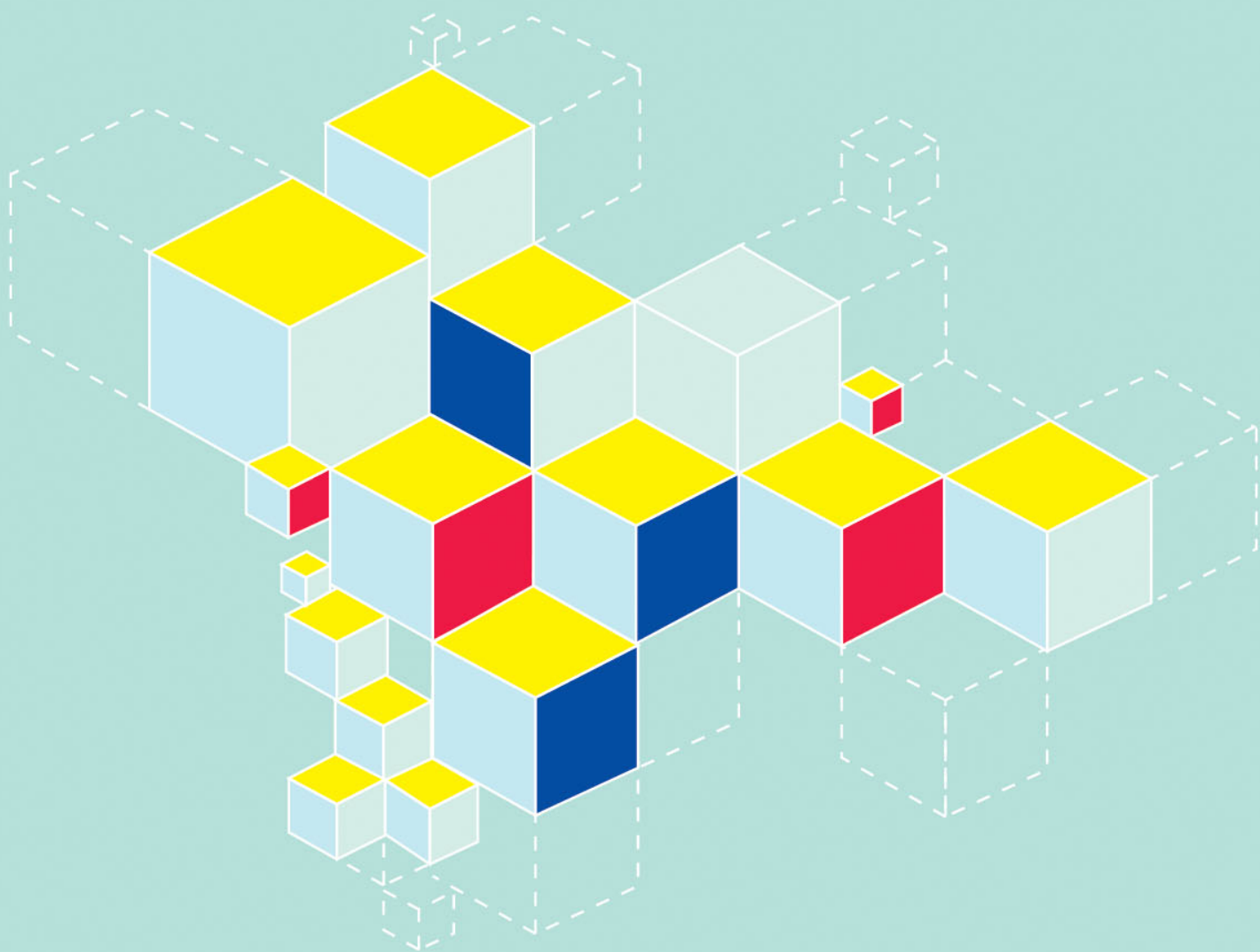


GLOSSARY OF TERMS FOR STATE AID REGULATION

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(with an introduction by Dr Eugene Stuart)

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HARMONISATION OF PUBLIC PROCUREMENT SYSTEM IN UKRAINE WITH EU STANDARDS

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ABBREVIATIONS:

