.

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# NATIONAL STATE AID REGULATIONS

- ✚GEO nr. 77/2014 on national procedures in the field of state aid;
  - ✚Law no. 346/2004 on stimulating the establishment and development of SMEs – for the definition of SMEs.
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## State aid definition

### Criteria :

- A. Economic advantage granted to undertakings;
- B. State resource;;
- C. selectivity;
- D. Distorts competition;
- E. Distorts EU trade.

**There is state aid incidence when all 5 criteria (A to E) are cumulatively fulfilled.**

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# Economic advantage

- ✚ transfer of public funds (subsidies) by the state;
- ✚ renouncing revenues by the state:
  - ➔ annulment of debts/loss takeover;
  - ➔ exemptions/reductions/postponements from the payment of duties and taxes;
  - ➔ provision of loans at preferential rates;
  - ➔ guarantees granted by state under preferred terms;
  - ➔ state capital participations, in case the profit rate of these investments is lower than the normal one;
  - ➔ reductions of price for the goods provided and services rendered (including sale of lands belonging to the private domain of the state or to the local public authorities, below market price);
- ✚ market creation to a supplier of goods/services.

# Economic advantage - I

The analysis of economic advantage is tightly connected to the idea of “undertaking”:

*Undertaking: Any entity which exercises an activity of an economic nature and which offers goods and services in competition (actual or potential) with other operators active in the market. This includes all private and public firms and the entirety of what they produce.*

*In this respect, it is not the legal aspect (public or private) but the nature of the activities that the project partnership intends to implement that determines whether the state aid discipline has to be respected or not.*

# Economic advantage - II

The analysis of economic advantage is tightly connected to the idea of “undertaking”:

*Non-profit entities can offer goods and services on a market too. EC opinion: Admittedly, municipalities and local authorities are not normally regarded as undertakings. But even though they may carry out a range of public tasks and exercise public power, they can, according to the ruling given by the Court of Justice, be regarded as undertakings if they carry out an economic activity in the market.*



# Economic advantage - II

The analysis of economic advantage is tightly connected to the idea of “undertaking”:

An economic activity can exist where other operators would be willing and able to provide the service in the market concerned.

A first clear distinction between *the beneficiary of programme funds (applicant)* and *the beneficiary of the activities (final beneficiary)* has to take place, in the light of the above. In case such effects occur, it will be the responsibility of the EU funding provider to establish a state aid scheme.

# State source

- ✚ State budget;
- ✚ other budget sources managed by the state (including EU funds);
- ✚ local budgets;
- ✚ budgets of state institutions/state authorities/managed by the state organised at national or local level;
- ✚ state run banks;
- ✚ investment funds run by the state.

ESFI represent state own resources and are directly imputable to it, which means that the rules also apply to EFSI

**The funds belong to the state or are managed by the state**

# Selectivity

**Selective measure** – granting economic advantage limited to one undertaking, to a limited number of undertakings or economic sectors.

**General measure** – the economic advantage is granted to an unlimited number of undertakings.



# Competition distortion

- ✚ an open market for competition is key;
- ✚ granting facilities in the market where there are legal monopolies does not involve granting state aid;
- ✚ in case of investments in infrastructure, state aid elements have to be analysed at the level of infrastructure element administrators.
- ✚ competition exists within the EU;
- ✚ lack of competitors in the internal market does not necessarily mean that there is no competition at European level;



# Competition distortion

✚ State aid definition does not imply that the distortion of competition or the effect on trade is significant or material. The fact that the state aid value is low or the beneficiary is a small undertaking will not exclude per se a distortion of competition or a threat.

✚ Competition in the market has to be described, including any legal requirements as to whether the respective undertaking is able to do its activities, now or in the future, in other markets (to expand).  
(Example: the same undertaking provides heating and electricity services)



# Intermediary conclusions

- ✚ Generally speaking, in case of ETC projects, the four conditions related to public fund transfer, competition distortion and trade distortion are fulfilled on cumulative bases. The reference is here made as against the five principles generally described
- ✚ The difference comes from the analysis of economic advantage, in the sense of using local impact or services of general economic interest
- ✚ The Altmark conditions apply, as described further on - the cumulative fulfillment of these requirements excludes the state aid, they refer only to activities associated to a public service
- ✚ Indirect advantage and the difference between the beneficiary and final beneficiary remain important, which means the difference between the applicant and the final beneficiary of activities.

