



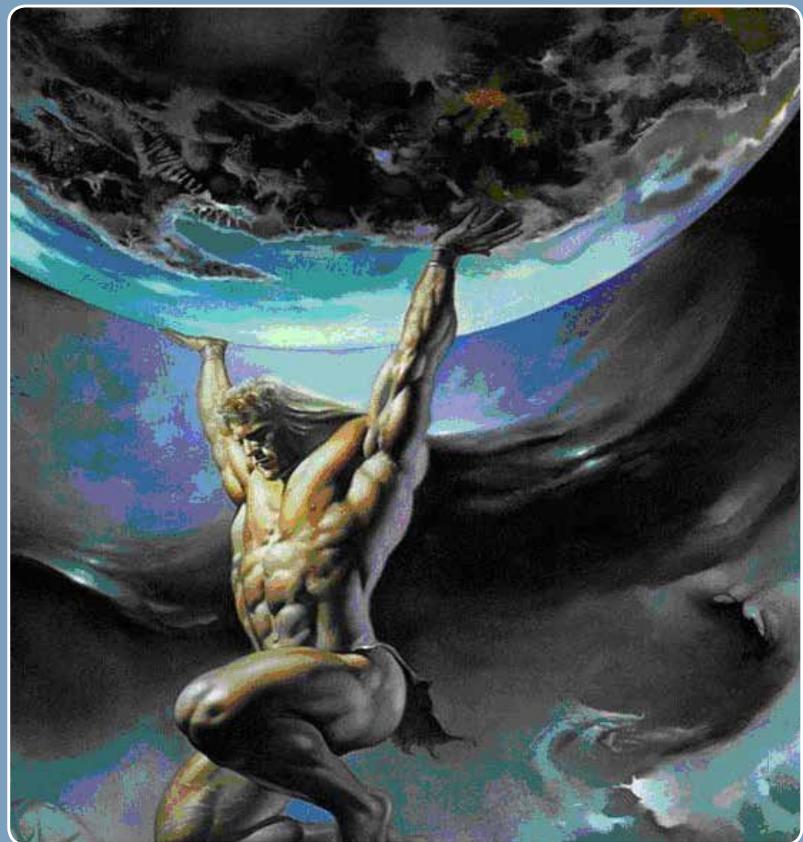
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DE MINIMIS

**Analysis of the Regulation and Practices
for Applying the State Aid and de Minimis Aid Rules
in Bulgaria and in Other EU Member States**



Bulgarian Centre for Not-for-Profit Law
Sofia, September 2014

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Analysis of the regulation and practices for applying the state aid and de minimis aid rules in Bulgaria and in other EU Member States

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List of abbreviations

APD	Agency for People with Disabilities
SACP.....	State Agency for Child Protection
EU.....	European Union
MH	Ministry of Health
MEE.....	Ministry of Economy and Energy
MYS.....	Ministry of Youth and Sports
CM.....	Council of Ministers
SME	Small and medium-sized enterprises
MLSP	Ministry of Labour and Social Policy
NGO	Non-governmental organization
NA	National assembly
NFM	Norwegian Financial Mechanism
OP	Operational Programme
OPHRD	Operational Programme Human Resources Development
EEAFM.....	European Economic Area Financial Mechanism
LP	Legal persons

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WHY IS THIS ANALYSIS IMPORTANT?

When we started working on this study, we received a lot of clarifying (even some startled) questions such as “What do *de minimis*, NGOs and their projects have in common?”, “We have never heard before about such a study about NGOs!”, etc. These were questions mainly by our counterparts from other countries whom we sent the questionnaires regarding the legal aspects of the comparative study. We were approached with fewer such questions by Bulgarian counterparts.

For us, the authors of this analysis, the answer in terms of Bulgaria is clear: hardly would a funding scheme for NGOs (mainly granted by the EU and the European Economic Area Financial Mechanism (EEAFM)¹) not apply the *de minimis* aid rule regardless of either the subject matter or the eligibility rules of the grant scheme – NGOs competing against businesses or only NGOs being eligible beneficiaries (usually because the “scheme” in question is targeted at the development of not-for-profit initiatives and projects), and regardless of the assessment whether the “grant”² finances economic or non-economic activity.

Some would argue that this rule is not an issue, being an “EU rule” we have to apply, which ensures equal treatment, protection of competition and the internal market, a rule that any operator across the EU is bound by. Yes, such an argument is valid as long as the rule is applied for the purpose of what it stands for, i.e. protection of competition in trade.

In the context of the Bulgarian legal and financial environment for the development of civil society organizations, it is worth noting two facts: a) financial support from grant schemes under the Operational Programmes and EEAFM is one of the main sources of NGO funding in Bulgaria, mostly for their non-economic activities, and b) almost all the schemes analyzed under these main funding sources abide by the state aid rules and the *de minimis* one, in particular. Therefore, this practice turns out to have the following objective impact: Bulgaria has a “ceiling” on the financing of NGO projects where public funds are used (even when NGOs aim at achieving goals of public importance by implementing non-economic projects). The ceiling stands at EUR 200,000 over a period of 3 fiscal years.

This assumption should be considered in light of the fact that for several years now the Bulgarian government has not provided state budget financing for NGO initiatives on a competitive basis; moreover, after the Strategy for Support of the Development of the Civil Organizations for 2012–2015 and the Vision on the setting up of a Financing Mechanism³ to it were adopted, no specific steps have been taken for their implementation.

If the hypotheses put forward in this analysis are proved, it will turn out, for instance, that in Bulgaria NGOs are passed over in favour of SMEs (the latter being, undoubtedly, involved in gainful operations), employers of people with disabilities, various educational organizations, museums and other entities that may be in a more favourable position due to financial support granted for specific economic initiatives (such support not being limited by a “ceiling”) in order to “promote” smart, sustainable and inclusive growth⁴ in the Community irrespective of setting competition at risk.

Subject

This analysis aims at studying the common EU regulation and practices for the application of the state aid and *de minimis* aid rules. The study examines both the legal framework and the practice in Bulgaria and in other EU Member States from the point of view of the state aid and *de minimis* aid rules applicable to grants for NGOs financed from public funds, including EU funds⁵.

The authors do not pursue a comprehensive review of the state aid mechanism at the EU level and its application in Bulgaria and other Member States, the focus being on a specific aspect, i.e. how the “law” (rules) regulates public funding for non-economic activities of NGOs, the practice in various states, and the challenges Bulgaria faces as of 2014 with regard to the application of the rules. The study aims at providing an answer to the question whether of the state of affairs stems from unequal treatment (and, hence, unfair) of Bulgarian NGOs or from the application of additional rules in order to ensure “transparency” and “clarity” in public funds spending, and, thus, protect competition.

¹ Total amount of the 2009–2014 Programme granted by EEAFM is EUR 11,790,000 (www.eufunds.bg/bg/page/792)

² Definition of *grant*: Bulgaria has no legal definition of the concept of grant. The terms often used are *subsidy*, *grant* or *project funding*. Only the State Budget Procedures Act lays down a legal definition of “budget subsidy” as the amount provided gratuitously from the state budget for a general or specific purpose.

³ The Strategy and the Vision were adopted by a Decision of the Council of Ministers, Minutes 33 of 5 Sept. 2012.

⁴ The goals of Europe 2020 Strategy.

⁵ The scope of the analysis will only cover grant schemes (direct gratuitous funding) without referring to the other forms of state aid such as interest rate subsidies, loans granted on preferential terms, state guarantees on loans, tax reliefs, reductions in social security contributions, the acquisition of goods or services by the undertaking provided by the state or municipalities on preferential terms, etc.

THE EU LEGAL FRAMEWORK

State Aid

The most important provisions establishing specific rules on state aid and its limits in the EU are laid down in the Treaty on the Functioning of the European Union (TFEU). Section 2 of Chapter 1 of TFEU on Aids granted by States, Articles 107-109⁶, contains the main provisions which serve as the foundation for the development of the EU secondary legislation in this area⁷.

“Article 107 (ex Article 87 TEC):

1. Save as otherwise provided in the Treaties, any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the internal market.”

General Rule

Pursuant to the Treaty, any aid granted by a Member State or through State resources in any form whatsoever which (*resource* Bulgarian author) distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the internal market.

It follows from the above that state aid is present where:

1. grant funding is present⁸, i. e. there is no purchase of goods and services delivered by public procurement;
2. the funding is granted by the state or through state resources;
3. the funding favours or may favour an undertaking or the production of certain goods compared to other goods that are placed on the same or a similar market (a selective advantage is conferred);
4. the funding as a result directly affects “trade between Member States”.