AMCU	Anti-Monopoly Committee of Ukraine
CCS	Carbon Capture and Storage
CHP	Combined Heat and Power
EU	European Union
GATT	General Agreement on Tariffs and Trade
GBER	General Block Exemption Regulation
GDP	Gross Domestic Product
GGE	Gross Grant Equivalent
NUTS	Nomenclature of Units for Territorial Statistics
OJ	Official Journal (of the European Union)
PCA	Partnership and Cooperation Agreement
PSO	Public Service Obligation
R&D&I	Research and Development and Innovation
SCMA	Subsidies and Countervailing Measures Agreement
SGEI	Services of General Economic Interest
SMEs	Small and Medium-sized Enterprises
TFEU	Treaty on the Functioning of the European Union
TRIMS	Trade Related Investment Measures Agreement
WTO	World Trade Organisation

Introduction to the Glossary of Terms for State Aid Regulation

The EU funded Project: *"Harmonisation of Public Procurement System in Ukraine with EU Standards"* commenced work in Kiev on 11 November 2013. The Project is being implemented by a consortium led by the leading international firm **CROWN AGENTS Ltd** and will operate until November 2016.

The Project is working:

"to contribute to the development of a solid and consistent public finance management through the establishment of a comprehensive and transparent regulatory framework for public procurement, an efficient public procurement institutional infrastructure, the accountability and integrity of public authorities in regard to public procurement and the development of the Ukrainian State aid system".

Support activities primarily focus on expert advice on policies, legislation and institutional structures and operations together with a range of training activities and awareness raising and public outreach activities and initiatives. The main beneficiaries of the Project are the Ministry of Economic Development and Trade (MEDT) and the Anti-Monopoly Committee of Ukraine (AMCU). As the key organisation in Ukraine responsible for the development of a State aid regulatory system, the AMCU is a key beneficiary of the Project.

THE UKRAINIAN LAW ON STATE AID TO UNDERTAKINGS

The Law of Ukraine "On State Aid to Undertakings" was adopted by the Verkhovna Rada on 1 July 2014. It was signed by the President of Ukraine on 22 July 2014 and published on 2 August 2014. The Law establishes the fundamental legal framework for the monitoring and control of State aid in Ukraine in compliance with EU principles. With its built-in three-year transitional period, the Law will fully enter into force on 2 August 2017.

The Law specifically excludes the agriculture, fisheries and defence sectors and this is consistent with the requirements of the Association Agreement. In addition, infrastructural expenditure by the State is excluded provided a public tendering process has ensured a proper degree of competition in regard to that expenditure. Also excluded are support measures by the State related to business activity associated with the provision of services of general economic interest (SGEIs); to the extent that reasonable expenses for the provision of such services are indemnified in part by the State. For the purpose of this exclusion, SGEIs are defined as services associated with the satisfaction of very important public needs which cannot be met on a commercial basis unless supported by State aid.

The broad economic purpose of the Law on State Aid to Undertakings is to avoid any undue distortions of competition and harmful impact on trade between Ukraine and EU Member States due to State aid granted to undertakings in Ukraine. Accordingly, the Law sets out a general prohibition on State aid. Recognizing that, in some circumstances, government interventions are necessary for a well-functioning and equitable economy, the Law leaves room for a number of policy objectives for which State aid can be considered compatible. The Law requires the prior approval of the Anti-Monopoly Committee of Ukraine for new State aid to be put into effect; while allowing for the possible development of block exemption procedures which might eventually obviate the need for notification in certain pre-defined cases.

The Law introduces a mechanism for State aid control coordinated at central level and provides a general legal framework for this mechanism. The Law also creates a basis for establishment of comprehensive State aid inventory and finally a State aid Register. As regards unlawful aid the Law provides the AMCU with the power to demand the recovery of incompatible State aid.

The important feature of the Law is that it is a framework law which will require a substantial body of secondary legislation to detail the actual rights and duties of State aid providers, State aid beneficiaries and the limitations on State aid in Ukraine that will be enforced by the Anti-Monopoly Committee as the Ukrainian regulator. To allow for this to develop, the Law provides for a reasonable transition before it comes into force. In the meantime, authority (AMCU) to create secondary legal acts is already in force and it remains essential that detailed and comprehensive secondary legislation and implementing guidelines are approved and an adequate institutional infrastructure is established in the period up to August 2017.