# LOCAL IMPACT- SPECIFIC TO EUROPEAN TERRITORIAL COOPERATION

In order to be able to fulfil the conditions related to local impact – which is generally the situation most desirable and most common for ETC project:

- (a) the aid does not lead to demand or investments being attracted to the region concerned and does not create obstacles to the establishment of undertakings from other Member States;
  - (b) the goods or services produced by the beneficiary are purely local or have a geographically limited attraction zone;
  - (c) there is at most a marginal effect on the markets and on consumers in neighbouring Member States.
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# State aid and EU funds

## DIRECT / INDIRECT STATE AID

✚ **DIRECT STATE AID**—refers to the economic advantage conveyed directly to the undertaking which is under contract with the state or which enjoys any support provided from state resources;

✚ **INDIRECT STATE AID**—refers to the economic advantage that a third part enjoys as an effect of state aid provision (example: Business incubators: grant to the owner, advantage for the incubated companies (lower rent, lower fees for different services such as, accounting, legal counselling, consultancy)



# STATE AID AND INFRASTRUCTURE

## State aid can be at the following levels:

- ✚ Owner of infrastructure;
- ✚ constructor of the infrastructure;
- ✚ administrator of the infrastructure;
- ✚ final final user – please see the initial remark between applicant and final beneficiary, namely the applicant is the one asking for financing and the final beneficiary is the one to the benefit of whom the project is implemented, and which may enjoy a better position as against the others

**at the owner level –**

## Possible situations:

- ✚ infrastructure is used, exclusively, for non-economic activities;
  - ✚ infrastructure is exclusively used for economic activities;
  - ✚ infrastructure is used for both economic and non economic activities.
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# STATE AID AND INFRASTRUCTURE

## STATE AID AT THE CONSTRUCTOR LEVEL

The state aid elements are excluded, at the level of the constructor of infrastructure, if the public works contract is granted through public, open and unconditional tender, in line with the national and EU legislation in the field of public procurement.

# State aid at the level of administrator

State aid elements are excluded, at the level of the infrastructure constructor (which is generally different from the administrator), if the administration of infrastructure is granted through a public, open and non conditional tender which follows the provisions of the national and EU legislation in the field.

The public, open and unconditional tender procedure secures the payment of a market price for the administration of the infrastructure.

For the user: a) free access applies, b) the use at the market price.

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# *Services of General Economic Interest (SGEI) - I*

**According to the above mentioned, in case of a public service, the idea is to cumulatively fulfill the four Altmark conditions, which are further on described. In the state aid theory, Altmark criteria refer to SGEI.**

The concept of SGEI appears in Articles 14 and 106(2) TFEU and in Protocol No 26 to the TFEU, but it is not defined in the TFEU or in secondary legislation.

- The Court has established that SGEIs are services that exhibit special characteristics as compared with those of other economic activities:
- Services are not and cannot be satisfactorily provided by the market “under conditions such as price, objective quality characteristics, continuity and access to the service, consistent with the public interest, as defined by the State” (Example: broadband sector)
- Addressed to citizens or in the interest of society as a whole

**If all four Altmark criteria are fulfilled, then there is no state aid incidence.**

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The concept of SGEI appears in Articles 14 and 106(2) TFEU and in Protocol No 26 to the TFEU, but it is not defined in the TFEU or in secondary legislation.

The European Court of Justice held that public service compensation does not constitute State aid when four cumulative conditions are met (Altmark criteria):

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

Where at least one of the Altmark conditions is not fulfilled, the public service compensation will be examined under State aid rules.

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## *Services of General Economic Interest (SGEI) - II*

The service has to be defined through means of a normative act: Law, Ordinance, Emergency Ordinance, Government Decision, Local Council Decision)) through which the state entrusts an undertakings with the obligation to perform the defined SGEI.

A decision by a regional public authority, with binding legal force under national law, that defines (a) the nature and duration of the public service obligations, (b) the undertaking or undertakings entrusted with these obligations and the territory concerned, (c) the nature of any exclusive or special rights granted to the undertaking(s), (d) the parameters for calculating, controlling and reviewing the compensation, and (e) the arrangements for avoiding and repaying any overcompensation may constitute an act of entrustment within the meaning of the Decision.

These decisions (legal documents) are to be considered at the level of each project, on a case basis depending on the act.