These conditions have to be present cumulatively (simultaneously) regardless of the legal form and goals of the recipient of the aid. What matters is that the activity carried out by the recipient of the aid (which activity is the subject of the funding in question) directly affects trade.

Possible exemptions

The Treaty provides for two cases of exemptions where the aid is granted by the state for activities that are important and are of common interest⁹:

1. the aid can be defined as “compatible” on the grounds of the provisions in the Treaty¹⁰;

⁶ The consolidated version of the Treaty on the Functioning of the EU.

⁷ 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, L 379, 28.12.2006, amended OJ, L 201, 04.08.2011) and Commission Regulation (EC) No 1860/2004 of 6 October 2004 on the application of Articles 87 and 88 of the EC Treaty to de minimis aid in the agriculture and fisheries sector.

⁸ Or the other forms of state aid listed above.

⁹ Several terms are used in the texts of the Treaty i.e. common economic interest, common interest and common European interest. While no explicit legal definitions are available, the terms can be interpreted based on the provisions of Articles 2 and 3 which define the explicit *common competence* (categories and areas) of the European Union. Some of the following provisions of the Treaty explicitly specify areas of common interest (common or exclusive competence).

¹⁰ Article 107 (2) of the TFEU defines some forms of aid (aid having a social character, aid to make good the damage caused by natural disasters or exceptional occurrences, etc.)

2. the aid can be defined as “compatible” by a decision of the EC¹¹ provided that it falls under one of the following categories:

- a) aid to promote the economic development of areas where the standard of living is abnormally low or where there is serious underemployment, and of the regions referred to in Article 349, in view of their structural, economic and social situation;
- 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 Union 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 on a proposal from the Commission¹².

The underlying logic is that despite the risk posed to the economy and fair competition, the common interest of the EU is more important, which requires, therefore, a special decision.

On application by a Member State, the Council may, acting unanimously, decide that aid which that State is granting or intends to grant shall be considered to be compatible with the internal market, in derogation from the provisions of [Article 107](#) or from the regulations provided for in [Article 109](#), if such a decision is justified by exceptional circumstances.

The competence of the EU regarding the application of Articles 107/108 has developed over the years within the frame of several regulations¹³ (*For the purpose of this analysis, the authors will not examine in detail the rules in the individual regulations but will focus on the latest two Regulations (2013 and 2014) while taking into account the main tenets and special rules of the legal framework developed over time*).

New categories of compatible aid

Commission Regulation (EU) 651/2014 (lays down general provisions regarding block exemptions approved on the grounds of Article 108 (4) and Article 109 of the TFEU) is the latest and most up-to-date Regulation regarding state aid and de minimis aid that entered into force on 1 July 2014 and will be effective until 2020. The expectations are that by means of this Regulation the EU will ensure improvement in terms of both law enforcement and simplification. What matters most is that the Regulation extends block exemption to cover the following aid categories: aid to make good the damage caused by certain natural disasters, social aid for transport for residents of remote regions, aid for broadband infrastructures, aid for innovation, aid for culture and heritage conservation, aid for sport and multifunctional recreational infrastructures¹⁴.

According to Recital 5 of the Regulation, *the general conditions* for the application of this Regulation should be defined on the basis of a set of common principles that guarantee that the aid serves a purpose of common interest (1), has a clear incentive effect (2), is appropriate (3) and proportionate (4), is granted in full transparency (5) and subject to a

¹¹ Adopted on the grounds of Article 107 (3).

¹² Article 107 (3) of the TFEU.

¹³ Regulations: Commission Regulation (EC) No 69/2001 of 12 January 2001 on the application of Articles 87 and 88 of the EC Treaty to de minimis aid (OB L 10, 13.1.2001, p. 30). 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 (OB L 379, 28.12.2006, p. 5). Case C-222/04, Ministero dell'Economia e delle Finanze/Cassa di Risparmio di Firenze SpA et al. [2006], ECR I-289. Case C-382/99, Kingdom of the Netherlands v Commission of the European Communities [2002], ECR I- 5163.

¹⁴ (21) As regards regional operating aid, regional urban development aid, aid for access to finance for SMEs, aid for the recruitment of disadvantaged workers, aid for employment of workers with disabilities and aid compensating for the additional costs of employing workers with disabilities, aid in the form of reductions in environmental taxes, aid to make good the damage caused by certain natural disasters, social aid for transport for residents of remote regions and aid for culture and heritage conservation, the requirement regarding the existence of an incentive effect does not apply or should be presumed as having been complied with, if the specific conditions set out for those categories of aid in this Regulation are fulfilled.

control mechanism and regular evaluation (6), and does not adversely affect trading conditions to an extent that is contrary to the common interest (7).

One of the forms of aid that is not subject under this new regulation to the Commission requirement regarding the existence of an incentive effect (or should be presumed as having been complied with, if the specific conditions set out for those categories of aid in this Regulation are fulfilled) is aid for small and medium-sized enterprises. According to Recital 40 of the Regulation, SMEs play a decisive role in job creation and, more generally, act as a factor of social stability and economic development ... To facilitate the development of the *economic* activities of SMEs, this Regulation should therefore exempt certain categories of aid when they are granted in favour of SMEs. Those categories should include, in particular SME investment aid and SME participation in fairs. (44) Start-up aid for small enterprises, aid to alternative trading platforms specialised in SMEs and aid for costs related to the scouting of SMEs should also be exempted from the notification requirement under certain conditions.

Recital 54 provides for similar treatment for certain categories of disadvantaged workers and workers with disabilities that still experience particular difficulties in entering and remaining in the labour market. For this reason, public authorities may apply measures providing incentives to undertakings to increase the levels of employment of these categories of workers, in particular of young people.

De Minimis Aid

Pursuant to **Regulation (EU) No 1407/2013**¹⁵ de minimis aid is such aid that due to its small size (the ceiling laid down in the Regulation) shall be deemed not to meet all the criteria in Article 107(1) of the TFEU and ultimately *does not lead* to distortion of the rules on competition. “The ceiling” laid down in the Regulation is EUR 200,000 that can be granted to a single undertaking over any period of three fiscal years. The Regulation reiterates the definition of an undertaking (for the purposes of the rules on competition laid down in the Treaty) as any entity engaged in an economic activity, regardless of its legal status and the way in which it is financed.

A new and important development in this Regulation is the introduction of rules regarding linked enterprises, namely all entities which are controlled (on a legal or on a de facto basis) by the same entity should be considered as a single undertaking.

The Regulation stipulates that a group of enterprises shall be treated as a ‘single undertaking’ if they have at least one of the following relationships with each other:

- a) one enterprise has a majority of the shareholders’ or members’ voting rights in another enterprise;
- b) one enterprise has the right to appoint or remove a majority of the members of the administrative, management or supervisory body of another enterprise;
- c) one 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) one 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.