UKRAINE'S COMMITMENTS ON STATE AID REGULATION TO EU AND INTERNATIONAL STANDARDS

The EU-Ukraine Partnership and Cooperation Agreement (PCA) entered into force in 1998 and remains partly in force, for the time being¹, as the legal framework for EU-Ukraine relations. Under the PCA, Ukraine committed itself to gradual approximation to EU standards in a range of fields, including State Aid regulation; which the PCA addressed as part of competition policy.

In 2003 Ukraine became a country covered by European Neighbourhood Policy and a European Neighbourhood Action Plan (ENAP) for Ukraine was adopted in 2005. This Plan further prioritised and detailed commitments in the PCA and, in particular, highlighted the priority of the development of a functioning State Aid system in Ukraine, including the development of legislation compatible with EU rules and the establishment of monitoring and transparency mechanisms.

In 2008 Ukraine became a member of the WTO and as a consequence is subject to the Subsidies and Countervailing Measures Agreement (SCMA) and the Trade Related Investment Measures (TRIMS) Agreement, which require the establishment of national regulation on non-agricultural subsidies and international reporting on these to the WTO. In addition, on 1 February 2011, Ukraine became a Contracting Party to the Energy Community Treaty. Accordingly, Articles 18 and 19 of the Energy Community Treaty, which require EU compatible rules as regards State Aid in the energy sector, became applicable in Ukraine together with the application of a range of EU sectoral energy legislation.

In March 2007 negotiations on a new EU - Ukraine Association Agreement, including a Deep and Comprehensive Free Trade Area (DCFTA) were launched to replace the PCA. These negotiations were completed in July 2012 and the relevant draft documents were initialed by the representatives of Ukraine and the EU in July 2012. The EU-Ukraine Association Agreement was signed on 21 March 2014, ratified by the Verkhovna Rada later in 2014 and

¹ In effect, certain trade-related provisions of the PCA remain in force until 1 January 2016, when the economic and trade provisions of the EU-Ukraine Association Agreement fully enter into force.

generally entered into force on a provisional basis² on 1 November 2014. However, the EU and Ukraine agreed to delay the provisional application of the DCFTA provisions³ of the Agreement until 1 January 2016.

The Association Agreement provides, *inter alia*, that Ukraine should accomplish a number of comprehensive reforms in several spheres, including State aid regulation (Articles 262 to 267) within a specified transitional period. Thus, the provisions of the Association Agreement regarding State aid are intended to further elaborate, prioritise and timetable the steps to be taken to achieve functioning systems in Ukraine which would be fully compatible with EU standards. Under the State aid provisions of the Association Agreement, Ukraine is required to:

- adopt State Aid legislation and establish an operationally independent State Aid regulatory authority with the necessary powers within a period of three years following the entry into force of the Agreement;
- apply State aid rules similar to those applying in the EU;
- ensure that new State Aid conforms to EU rules within one year following the establishment of the authority;
- establish a comprehensive State aid Inventory within a period of five years following the entry into force of the Agreement;
- ensure the alignment of existing State Aid schemes with EU rules within a period of seven years following the entry into force of the Agreement;
- complete a “State Aid mapping” exercise within a period of four years following the entry into force of the Agreement;
- report annually on State Aid within a period of five years following the entry into force of the Agreement.

OVERVIEW OF EU STATE AID REGULATION

In all countries across Europe national governments grant subsidies, tax reliefs and other specific benefits to business undertakings as part of their economic and industrial policies. The purposes of these economic interventions include the promotion of economic development generally, the promotion of certain firms or industries specifically, employment maintenance and growth, the recovery of certain industries etc. While these actions advance the policies of the government towards the envisaged social or economic objectives, they directly or indirectly affect trade in the EU Internal Market and, to some degree at least, actually or potentially distort competition.

The problem is that some State aid granted to undertakings may provide them with operating benefits which are sufficient to prevent market forces from rewarding more competitive firms, not in receipt of State aid. This is because State aid reduces the costs of

² Ratification by EU Member States is now awaited.

³ These provisions include the Agreements commitments and requirements regarding State aid. As a result, 1 January 2016 becomes the starting date for all transitional periods in the Agreement related to the timing of Ukraine’s State aid commitments to EU standards under the Agreement.

producing goods or supplying services by assisted firms. Put another way, State aid can allow an assisted firm to artificially compete with more efficient firms. In time, this can decrease overall competitiveness and, as a result of such distortions, consumers may be faced with higher prices. State aid also has a negative impact upon trade between Member States which, in extreme cases, can lead to subsidy wars between countries.