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# *Services of General Economic Interest (SGEI) - III*

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

Such a study should cover the following topics:

- a breakdown of estimated costs needed to run the business in an efficient way. Therefore, comparison with well – run companies is needed.
  - a market study showing the demand for the service, the conditions in which the service would be required by the potential customers, in terms of schedule, tariffs, etc.
3. the compensation cannot exceed what is necessary to cover all or part of the costs incurred in the discharge of the public service obligations, taking into account the relevant receipts and a reasonable profit;
  4. Where the undertaking which is to discharge public service obligations is not chosen pursuant to a public procurement procedure which would allow for the selection of the tenderer capable of providing those services at the least cost to the community, the level of compensation needed must be determined on the basis of an analysis of the costs of a typical well-run company.
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Where the undertaking which is to discharge public service obligations is not chosen pursuant to a public procurement procedure which would allow for the selection of the tenderer capable of providing those services at the least cost to the community, the level of compensation needed must be determined on the basis of an analysis of the costs of a typical well-run company.

For the 3rd and 4th requirement, an independent audit of the financial statements on the basis of which the compensation shall be granted should be required. The audit should also cover the opportunity and efficiency of costs and revenues.

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## OTHER GENERAL CONSIDERATIONS- I

- All expenditure must be made according to the relevant laws on public procurement in force at the time of the grant award. This condition applies to **all** partners (e.g. public administration bodies, NGOs). The procurement procedure (performed by either Romania/Hungarian partners) has to be open (to allow all interested and qualified bidders to participate in the process), transparent, sufficiently well-publicized, non-discriminatory and unconditional. When a tender procedure complies with these principles, it can be presumed that the transactions are in line with normal market conditions. For direct procurements the market price level is observed (try to refer to any well-known suppliers available at national level - print screen from websites are accepted and recommended). This is based on international practice and technical assistance study
- All studies or other results of the non-investment research and development projects shall be made available for free to all interested individual or legal persons, in a non-discriminatory way.

## OTHER GENERAL CONSIDERATIONS- I

In the cases involving research (this example is a general one, for guiding principles to be illustrated) if the results of the research are made available to a limited number of undertakings there might be a selective economic advantage granted to those undertakings. In order to avoid the selectivity issues in such a case ensuring a sufficient promotion of the results, by means of publication in speciality magazines and/or on the project's web page. Public funding of research databases or any other infrastructure used for dissemination of research results with an open and non-discriminatory access to all users can be regarded as a non-economic activity. If the infrastructure capacity (e.g. equipment and laboratories) is occasionally rented out to industrial partners or if the research organisation uses in part its infrastructure to perform contract research on behalf of industry (all profits from economic activities are reinvested into the non-economic activities, the research organisation provides an open and non-discriminatory access to the infrastructure).

## OTHER GENERAL CONSIDERATIONS- II

- All studies or other results of the non-investment research and development projects must be made available for free to all interested individual or legal persons, in a non-discriminatory way in order not to be considered an economic advantage.
- A service that is paid at market price is not conveying an *advantage*.
- The projects that have as results research, IT tools/software and/or if training is involved, competing undertakings in the relevant market will be able to/can use the project output (e.g. ICT tool/software, training course) in the same way and under the same conditions as the lead partner, any of the project partners or the end users of the project.
- The tender process shall give rise to a sufficient level of competition to be qualified as a competitive tender process.

# OTHER GENERAL CONSIDERATIONS - IV - PER IP

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

- Considering that non-governmental entities are among the target beneficiaries, it is recommended that a partnership is set up with public entities and the rights for future use of the investment are transferred to the public entity in order to provide general free access.
  - The contract for the infrastructure has to take place based on an open tender process for the selection of the entity, construction and operation)
  - A large free dissemination of results is recommended
  - "Polluter pays" principle has to be taken into account. In case of historic pollution, where the polluter can no longer be identified, this will be specified, otherwise the principle applies and there is state aid
  - The access has to be general and on free basis
  - The Altmark criteria shall be taken into account, in keeping with the previous explanations: when all 4 Altmark criteria are fulfilled, then we do not have state aid
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# OTHER GENERAL CONSIDERATIONS - V - PER IP

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

The local impact concept could apply here. Details on the approach for “local impact”, in relation to which projects are request to provide details:

In case of CBC projects, “local impact” is of interest in relation to state aid. Thus, in order to assert a local nature of a project, the following characteristics have to be fulfilled:

- that the goods or services produced by the beneficiary are purely local or have a geographically limited attraction zone;
- that there is at most marginal effect on the markets and, in particular, on consumers in neighboring Member States; and
- the market share of the beneficiary is limited

If the project states that the activities developed here will not affect competition (not diverting the flow of tourists from other destinations), then a study has to be provided. This study should demonstrate that the incoming tourists were visiting the respective destinations not as a target but due to visiting them as part of a tour.