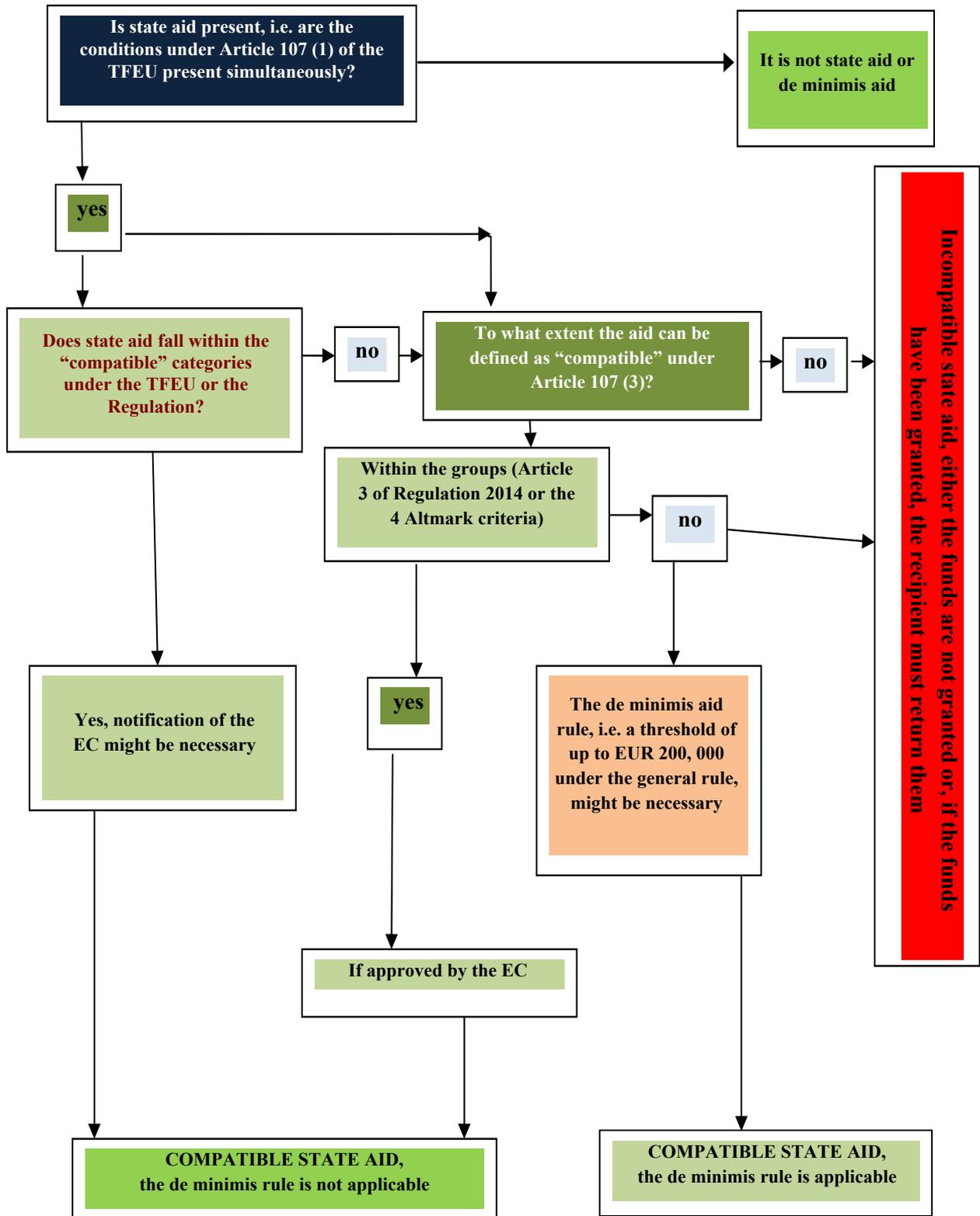
The Regulation reconfirms the rule that European Union funding centrally managed by the Commission which is not directly or indirectly under the control of the Member State does not constitute state aid and should not be taken into account in determining whether the relevant ceiling is complied with.

Article 3 of the Regulation explicitly states that where “aid measures¹⁶ shall be deemed not to meet all the criteria in Article 107(1) of the Treaty, and shall therefore be exempt from the notification requirement in Article 108(3) of the Treaty, if they fulfil the conditions laid down in this Regulation”, i.e. where funding is granted for non-economic activity, for instance, the provisions shall not apply (this interpretation has been further developed in the Regulation of 2014).

¹⁵ Commission Regulation (EU) No 1407/2013 of 18 December 2013 on the application of Articles 107 and 108 of the Treaty on the Functioning of the European Union to de minimis aid published in the Official Journal L 352, 24.12.2013, in force as from 02.01.2014 (and will apply until 01.12.2020).

¹⁶ 6. For the purposes of the ceilings laid down in paragraph 2, aid shall be expressed as a cash grant. All figures used shall be gross, that is, before any deduction of tax or other charge. Where aid is granted in a form other than a grant, the aid amount shall be the gross grant equivalent of the aid.

Algorithm for making decisions when applying the state aid rules in relation to public funding schemes¹⁷:



¹⁷ Presentation of the European Institute of Public Administration (EIPA) in 2009.

Non-economic activity and the state aid rules

The unequivocal answer to the question about the extent to which the state aid rules apply to the non-economic activities of NGOs requires that a differentiation should be made in principle between economic¹⁸ and non-economic activities.

Under the internal market rules set forth in the Treaty, the provision of services for remuneration must be regarded as an economic activity. The permanent case law of CJEU (the Luxembourg Court) states that any activity involving the supply of goods or services on the market constitutes an economic activity. The existence of a market for particular services should be determined depending on the arrangements for the particular services put in place by the Member State. According to the case law while the service shall not necessarily be paid for by those to whom it is provided, the service in question has to be supplied for remuneration.

The Court¹⁹ also ruled that the “economic” nature of an activity does not depend either on the legal status of the operator or the body (which can be a public or not-for-profit body) or on the nature of the service (thus, for instance, the fact that a service falls within the scope of social security or healthcare does not on its own preclude the application of the rules of the Treaty)²⁰. In order to determine whether a service constitutes an “economic activity” subject to the internal market rules under the Treaty and, if necessary, the Services Directive, all the characteristics of the activity in question should be examined on a case-per-case basis, in particular the manner in which the activity is carried out, organized and financed in reality by the Member State.

The approach adopted in the latest Regulation No 651/2014 of distinguishing economic and non-economic activities with regard to the application of the state aid rules to the funding of either activity is clear enough. The guidelines/answers provided by the Commission to enquiries from Bulgarian institutions (see below) have also been to that effect.

Several main rules have to be followed:

1. “In order to avoid granting State aid to economic activities through public funding of non-economic activities, the costs and financing of economic and non-economic activities should be clearly separated” (Recital (49) of Regulation No 651/2014),
2. The Regulation explicitly stipulates that the funding of a non-economic activity, including an infrastructure, does not constitute state aid:

“Where an infrastructure is used for both economic and non-economic activities, the funding through State resources of the costs linked to the non-economic activities of the infrastructure does not constitute State aid. Public funding falls under State aid rules only insofar as it covers costs linked to the economic activities. Only the latter should be taken into account with a view to ensuring compliance with the notification thresholds and maximum aid intensities. If the infrastructure is used almost exclusively for a non-economic activity, its funding may fall outside State aid rules in its entirety, provided that the economic use remains purely ancillary, that is to say, an activity which is directly related to and necessary for the operation of the infrastructure or intrinsically linked to its main non-economic use, and is limited in scope. This should be considered to be the case when the economic activities consume the same inputs (such as material, equipment, labour and fixed capital) as the non-economic activities and the capacity allocated each year to such economic activity does not exceed 20 % of the research infrastructure's overall annual capacity.

! In other words, the Regulation is unequivocal and clearly reiterates the provision of Article 107 of the Treaty:

- the state aid rules matter insofar as they concern the carrying out of economic activities;
- the Regulation moves one step further from the Treaty by providing an interpretation of what a non-economic activity is;

¹⁸ The Bulgarian version of the text uses two synonyms for “economic”.

¹⁹ Joined cases C-51/96 and C-191/97 *Delière*, Recueil 2000, ECR I-2549, paragraph 52. The Court ruled that hospital services provided free of charge within the existing health insurance scheme could constitute an economic activity under the Treaty; C-172/98 *Commission of the European Communities v Kingdom of Belgium*. See also case C-157/99 *Smits u Peerbooms* (paragraph 50).

²⁰ “Economic activity” is the activity carried out by undertakings the outcomes of which are intended for exchange on the market (item 13 of the Supplementary Provisions of the Competition Protection Act), i.e. it is not relevant whether there is profit or whether the activity pursues the making of a profit but whether there is an exchange on the market.

- the Regulation sets the rules on how to evaluate whether an activity is economic or non-economic and on the principle to be applied;
- the Regulation lays down that not-for-profit entities that also carry out economic activities record separately the financing, costs and revenues from these economic activities;
- the Regulation states that where the volume of additional economic activity does not exceed the limits set (up to 20%), the state aid rules shall not be applicable.

The special status of Services of General Economic Interest

Following a public consultation and a thorough revision process, the Commission adopted the new package on Services of General Economic Interest (SGEI) on 20 December 2011 in order to define the conditions under which State aid in the form of public service compensation can be considered compatible with the EU rules. The package consists of a Framework, a Decision and a Communication clarifying basic concepts of State aid. On 26 April 2012 Commission Regulation on the application of Articles 107 and 108 of the Treaty on the Functioning of the European Union to de minimis aid granted to undertakings providing services of general economic interest was published in the Official Journal (OJ, L 114 of 26 April 2012).