Because EU Member States retained sovereignty as regards their industrial policies, the EU Treaties, from the very beginning in the 1950s, found it necessary to innovate⁴ in the form of Treaty rules to regulate the economic spillover effects of State aid decisions by one Member State on trade or on competition within the developing EU Internal Market. Most recently, these rules continue in Articles 107 to 109 of the Treaty on the Functioning of the EU (TFEU). These Articles provide for the requirements for a government measure to be State aid and set out the general requirements for State aid control. Accordingly, lawful State aid, under the EU treaty rules, is State aid that is granted in compliance with the TFEU requirements as elaborated further by the EU secondary rules and the jurisprudence of the European Courts.

In principle, State aid is incompatible with the EU Internal Market and is not allowed for that reason. However, as the purpose is not to prevent all State aid; but only to stop State aids that have an undue impact on competition and trade, the EU system, in practice, considers that State aid can be justified in many cases⁵.

State aid and its essential prohibition

Article 107 (1) of the TFEU contains the principal provision applicable to State aid. It States that:

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

Article 107(1) refers only to “aid” and does not provide an explicit definition of aid⁶. Over the years, the European Courts have held that it is the effect rather than the form or even the intention of support measures that ultimately makes them State aids. Interpretation of subsidies and aids was defined by European Courts in number of cases. For instance, the concept of State aid was defined by the Court of Justice in the *Denkavit* case where the Court concluded that the Treaty: “refers to the decisions of Member States by which the latter, in pursuit of their own economic and social objectives, give, undertakings resources or procure for them advantages intended to encourage the attainment of the economic or social objectives sought”. This wording refers to interventions which in various forms mitigate the charges which are normally included in the budget of an undertaking. Thus, it is

⁴ The inspiration of this innovation was largely drawn from the draft (and never adopted) Havana Charter of 1948 of what was to become the General Agreement on Tariffs and Trade (GATT) and later the WTO.

⁵ It is a matter of some interest to commentators and practitioners that the *prohibition system* that the TFEU appears to establish works, in practice, as a system that, via European Commission regulatory decisions, allows State aid to be granted in over 90% of cases considered by the regulator.

⁶ Over time, “State aid” has become a term of usage and is used in more recent EU international agreements, including the EU-Ukraine Association Agreement.

evident that State aid includes, in the first place, subsidies.

However, State aid comprises not only the direct financial support from State institutions to undertakings, but also other indirect measures of support e.g. low-Interest loans, provision of guarantees, tax rebates, increase in capital and other methods (forms). In general, State aid may include measures of support to undertakings as long as they provide any selective economic benefit to those undertakings. That is why it is the effect rather than the form of a measure that matters. If the effect of a particular measure is to benefit a particular undertaking or category of goods, then it can be regarded as an aid.

Essentially Government support measures are considered to constitute State aid (within the meaning of Article 107 of the Treaty), where they meet the requirements of certain tests or criteria. These criteria are set out in Article 107(1) of the Treaty and can be summarised as follows:

- First, the measure must be granted from State funds or supported by the State. The concept of “State” includes the Government (Ministries, municipalities, and other institutions), public enterprises and in some cases even private undertakings acting on behalf of the State or authorised by public institutions;
- Secondly, the measure must have an actual or potential negative impact on competition and a similar effect on trade between Member States;
- Thirdly, the measure must be selective (rather than general). This means that the measure must be provided selectively, for the production of certain goods or the support of certain undertakings. State aid does not include measures of general economic policy that are available to all undertakings (so-called general measures) such as special credit terms, a reduction of interest rates, a reduction of the general tax burden (e.g. rates of corporate income tax) as these will apply to all undertakings. In contrast, selective measures are typically measures targeting the development of firms located in a particular region, granting support to individual sectors, pursuing so-called “horizontal objectives” of economic policy (e.g. aid to small and medium-sized enterprises, aid for research and development, aid for environmental protection etc.) or providing tax reliefs, tax exemptions or reductions in the social charges paid by businesses in a way that applies to some, but not to all firms;
- Finally, the measure must provide an economic benefit that an undertaking would not receive operating without the measure under normal market conditions.