## OTHER GENERAL CONSIDERATIONS - IV - PER IP

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## OTHER GENERAL CONSIDERATIONS - IV - PER IP

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

- The access has to be general and on free basis
- Infrastructure construction: the operator has to be selected through a tender and the construction has to take place at the market value. If for any reasons, after the rehabilitation of a cultural or historic infrastructure, a decision is made as to entrust its operation to a different operator with the aim of increasing its efficient operation, then the following cumulative conditions have to be met in order to avoid state aid: selection of the operator through tender, the operator to pay a fee proportional to the infrastructure value and the usage duration and the service has to be granted at market price.

## OTHER GENERAL CONSIDERATIONS - IV - PER IP

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

- In relation to the thematic routes envisaged: they have to preserve a general nature, without providing any economic advantage to various entities that may exist along the route
- The roads envisaged for providing and facilitating access to the natural and cultural heritage: they need to serve a strategic purpose, based on local strategies (the avoidance of state aid is tightly connected to unrestricted access)
- In case of tourist access to the natural local parks, if the access is granted based on tickets (fees), the total amount thus resulted must not exceed 20% of the entire economic activity
- Any studies developed for tourist promotion have to be developed following the tendering process of the one responsible for the study and then the availability of the results of the studies to the local administration (in order to cancel any ownership rights that would lead to state aid)
- Specific cases of religious objectives: after rehabilitation, they cannot have rental activities for accommodation and hospitals (these are economic activities), thus state aid.

**As a general rule, if the a/m cannot be applied in whole, one has to have below 20% of the economic activity (out of the cumulated activities of the entity), applicable for tourism – culture and for R&D – based on the EC Communication.**



## OTHER GENERAL CONSIDERATIONS - VI- PER IP

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

- Provided that the projects focus on infrastructure, there should be no state aid involved, as long as the infrastructure is provided on a non-discriminatory basis (see the above mentioned aspects on the 5-step methodology for state aid assessment). The applicant and project partnership are asked to provide explanations for the 5 criteria.
- Conditions for the projects dealing with studies: open and non -discriminatory public tender (the announcement has to be published in largely circulated media during at least one month and a sufficient number of offers has to be received)
- Considering that non-governmental entities are among the target beneficiaries, it is recommended that a partnership is set up with public entities and the rights for future use of the investment are transferred to the public entity in order to provide general free access.

## OTHER GENERAL CONSIDERATIONS - VII - PER IP

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

- The existence of state aid is excluded where the State acts by exercising public power or where authorities emanating from the State act in their capacity as public authorities. Any entity may be deemed to act by exercising public powers where the activity in question is a task that forms part of the essential functions of the State or is connected with those functions by its nature, its aim and the rules to which it is subject. Generally speaking, unless the Member State concerned has decided to introduce market mechanisms, activities that intrinsically form part of the prerogatives of official authority and are performed by the State do not constitute economic activities. Examples are activities related to: the army or the police; air navigation safety and control; maritime traffic control and safety; anti-pollution surveillance and the organisation, financing and enforcement of prison sentences.
- The contract for the infrastructure has to take place based on an open tender process for the selection of the entity, construction and operation)
- Altmark criteria applies
- Bicycle roads: free for all users

## OTHER GENERAL CONSIDERATIONS - VII - PER IP

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- Considering that non-governmental entities are among the target beneficiaries, it is recommended that a partnership is set up with public entities and the rights for future use of the investment are transferred to the public entity in order to provide general free access.
- The contract for the infrastructure has to take place based on an open tender process for the selection of the entity, construction and operation)
- A study to demonstrate that tickets are sold at market value
- Any sale has to be based on market value
- A large free dissemination of results is recommended
- The access has to be general and on free basis
- The roads envisaged for providing and facilitating access to the natural and cultural heritage: they need to serve a strategic purpose, based on local strategies (the avoidance of state aid is tightly connected to unrestricted access)
- Studies: tendering of the provider and dissemination or its provision to the local authorities