The special Commission Regulation No 360/2012 addresses aid granted to undertakings providing services of general economic interest within the meaning of Article 106(2) of the Treaty. This Regulation sets a higher ceiling of up to EUR 500,000 over any period of three fiscal years for aid in this category. The new EU framework²¹ stipulates that a given undertaking shall be explicitly entrusted with the operation of services of general economic interest by public authorities. There is no specific definition of the concept of *services of general economic interest*. The Commission clarifies the concept in the Quality Framework (p. 3)²² where the Commission explains that services of general interest (SGI) are services that public authorities of the Member States at national, regional or local level (are free to) classify as being of general interest and, therefore, subject to specific public service obligations (PSO). The term covers both economic activities and non-economic services. In its Quality Framework the Commission clarifies that Services of general economic interest (SGEI) are economic activities which deliver outcomes in the overall public good that would not be supplied (or would be supplied under different conditions in terms of quality, safety, affordability, equal treatment or universal access) by the market without public intervention. A specific characteristic of these services is that they probably would not be supplied by the market or would be supplied with lower quality and scope without public intervention (on the presumption that the market “failed” to supply these services).

What is relevant to the application of the state aid rules to the services of general economic interest, apart from the Regulation, is the case law of the Luxembourg Court and in particular the *Altmark case*, i.e. *case C-280/00 Altmark Trans GmbH and Regierungspräsidium Magdeburg v Nahverkehrsgesellschaft Altmark GmbH and Oberbundesanwalt beim Bundesverwaltungsgericht* [2003], *Recueil I-7747*.

In its ruling in the *Altmark* case, the CJEU set several conditions that have to be met so that the compensation for the provided service of general economic interest does not constitute state aid²³. Under the ruling in the *Altmark* case, compensation for public services does not constitute state aid under Article 107 of TFEU provided that four cumulative criteria are satisfied. Where the Member States fail to satisfy these criteria and where the general rules for the application of Article 107(1) of TFEU are satisfied, compensation for public services constitutes state aid.

Four cumulative criteria:

1. the recipient undertaking must actually have public service obligations to discharge, and the obligations must be clearly defined first;
2. the parameters on the basis of which the compensation is calculated must be established in advance in an objective and transparent manner;
3. the compensation cannot exceed what is necessary to cover all or part of the costs incurred in the discharge of the PSO, taking into account the relevant receipts and a reasonable profit; and;
4. where the undertaking is not chosen pursuant to a public procurement procedure which would allow for the selection of the bidder capable of providing those services at the least cost to the community, the level of compensation needed

²¹ European Union framework for State aid in the form of public service compensation (2011), OJ C 8 of 11 January 2012.

²² A Quality Framework for Services of General Interest in Europe.

²³ These conditions guarantee that a compensation whose amount does not exceed the net costs of an efficient undertaking providing a service of general economic interest does not constitute state aid under Article 107(1) of the Treaty.

must be determined on the basis of an analysis of the costs of a typical, well run and adequately equipped undertaking.

! The regulation (and the practice) regarding the so-called *services of general economic interest* is clear. If the relevant services meet the above 4 criteria, they do not fall within the scope of state aid requirements. To that effect, any activities and programmes whose purpose is, for instance, the provision of social services and support, even though they are carried out for remuneration, should in no case be subject to the state aid rules, provided that they meet the 4 criteria.

General conclusions related to the common European legal framework

- I. As any matters pertaining to the single European market, safeguarding fair competition, hence the regulation of state aid, fall within the exclusive competence of the EU,
 - only the EU can adopt rules on these matters, and the Member States do not have the right to pass any other regulations apart from the procedural rules ensuring the application of the EU regulations and the control over the compliance with the EU regulations in the territory of the relevant Member State (such as the rules laid down in the Bulgarian State Aid Act and the related ordinances);
 - the Regulations (the rules set by the EU) are immediately enforceable and any interpretation on behalf of the Member States extending or limiting their effect is not justified and, therefore, different practices of application in the Member States are unacceptable, as this would be conducive to unequal treatment.
- II. Articles 107 and 108 of the TFEU on state aid and the subsequent secondary legislation (the Regulations) explicitly refer only to the assumption of carrying out an economic/commercial activity that affects or might affect the free market and competition (these conditions are cumulative). In this respect, where funding programmes aim at supporting the non-economic activities of NGOs, these rules should not be applicable. The Treaty, the regulations and the CJEU case law clearly show that an entity performing both economic and non-economic activities should be regarded as an undertaking only in relation to its economic activities.
- III. A clear distinction should be made between economic/non-economic activities and the use of public funding for each activity type. The state has the duty to ensure such measures and mechanisms whereby the reporting of the costs and the allocation of public funds to cover these costs are done in a separate manner for each type of activity.
- IV. Services of general economic interest (including social, health and other public services) have a higher threshold and any amount granted below that threshold does not constitute state aid; in addition, the CJEU has consistently held that where the 4 criteria from the *Altmark* case are not satisfied, the state aid rules are not applicable, either²⁴.

The case of Bulgaria

As regards the practice in Bulgaria, however, the unambiguous provisions of the Treaty, the relevant Regulations and the CJEU case law have not been correctly interpreted and applied in some (quite a few) cases. What is not quite clear is the principle based on which certain programmes (such as the ones run by the Ministry of Youth and Sports (MYS) and the Ministry of Justice (MJ)) preclude the application of the state aid rules and, thus, de minimis aid to non-economic activities²⁵ carried out by NGOs²⁶, while others (such as the programmes run by the Agency for People with Disabilities (APD) only for NGOs or OPHRD) apply these rules to such activities.

Non-profit legal entities (NPLE) in Bulgaria, as legal entities, operate within a legal framework other than the one for commercial companies (Non-profit Legal Entities Act (NLEA))²⁷: being different in essence from economic operators, the legislator has chosen a separate regulation for their activities..

First, the goals pursued by NPLEs (non-profit in essence) distinguish them from commercial companies and predetermine the nature of their activity. Commercial companies have a common goal, i.e. making a profit, and they pursue their goal in different ways (by means of various commercial operations). However, all activities share a common feature, i.e. they are economic/commercial (in simple terms, they are carried out when someone simply “purchases” the goods and services offered). The various objectives on the agenda of NPLEs contribute to social development and

²⁴ Guide to the application of the European Union rules on state aid, public procurement and the internal market to services of general economic interest, and in particular to social services of general interest.

²⁵ Some Operational Programmes and other public instruments apply the de minimis aid rule when funding NGOs regardless of the subject of the activity supported; in practice, the threshold applies to projects implementing non-economic activities.

²⁶ The legal term in the Bulgarian law is Non-profit Legal Entity (NPLE).

²⁷ In effect as from 01.01.2001.

to solving important social, educational, environmental and other issues.²⁸ In the context of these non-economic objectives, the main scope of business of NPLEs includes non-economic activities targeting certain non-profit objectives financed mainly through grants (grant schemes, subsidies, donations).

Second, under the Bulgarian law NPLE have the right to also perform related economic activities but the latter have to meet certain conditions defined by law. Such economic activities shall be

- a) *supplementary* (i.e. most of their activity shall be non-economic),
- b) *relevant* (a means to achieve the goals),
- c) laid down in the articles of association, and where profit is generated, the profit shall not be distributed among the members, founding members, etc., but shall be used to achieve the goals of the organization.

This clear-cut logic is at the core of the taxation norms regulating these two different types of activities. NPLEs have to keep separate accounting for their economic and non-economic activities. Where NPLEs generate revenues from a non-economic activity, no corporate tax is levied, while where a profit is made, a tax is levied under the Corporate Income Tax Act (CITA).

Similar to the differentiated treatment and taxation rules applicable to economic and non-economic activities, a differentiated approach is also required in terms of the state aid rules should.

A response to a letter to the Ministry of Finance in relation to the Access to Public Information Act (APIA) reads that “on the basis of the case law of the CJEU and the Commission (...) a general principle has established that an entity performing both economic and non-economic activities that are clearly separated and reported can be regarded as an “undertaking” only with regard to the former”.

Letter of June 2014

The practice of awarding grants under grant schemes to finance non-economic activities mainly of NGOs is a widespread form of financial support with public resources from the state or the EU. The underlying logic is that by supporting non-economic activities, such grants facilitate the development of important and prominent public causes and initiatives which have value added for social development and contribute to solving social problems. Hence, what is more relevant is not the protection of free competition but transparency in spending public funds, efficiency (in achieving the goals planned) and effectiveness of initiatives.

The case of Hungary

According to the Hungarian State Aid Monitoring Office (SAMO) (see below what body SAMO is) and in compliance with the EU legal framework, what is relevant for the application of the de minimis rules is only the economic nature (character) of the supported activity²⁹ on the basis of which the recipient can be regarded as an “undertaking” or “production” under Article 107 (1) of TFEU. The Hungarian practice has fully adopted the main principles laid down in the Communication from the Commission regarding Draft Commission Notice on the notion of State aid pursuant to Article 107(1) TFEU.³⁰ SAMO states that the CJEU has consistently defined “undertakings” or “production” under Article 107 (1) of the TFEU as entities engaged in an economic activity, regardless of their legal status and the way in which they are financed. For the purpose of the application of the de minimis rules, an undertaking qualifies as an entity only based on a specific activity, and not by way of principle. The CJEU also holds that an entity that carries out both economic and non-economic activities (for instance NGOs) is to be regarded as an “undertaking” or “production” only with regard to the former.³¹ Non-profit organizations can carry out economic activities relevant to their goals and offer goods and services on the market. However, with regard to their non-economic activities, NGOs – suppliers do not fall within the scope of the application of the state aid rules.³²

²⁸ Article 38 of the NLEA even lists the objectives to the public benefit that NPLEs may have .

²⁹ State Aid Control in Hungary; Hargita, Eszter; Filep, Zsuzsanna Remetei

³⁰ Draft Commission Notice on the notion of State aid pursuant to Article 107(1) TFEU

³¹ Draft Commission Notice on the notion of State aid pursuant to Article 107(1) TFEU

³² Joined Cases 209/78 to 215/78 and 218/78 *Van Landewyck* [1980] ECR 3125 paragraph 88; Case C-244/94 *FFSA and Others* [1995] ECR I-4013, paragraph 21; Case C-49/07 *MOTOE* [2008] ECR I-4863, paragraphs 27 and 28.

! Under the TFEU and the relevant Regulations the state aid rules should be applied to NGOs only where they carry out an economic activity and only relative to it (see above the interpretation regarding Recital 49 of the new Regulation, including the threshold of up to 20%). It is only in the latter case that *de minimis* rules can apply to NGOs. What matters is assessing if the specific activity can be the subject of support and to what extent it meets the criteria of being a) economic and then b) compatible, etc.

Similar guidelines have always been provided by the Commission to the Bulgarian authorities: “Let me first observe that the State Aid rules including the *de minimis* Regulation only apply to undertakings. An undertaking is defined as an entity engaged in an economic activity, regardless of its legal status and the way in which it is financed. Such an entity can be a natural or a legal person, but it has to be engaged in an economic activity, i.e. offering goods or services on a market”³³.

- The regulation of non-economic activities of NGOs and the application of the state aid rules, including the *de minimis* rule, should be given a restrictive interpretation – without any options for deviation– and not a broader one, with a view to playing it safe (as this matter falls within the exclusive competence of the EU, any deviation in regulation and application may be conducive to discrimination and unequal treatment of entities from other Member States);
- Where the state considers certain activities to be exceptionally important, and therefore, deemed to be compatible or significant to achieve certain important goals and priorities, the state can always take steps for their notification and exemption.

The case of Poland

In 2011 the amount of *de minimis* aid granted by the state was approximately EUR 83 million or 12.3 % of the total amount of state aid granted in 2011. The statistical data of the Commission on the state aid granted show that in 2011 Bulgaria submitted only 2 notifications for exemption to DG Competition of the Commission for state aid schemes while Poland, in comparison, submitted 34. In 2012 Bulgaria also submitted 2 notifications and 5 in 2013. Poland, in turn, submitted 36 notifications in 2012 and 29 in 2013.

The application of the principle

As mentioned at the beginning of the analysis, this study aims at examining to what extent and how the state aid rules are applied to non-economic activities of NGOs in Bulgaria.

I. Funding schemes supporting exclusively NGO projects for non-economic activities:

a) The state aid rules, including the *de minimis* rule, are not applicable. This approach has been adopted by the following Bulgarian public institutions:

- The Ministry of Economy and Energy (MEE) conducts, on an annual basis, a procedure for the financing of representative consumer associations of NGOs. The funds granted to these associations support mostly activities in the areas of the protection of consumer health and safety, the protection of consumers’ collective and economic interests, information activities related to consumer rights, etc. The funds granted are not regarded as state aid;
- The Social Protection Fund (SPF) with the Ministry of Labour and Social Policy (MLSP) grants funds in a competitive procedure for social inclusion and improving the quality of life of certain target groups, opportunities for new community-based social services, better living standards in specialized institutions, etc. Commercial companies and sole proprietors are eligible, together with NGOs. The funds granted by the SPF are not regarded as state aid;
- The Ministry of Justice administers a grant scheme financed from the state budget which finances NGO projects for the development and implementation of programmes and trainings under Article 6 (7), para 7 of the Protection against Domestic Violence Act (PDVA). Eligible beneficiaries under this grant scheme are only NGOs operating to the public benefit, which are registered by the Social Assistance Agency and are licensed as providers of social services for people aged below 18. The objective of NGO programmes receiving financial support has to be the provision of support to victims of domestic violence, including social, psychological and legal counseling, referral to specialized services and interdisciplinary counseling, as well as crisis centres for victims of domestic violence, etc. The funds granted to NGOs under this grant scheme are not regarded as state aid.

³³ A response of Directorate General for Competition to Deputy Minister of Finance Lyudmila Elkova, 21 March 2014.

The case of Lithuania

The Norwegian Programme does not apply the state aid rules, as the operator (Human Rights Monitoring Institute) is not a public body. In addition, the programme is fully targeted at NGOs and not economic/commercial undertakings. However, the allocation of funds from the Swiss or the Norwegian programme by the ministries is subject to the state aid rules. The Lithuanian government provides national co-financing in relation to international aid (EU funds, EEA & Norway Grants, Swiss operation scheme), and, where the allocation is made by public institutions, the funds are considered to be state aid.

The case of Estonia

In principle, any institution providing public resources has to examine the relevant grant schemes in conformity with the competition law³⁴. Where the resources fall under the scope of state aid, the donor is obliged to submit information to the Central State Aid Registry. Under an agreement with the Ministry of Finance, the Norwegian NGO Programme has been explicitly excluded from the scope of state aid (in addition, the funds are not channeled through the state budget but are provided directly by the donor state to the selected operator). The Swiss Programme does not apply these rules, either, with the exception of direct financing of social enterprises' business plans.

b) It is difficult to explain why the opposite approach has been adopted by other institutions in relation to funding programmes that support the same or similar types of projects and activities:

- **The Ministry of Interior:** in relation to the state aid rules in BG 12 programmes *Domestic Violence and Gender-based Violence*, in awareness raising campaigns, and under Measure 4 *Support and Sensibility Services for Victims of Domestic Violence*. Eligible lead organizations are only NGOs and international organizations carrying out activities in Bulgaria. With regard to the types of activities, funding is granted to projects providing support and services to victims of domestic violence such as short-term accommodation, counseling and psychological services, information services, advocacy, legal counseling and others. Project proposals about activities aimed at improving the living conditions of the Roma minority, Roma women and girls who are the most common victims of domestic violence, are awarded a higher score in the technical evaluation of the project. While no specific evaluation is made of the programmes with a clear focus on supporting NGO projects exclusively in the area of social services, the state aid rules are applied to such programmes;
- **The Agency for People with Disabilities:** in relation to the funds under the grant schemes provided to public-benefit NPLEs and nationally representative organizations of people with disabilities registered under the Cooperatives Act. While the grant schemes support activities that are carried out mainly by nationally representative organizations and in essence undoubtedly constitute non-economic and social services (*related to the integration and reintegration of permanently disabled people and overcoming their social exclusion, as well as raising the educational, professional and cultural competence of permanently disabled people, the development and introduction of social aids and assistive technologies to overcome their exclusion, etc.*), the funds under these grant schemes are regarded as state aid.

II. A funding scheme where NGOs are not the only eligible entities and where there is a risk of financing an economic activity:

In this case a clear mechanism has to be provided for monitoring the activities to be funded. In the application process beneficiaries are required to fill in a declaration stating to what extent the subject matter (activities) of the specific project concerns the development of an economic activity; and the project proposal is subject to a specific evaluation to determine the economic or non-economic nature of the activities. This circumstance (the subject of funding) is examined during the project evaluation and, subsequently, for the purpose of costs reporting. In such cases the focus is not whether the NGO's usual activity is an economic one and whether this activity is performed by a separate legal entity or directly but the specific activity to be funded.