## OTHER GENERAL CONSIDERATIONS - VIII - PER IP

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

- Considering that non-governmental entities are among the target beneficiaries, it is recommended that a partnership is set up with public entities and the rights for future use of the investment are transferred to the public entity in order to provide general free access.
- The roads envisaged for providing and facilitating access to the natural and cultural heritage: they need to serve a strategic purpose, based on local strategies (the avoidance of state aid is tightly connected to unrestricted access)
- The studies shall be developed by conducting the tender in keeping with the rules for the selection of the project partner
- The local impact concept could apply here. Details on the approach for “local impact”, in relation to which projects are requested to provide details:

## OTHER GENERAL CONSIDERATIONS - VIII - PER IP

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

- In case of CBC projects, “local impact” is of interest in relation to state aid. Thus, in order to assert a local nature of a project, the following characteristics have to be fulfilled:
  - that the goods or services produced by the beneficiary are purely local or have a geographically limited attraction zone;
  - that there is at most marginal effect on the markets and, in particular, on consumers in neighboring Member States; and
  - the market share of the beneficiary is limited

## OTHER GENERAL CONSIDERATIONS - VIII - PER IP

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

Any possible roads must serve a strategic purpose, based on local strategies (in line with the unrestricted access, a correlation has to take place between the objective of the programme and the project in order to fulfil this condition as much as possible)

Large dissemination of activities

Training activities: supplied on individual bases

If the local people wish to participate with products in the events, they have to pay a fee at the market value or to participate in individual capacity, otherwise there is state aid

The use of a promotional space is to take place against a market value fee

## OTHER GENERAL CONSIDERATIONS - IX- PER IP

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

- In order not to have state aid, considering the principle that substantiates the funding of hospitals, it has to be proved that such hospitals (included) in the rehabilitation have a local impact (local scope). See above how the concept “local impact” applies.
- Free and non-discriminatory access has to be considered
- In case an NGO participates in project proposals under this IP, it is recommended that the NGO shall focus on promotion activities in relation to health and health care, in keeping with the objective of the IP
- A large free dissemination of results is recommended
- The roads envisaged need to serve a strategic purpose, based on local strategies (see also the note from the Guide, which specifies that the construction of roads cannot be financed as such but to serve the objective, in line with the previous explanations related to the correlation between specific and general purpose)
- Training activities: a) they have to take into consideration the idea of being provided on individual basis, b) they must not be provided as to substitute the obligation of the undertaking to provide the training Any health service developed has to observe the requirement of serving a social health objective.

## OTHER GENERAL CONSIDERATIONS - X - PER IP

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

- The type of actions foreseen under this IP refers to public prerogatives, dedicated to citizens, which do not imply state aid. This has to be clearly detailed within the project proposal. See above the definition for legal monopoly
- In case an NGO participates in project proposals under this IP, it is recommended that the NGO shall focus on awareness - raising activities in relation to risks and disaster resilience, in keeping with the objective of the IP
- Since acquisitions are foreseen here, please see above the details asked for the organization of the tender in order to avoid state aid
- After acquisition take place, then a tender following the same principles has to take place. Any transfer of rights to use the equipment has to be accompanied by the payment of a fee at market value, including the tendering.
- Transfer of ownership rights on project outcomes (such as maps and databases) to authorized state entities is recommended
- A large free dissemination of results is recommended



## OTHER GENERAL CONSIDERATIONS - XI- PER IP

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

- The type of actions foreseen under this IP refers to public prerogatives, dedicated to citizens, which do not imply state aid. This has to be clearly detailed within the project proposal. Legal monopoly as above applies (this should apply to the regulatory activities, needs assessment, models of institutional cooperation)
- See above the requirements for training: on individual basis and see also the requirements for the selection of the company to provide the tender (large public procurement)
- See also the “local concept” notions. For festivals: during their development, no promotional activities have to take place.
- In case an NGO participates in project proposals under this PA, it is recommended that the NGO shall focus on awareness - raising activities in relation to risks and disaster resilience, in keeping with the objective of the IP
- Transfer of ownership rights on project outcomes (such as maps and databases) to authorized state entities is recommended
- A large free dissemination of results is recommended

# Final remarks

A few examples of projects, where state aid analysis incidence takes place, shall be presented to the audience, as case studies.



**Thank you for your attention**

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**18.09.2015**

**INTERREG V-A ROMÂNIA - UNGARIA**