In Bulgaria a similar approach has been adopted for the various programmes of the Ministry of Youth and Sports and the funding under these programmes. While the ongoing programmes underway at present such as *Learn to swim, Sport Development for Students, Sports for Children with Disabilities and Children at Risk* and *The Development of Sports Clubs* distribute substantial resources targeted at sports clubs, associations and federations, these resources/funds are not treated as state aid. A similar approach is expected under the grant scheme of the National Academy of Young Leaders within the National Youth Programme (2011–2015). The beneficiaries will be public-benefit NPLEs *carrying out youth activities*. The applicants have to submit a declaration on the type of activity and the separation of activities by means

³⁴ Competition Act – www.riigiteataja.ee/en/eli/522012014003/consolide#ab1d30bc-5221-494a-af1b-aa2f43e43a19

of differentiated analytical accounting for the organization's economic and non-economic activities. Beneficiaries are required to keep separate analytical accounting for their economic and non-economic activities, which enables overseeing the activity types in question.

This position is also referred to in a Letter of the Minister of Finance Plamen Oresharsky to the Minister of State Administration Nikolay Vassilev³⁵ regarding the state aid rules and NPLEs. The letter clearly states that these are two essentially different types of activity and, therefore, the financing authorities have to apply the *de minimis* rule only in either of the cases (for economic activities) and request "information from the beneficiary about the activity type, the costs and financing, and, where the two activities are clearly separated, *de minimis* rules have to be applied only to economic activities". This position is also mentioned in the Q&A section on the website of the Ministry of Finance (Q&A 19: <http://stateaid.minfin.bg/bg/page/9#Q19>).

The case of the Czech Republic

The NGO Programme of the EEAFFM in the Czech Republic³⁶ assesses individual projects separately in terms of state aid and the extent to which the projects meet the 4 criteria for state aid. *The de minimis rule has to be applied to 25 out of 91 approved projects. In case only one single activity meets the 4-criterion test, the de minimis rule is applied to the overall project irrespective of whether the NGO usually carries out economic activities. While the project is evaluated without taking into account the NGO's other activities, if some project activities are aimed at capacity boosting and the organization has an economic activity, the funding will be regarded as state aid. The beneficiary concerned is notified and is entitled to withdraw the relevant activity if the revenues from it over the last 3 fiscal years exceed EUR 200,000. The Swiss Programme applies the same principle³⁷.*

While the legislative documents adopted in that respect do not expressly stipulate that all schemes have to always apply the state aid rules, they provide for an assessment of the specific activities and compliance control in relation to these rules:

Decree No 107 of 10 May 2014 on the procedure for awarding grants under the programmes co-financed by the European Regional Development Fund, European Social Fund and the Cohesion Fund of the European Union

(7) Where a measure constitutes state aid under Article 107 of the Treaty on the Functioning of the European Union or *de minimis* aid under Commission Regulation (EU) No 1407/2013 of 18.12.2013 on the application of Articles 107 and 108 of the Treaty on the Functioning of the European Union to *de minimis* aid, ... the contract, and, therefore, the order under paragraph 1 shall include information about the type of state aid granted as well as the possible implications of the aid, including the conditions for accumulation and the opportunity for recovery of unduly granted state aid under Section V of the Rules on the application of the State Aid Act.

Article 26. The Head of the Managing Authority shall issue a reasoned decision for the rejection of the grant application where:

1. the applicant has not submitted formal documents and/or declarations under Article 9, para 8, item 2 to prove the respective circumstances;
2. double financing of a project or project activities is established with the exception of the cases under Article 2, items 1 and 2;

³⁵ Ref No 04-20-94 of 2007.

³⁶ NROS is the operator.

³⁷ The main legal act applied is *Regulation 1407/2013*.

The national legislation is mainly involved with registration in the state aid register.

3. prior to signing the contract or issuing the order for the award of a grant, it is established that the threshold of eligible state/de minimis aid has been exceeded, apart from the cases under Article 21, para 5.

The new Decree³⁸ on the eligibility of expenditure under the operational programmes stipulates that where the expenditure was incurred in violation of the state aid rules, the expenditure shall be considered ineligible.

Nevertheless, some Bulgarian public institutions administering financial schemes have yet another practice:

- **The Employment Agency with MLSP** administering the National Programme for Assistants for People with Disabilities which finances a social service considers the funds granted under the programme as state aid;
- **OPHRD** in Bulgaria applies the de minimis rule regardless of the nature of the activity funded and without allowing for examination of this issue. Where the applicant submits a declaration certifying that an economic activity is carried out via a separate legal entity, the scheme is not applied³⁹. Furthermore, it is worth noting in relation to the state aid rules that OPHRD requires that each applicant declare in person the one hand, the state aid received (thus bearing the lowest level of criminal liability for untrue data declared despite the existing state aid register), and, on the other hand, whether the entity has an economic activity (if the applicant is an NGO) defined as supplementary under the rules of the NPLEA. And the opposite argument - where the applicant does not have an economic activity, the rules do not apply without any evaluation of the nature of the activity to be funded.

! It is not clear what principle the relevant Bulgarian public institution uses in deciding on the application of the state aid rules; it is not clear, either, why the Social Protection Fund does not apply the state aid rules and the Agency for People with Disabilities does (both institutions finance mainly NGO activities with a similar scope and goal); why the Ministry of Interior applies these rules to services countering domestic violence and the Ministry of Justice does not, etc.

The case of Poland

The practice in Poland shows that operators of funding schemes apply mostly the rule for individual assessment of the specific activity and its social implications. The approach is individual insofar as an individual assessment is made of the extent to which the public funding granted under the programme constitutes state aid under the EU acquis. An individual assessment is also made to establish to what extent the goals of the funding defined as state aid can be achieved by applying the de minimis aid rules (thresholds respectively). This is proved by the fact that the state aid rules apply for specific types of activities and the related costs within the same sub-measure, while the de minimis aid rule has been introduced for others. The assessment in relation to the application of the state aid rules does not take into account the legal status of the beneficiary entity (foundations, associations, health establishments, church structures, etc.)⁴⁰; it stresses on the analysis of the nature of the particular activity. Two activities carried out simultaneously by the same legal person can be treated in a different way. It is important to consider the characteristics of the specific activity (whether it is intended for exchange on a market), its effect (profit generation), etc.

Operational Programme Human Resources Development 2007–2013 and Operational Programme Innovative Economy 2007–2013 (EUR 10 billion)

1. OP Human Resources in Poland explicitly stipulates whether the state aid rules are applicable in respect of each measure and sub-measure; in other words, each measure is individual assessed to determine whether project funding meets the criteria of Article 107 (1) of the TFEU. The funds granted under priority III, Measure 3.3., are not regarded as state aid (as for sub-measure 3.3.2, where the funding mechanism involves a call for project proposals and eligible applicants are any legal persons, the state

³⁸ Decree No 119 of 20 May 2014 on the adoption of national rules on eligibility of expenditure under the operational programmes co-financed from the European Regional Development Fund, European Social Fund and the Cohesion Fund of the European Union and from the European Maritime and Fisheries Fund for the years 2014–2020.

³⁹ This practice raises a lot of questions as to how precisely this declaration: 1) ensures that the specific funded activity is non-economic and 2) addresses the issue of linked enterprises that are collectively subject to the state aid rules (see above the Regulations of 2013 and 2014).

⁴⁰ Guide for the administration of programmes promoting innovative economy.

aid rules are not applicable). An assessment is made of the overall measure/sub-measure on the basis of the type of eligible expenditure and related project activities.

Under Priority 5 Good Governance (p. 129), the Development of the Potential of the Third Sector measure (more than EUR 100 million), the state aid rules are not applicable with regard to the subject of funding. However, under sub-measure 5.4.2., the Development of Civil Dialogue where calls for project proposals are used and any legal persons are eligible, each project is assessed individually in terms of the state aid rules.

2. Second, the funding granted to innovation centres is not considered as state aid, which is explicitly laid down in a decree of the Ministry of Regional Development; innovation centres can be legal persons, including non-profit organizations, their activity and goals are regulated by law and they are defined as innovation centres. In addition, innovation centres are expected to generate a profit or income from carrying out the activity financed under the OP. A specific feature of these centres is that their output is intended for free use or at preferential (lower than market) prices by economic operators (entrepreneurs). The difference between the cost of the support provided by innovation centres to businesses in the form of training, renting premises in buildings, and other similar resources and its market price is treated as state aid for the businesses receiving the support. That is why innovation centres have to issue certificates for the amount of state/de minimis aid provided to a business.

The Norwegian Financial Mechanism (NFM) and the Financial Mechanism of the European Economic Area (EEAFM) in Bulgaria

As the operators running the grant schemes financed by the NFM and EEAFM also apply a different practice. It is difficult to trace a similar approach in terms of the rules. The study examined the grant schemes financed by the NFM and administered by the Ministry of Interior, the Ministry of Justice, the Ministry of Culture and the NGO Programme.

1. **The Ministry of Culture** runs the BG 08 Programme *Cultural Heritage and Contemporary Arts* consisting of three measures, a small grant scheme and a fund for the development of bilateral relations within the programme. The funds granted to projects under the measures and the small grant scheme are regarded as state aid. The main beneficiaries under the measures are public institutions, cultural institutes and universities, and NGOs can only be partners but not lead organizations. It is only under the small grant scheme funding activities related to *the establishment, organization and holding of new events (concerts, festivals, etc.) of contemporary art, the organization of exhibitions, the creation of new forms of innovative cultural events, etc.* that NGOs operating in the area of culture and art are eligible as both applicants and partners. The funds allocated are regarded as state aid.
2. **The Ministry of Interior** administers the BG 13 Programme *Schengen Cooperation and Combating Cross-border and Organised Crime*, including *Trafficking and Itinerant Criminal Groups*, a small grant scheme *Strengthening national capacities for the efficient use of EU information-sharing instruments and application of Schengen – relevant laws through competence – building measures and financial support*. The beneficiaries are mainly structures of the Ministry and the State Agency for National Security (SANS) **but also NGOs**. The grant scheme has adopted an interesting approach whereby applicants have to declare that the funding received under the project will be used only for non-profit activities. The activities supported under this grant scheme include training, exchange of information, experience and practices with Members of the Schengen Area. Therefore, it can be concluded that the funding under this grant scheme **is not regarded** as state aid.
3. **The Ministry of Interior** also administers the BG12 Programme *Domestic Violence and Gender-based Violence*. The funding under the programme measure for support services to victims of domestic violence and gender-based violence (measure 1) aims mainly at providing support to victims of domestic violence and at setting up crisis centres. NGOs are eligible applicants together with other local, regional or national public institutions. We established that applicants have to declare that the funding awarded will be used only for non-economic activities; hence, we reached the conclusion that the funding allocated is not regarded as state aid. However, the funds under the grant schemes *Organization of awareness and sensibility raising campaigns with a particular focus on the Roma and other vulnerable groups* or measure 4 *Research and Data Collection*, (services for victims of domestic violence) of the same BG 12 Programme, are regarded as state aid. NGOs together with other public institutions or research centres are eligible applicants under these measures.
4. **The Ministry of Justice** is a programme operator of a small grant scheme under the BG15 Programme *Correctional Services, including Non-Custodial Measures*. NGOs under this scheme are eligible applicants together with other public or private, commercial or non-profit organizations; they can apply with projects related to the organization of training activities and development of programmes for the officers in the probation services and various vulnerable groups in prisons. The guidelines to the programme show that where an NGO has been granted funding under this scheme and

has declared *in principle* that the organization does not carry out an economic activity, the funding granted shall not be regarded as state aid.

5. Under the **NGO Programme** in Bulgaria eligible applicants are only NGOs (and community centres); judging by the goals of this programme, it aims at supporting organizational development and targets exclusively the non-economic activities⁴¹ of NGOs. Nevertheless, the funding granted is subject to the de minimis aid rules. Without being provided with clear explanations in the Application Guide, the applicants and their partners have to state in the declaration, apart from complying with the obligation of declaring related parties to which the rules apply, to what extent the NGO in question carries out an economic activity or not. However, no analysis is made of the specific activity to be funded.

! We reached the following general conclusion after reviewing the grant schemes with different operators using a common funding source, i.e. the Norwegian Financial Mechanism and EEAFM: the operators apply a different approach in order to define if the funds granted constitute state aid, even in respect of individual measures within the same programme. Some operators assess the specific activity and request a declaration that the activity is not economic by nature, while others apply the state aid rules to similar activities without such an assessment.

EEAFM in Hungary

Hungary has consistently applied in practice the principle according to which where non-profit organizations are awarded grants and/or funding to support them in achieving their ideal goals, i.e. carrying out a non-economic activity, such funding is not regarded as state aid and the de minimis rule is not applicable to it.

Thus, for instance, the Application Guide under the EEA Financial Mechanism 2009–2014, HU-02-2013-B2 for the exchange of experience among NGOs under the energy efficiency programmes in Hungary financed by the Kingdom of Norway, Iceland, the Grand Duchy of Liechtenstein, explicitly states that the grants awarded to NGOs under this mechanism will not be regarded and treated as state aid.⁴²

The issue is addressed similarly under the EEA and Norwegian Financial Mechanism 2009–2014, National Fund for Bilateral Relations for combating climate change and supporting cooperation between the Donor States and Hungary in the area of environment protection. The call for proposals under this financial mechanism applies an explicit provision regarding the state aid rules.⁴³ Pursuant to this provision where non-economic activities are supported, the grants will not be regarded as state aid under Article 107 of the TFEU. Where economic activities are supported, the de minimis rule will apply to the grants.

Similar provisions are included in the Application Guide for Twinning and Partnership Block Grant, Swiss-Hungarian Cooperation Program. Small projects aimed at addressing specific problems have been defined in Hungary as non-economic activities and, therefore, the Guide explicitly provides for non-applicability of the state aid rules⁴⁴.

Who is responsible for introducing uniform rules?

The experience of other Member States with proceedings before the Commission shows that it is the arguments put forward by the Member State to “defend” the extent to which certain measures fall within the scope of state aid that are of paramount importance⁴⁵.

The relevant question to be asked is who is obliged to ensure equal, equitable and correct application of the state aid rules so that fair competition, equal treatment and free movement of goods and services can be guaranteed in the EU. Under the Bulgarian law, the competent authority is the Ministry of Finance. The Minister of Finance has exclusive

⁴¹ www.eeagrants.bg/bg/2009–2014/програми/бр05-фонд-за-неправителствени-организации

Application Guide in the first and second calls.

⁴² General Application Guide for the EEA and Norwegian Financial Mechanisms 2009–2014

⁴³ Call for proposals within the EEA and Norwegian Financial Mechanism 2009–2014, National Fund for Bilateral Relation

⁴⁴ Twinning and Partnership Block Grant, Swiss-Hungarian Cooperation Program. Application Guide

⁴⁵ Thus, for instance, the Commission Decision of 19.12.2012 on state aid SA.20829 (C 26/2010, ex NN 43/2010 (ex CP 71/2006)) Scheme concerning the municipal real estate tax exemption granted to real estate used by non-commercial entities for specific purposes implemented by Italy regarding the possibility for tax exemption of certain non-commercial entities (Italy) and whether the exemption qualifies as state aid, **clearly stated that this exception could have been applied only provided that the competent authorities had applied respectively the EU acquis and had taken advantage of the opportunities the EU acquis offers**, (39) and (40).

competence on state aid matters, incl. monitoring, coordination and cooperation with the European Commission in relation to state aid (Article 5 (2), Article 8); the Minister has the prerogative to issue opinions regarding the scope of the state aid legislation, request opinions about compatibility or block exemption, etc. As these powers entail both rights and obligations, the Ministry of Finance:

- ensures that the TFEU and the Regulations concerning state aid are correctly applied and guarantee not only the protection of community interest but also equal treatment:
- gives clear instructions to the operators and the Managing Authorities which fall within the scope of state aid, instead of refraining from the exercise of its competence /powers and thus “trying” to shift the responsibility to the operators, while ultimately retaining its right to respond in the event of an emerging problem; and
- contributes to the proper application of the EU rules and to the prevention of potential court proceedings before the CJEU, as the exercise of the above power does not pertain only to ensuring the rule of law and the goals of the law.

The Hungarian Approach

Hungary is a state with extensive experience regarding state aid. Statistical data for 2011 show that the amount of state aid granted in Hungary stood at almost 2.3% of its GDP.⁴⁶ This, however, is not a new trend. As early as 2004 Hungary⁴⁷ ranked among the first three states from the newly acceded 10 Member States granting considerable funds in the form of state aid (see above the data about Poland).

The State Aid Monitoring Office (SAMO) plays an important role in terms of the control over state aid and the application of the de minimis rule⁴⁸. While SAMO is a structure within the Ministry of National Development, it has a special status. The mandatory official opinions of the Office are signed by the Head of SAMO, not by the Minister. SAMO is not obliged, either, to consult with the other offices and/or departments in the Ministry and other public administration bodies prior to issuing an opinion.

Some of SAMO’s functions include assessing the compliance of the national application of the state aid rules with the EU norms. The procedural rules oblige all state aid operators to notify the Minister of National Development about every state aid measure planned. The notification has to take place either before the measure is examined by the Managing Authority of the relevant operator or before it is brought forward for public consultation. The Minister of National Development delivers a preliminary opinion on the proposed measure. SAMO registers the aid schemes falling within the scope of the de minimis rule and issues instructions to the operators about notifying the beneficiaries of the type of aid and their administrative obligation to provide information. Where SAMO establishes that a measure does not meet the EU rules, notification cannot be submitted to the European Commission unless the Hungarian government expressly instructs SAMO to send such notification to the EC. Pursuant to the law⁴⁹ state aid can be granted only in the event of a positive opinion by SAMO. The law obliges SAMO to issue a positive opinion and complete all related proceedings within a 30-day term.

The Polish approach

The state institution that exercises control over the proper application of the state aid rules is the President of the Office of Competition and Consumer Protection⁵⁰ (POCCP). The President has been delegated these powers under the Law of 30 June 2000 on the Conditions for Eligibility and Control of State Aid for Enterprises⁵¹. POCCP being a permanent member of the committees with the Council of Ministers, it takes part in the development of any legislative amendment drafted by the government. Within the remit of POCCP is the issuing of opinions (prior to the official notification of the EC) on any state aid scheme or individual aid project.

⁴⁶ Monikka Papp, Application of State Aid rules in Hungary 2004–2012.

⁴⁷ The current legislative act regulating the issues in Hungary related to the measures under Article 107 (1) of the TFEU and the granting and control of state aid is a Decree of the Council of Ministers in Hungary. The Decree lays down the procedural rules for notification, the rules for cooperation between SAMO and the operators of state aid, as well as the regional map of state aid.

⁴⁸ State Aid Monitoring Office (SAMO)

⁴⁹ Act CXCIV of 2011 on the Treasury

⁵⁰ UOKiK

⁵¹ Polish Competitive Law – Commentary, Case Law and Texts, Mateusz Błachucki, Office of Competition and Consumer Protection, Warsaw 2013

The next good practice in Poland in terms of the application of state aid is the declaration that any state aid administrator has to issue to every individual recipient of funding regarded as de minimis state aid. The declaration states the amount and type of aid, as well as the time period and the legal grounds for awarding the aid. Hence, administrators bear responsibility for the correct/incorrect definition of the relevant funding as de minimis state aid and for monitoring the thresholds. The recipients of state aid are not placed under the unjustified and illogical burden of the obligation to “declare” on their own to what extent the state considers the funding as de minimis state aid.

Each state aid administrator (i.e. each Operational Programme Operator) is obliged, prior to signing an agreement with the beneficiary concerned, to notify the latter of the amount of funding considered as state aid under the relevant measure and programme in compliance with the rules.

The Ministry of Finance issued an Opinion on the application of state aid for the development of procedural guides for the period 2014–2020 (17 July 2014). This Opinion states that all Managing Authorities subject to a clear requirement to make an assessment of the goals and impact of the aid; in addition, Annex 1 which is an indicative list of questions to be used by the Managing Authorities includes the following explicit questions: 2. Is the operation related to potential beneficiaries carrying out an economic activity; where both economic and non-economic activities are performed, are there arrangements allowing a clear separation of these activities, including the mechanism of analytical accounting in order to ensure that only non-economic activities benefit from the implementation of the operation, etc. Unfortunately, these are timid and indecisive positions whose “interpretation” is between the lines.

General conclusions based on the analysis of the practices in Bulgaria

- I. Different practices are applied by public institutions in relation to spending public funds for NGO funding programmes in Bulgaria;
- II. In most cases when the state aid rules are applicable, the Bulgarian public institutions do not take into account whether NGOs are the only eligible applicants;
- III. It is not common for public institutions to assess (during the application process) whether the specific activity is economic or not and apply the state aid and de minimis aid rules on the basis of the assessment; the practice is requesting that in the application process the applicant submits a declaration about carrying out an economic activity, if any (however, more often than not this is a declaration in principle whereby the applicant declares if it carries out an economic activity directly or via a related structure, and does not concern the specific activity);
- IV. This heterogeneous practice which is heterogeneous and far from being justified under the EU acquis poses a risk of unequal and unfair treatment of NGO projects and initiatives developing their non-economic activity;
- V. What is missing are good and detailed guidelines (as is the practice in many other Member States) that can facilitate and help operators of public resources to apply adequate and equal rules.

INSTEAD OF CONCLUSION

This analysis has made a brief review by examining the main issue raised in the introduction, i.e. what rules and practices do the different Member States apply to the non-economic activity of NGOs in relation to the state aid rules? By means of a legal analysis with specific arguments and interpretation of legislative documents, we aimed at putting forward proposals for the Bulgarian authorities to consider with a view to improving the legal and institutional environment for Bulgarian NGOs.

This last section, the recommendations, turned out to be the most effort-consuming task for the authors of the analysis. The difficulties we experienced stem from the fact that we are well aware of what the main recommendation should be: complying with the Treaty on the Functioning of the EU and the relevant Regulations, as well as the case law of the CJEU which is an integral part of the *acquis*.

Recommendation 1

The conclusion that NGOs should not fall within the scope of state aid in relation to their non-economic activity is indisputable for the authors and is clearly set forth in the provision of Article 107. The accompanying relevant legal provisions referred to in the analysis only come to complement this argumentation. Therefore, the Bulgarian institutions should review all funding schemes for NGO projects and consider exempting them from the application of the state aid rules, respectively the *de minimis* aid rule. Moreover, such a step is supported by the fact that the EC, in its most recent documents, points to reviewing altogether the *de minimis* rule even for some indisputably commercial entities (not in terms of their goals but activities), such as social enterprises, SMEs, training organizations, etc. in view of the importance of the initiatives they carry out. The recommendation is about introducing a less restrictive application regime for the state aid and *de minimis* rules when it comes to social enterprises, even though funds are gratuitously granted to directly support an economic activity, the underlying argument being the long-term impact of social intervention on vulnerable groups⁵².

Recommendations 2 and 3:

In addition to the recommendation about strictly abiding by the EU *acquis*, a good practice, as the examples of the other countries show, will be an individual assessment of each and every contract/project proposal (at the level of application and implementation) in cases of “concerns” regarding the application of these rules, which will help make sure that the specific activity to be supported is not economic (and, therefore, does not fall within the scope of Article 107 and following of the TFEU). Where the funding schemes are complex in terms of the activities and measures funded but the interventions have been assessed as important and having value added, it is advisable that the notification and block exemption mechanism are used.

Otherwise...

...the unclear and inconsistent practice of various public institutions in the management of funding programmes in Bulgaria which support the same activities but in a different way poses a lot of risks in terms of the erroneous application of the EU *acquis*, unequal treatment (in Bulgaria compared to other Member States), incorrect shifting of responsibility to operators, beneficiaries, etc.; these are risks whose consequences will sooner or later become visible.

In view of the practice over the last years and the likelihood of potential cases against Bulgaria before the Court of Justice of the European Union, it is imperative for the Ministry of Finance to exercise its powers and issue clear instructions⁵³ to the operators and Managing Authorities, given the divergence in application compared to the other countries. This is the right point in time as it coincides with the start-up of new programming period 2014–2020. The

⁵² The President of the Section for the Single Market, Production and Consumption, Bryan Cassidy, OPINION of the Section for the Single Market, Production and Consumption on the Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: social Business Initiative – Creating a favourable climate for social enterprises, key stakeholders in the social economy and innovation COM(2011) 682 final, Brussels, 8 May 2012.

⁵³ A similar very good guide has been prepared by the team of the Department for Business Innovation and Skills with the Cabinet in the UK: www.gov.uk/government/publications/state-aid-the-basics

legislation being clear enough, it is not justified to await an explicit provision in a regulation stipulating that “non-economic activities of Bulgarian NGOs shall not fall within the scope of state aid” .

Unless the Bulgarian practice regarding the application of the state aid rules to NGO non-economic activities changes, a different conclusion will probably be reached about a different issue, namely the lack of trust in the meaningful existence and the benefits ensuing from the operation of Bulgarian NGOs for social development and the important initiatives to be supported by means of public funds. And this justifies “the ceiling” of EUR 200,000.

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