To be a State aid regulated by the TFEU, Article 107 requires that a measure being considered fulfills all of these criteria. Where any one of the above criteria is not met, the support granted by the State does not constitute State aid and therefore will not be subject to regulation under the EU system.

Examples of the measures that do not meet the criteria include the following:

- Assistance to public institutions or entities that are not engaged in economic activities;
- general support measures applied to all undertakings throughout the country;

- public procurements in the acquisition of goods and services at market prices (as a result of open transparent tenders);
- measures applied to public institutions when public institutions behave like a private market investor;
- expenditure on infrastructure where this does not provide any exceptional benefit to one or several users (e.g. general road building in contrast to a road built by the State solely to facilitate access to a single firm or even built within the grounds of a particular firm – these would be selective State support).

De jure compatible State aids and grounds for discretionary exemption from prohibition by the European Commission

While Article 107(1) starts off with a general prohibition on State aid measures, Article 107(2) sets out specifies cases when State aid is always to be considered compatible with the EU Internal Market – *de jure* compatible State aids. These cases are:

- aid having a social character, granted to individual consumers, provided that such aid is granted without discrimination related to the origin of the products concerned; the aid beneficiary in this case must be an individual user, and not an entity;
- aid granted to make good the damage caused by natural disasters or caused by exceptional occurrences (force majeure). In these cases the State aid cannot be larger than the damage incurred;
- aid granted to the economy of certain areas of the Federal Republic of Germany affected by the division of Germany, in so far as such aid is required in order to compensate for the economic disadvantages caused by that division⁷.

Providing the general parameters for State aid control by the European Commission, Article 107(3) sets out the broad circumstances where State aid *may* be considered compatible with the EU Internal Market. In these circumstances, exemption from the general prohibition may be allowed but this is not automatic, and exceptions to the prohibition are supposed to be strictly applied and actually exceptional. The circumstances that may justify exemption are:

- a) aid to promote the economic development of the areas where the standard of living is abnormally low or where there is serious underemployment;
- b) aid to promote the execution of an important project of common European interest, or to remedy a serious disturbance in the economy of a Member State;
- c) aid to facilitate the development of certain economic activities or of certain economic areas, where such aid does not adversely affect trading conditions to an extent contrary to the common interest;
- d) aid to promote culture and heritage conservation where such aid does not affect trading conditions and competition in the Community to an extent that is contrary to the common interest;
- e) other categories of aid that may be specified by a decision of the Council on a proposal from the European Commission.

⁷ This provision is largely of historic interest, dating back to its original inclusion in the Rome Treaty of 1957. The TFEU of 2008 provides that, after five years, the Council, acting on a proposal from the Commission, may adopt a decision repealing this point.

Exemptions to the general prohibition of Article 107(1) are also laid down in other Articles of the TFEU related to agriculture, public transport, the provision of services of general economic interest and defence. These are the main areas covered by the phrase "*Save as otherwise provided in the Treaties*" which fully qualifies the prohibition on aid in Article 107(1).

Thus, it is clear that, while Article 107(1) generally prohibits State aid, that prohibition is not total. Its scope is further reduced by the *de jure* exceptions of Article 107(2) and the important, and in practice wide-ranging, grounds for exemption in Article 107(3).

Notification, approval and other required procedures

The general procedures for State aid regulation by the European Commission are set out in Article 108 of the TFEU. First, there is a duty on Member States to notify the European Commission of their intentions to grant or alter State aid and to refrain from putting State aid into effect until it has been authorised by the Commission. If this is not done and the State aid is later found incompatible, the Commission is required to ensure that the Member State government concerned stops giving the State aid and recovers whatever amounts of State aid were previously granted with interest. Approved State aid which breaches any conditions imposed by the Commission or which is used for an entirely different purpose (mis-used State aid) is also subject to recovery with interest. In addition, Article 108 empowers the European Commission to keep under constant review all systems of State aid and it may demand that any State aid which is incompatible with the EU Internal Market shall be abolished or altered. These general provisions have been elaborated further in the main State aid Procedural Regulation - Council Regulation No 659/1999.

Article 109 of the Treaty grants the powers to the Council to pass new legal acts required for the implementation of Articles 107 and 108 of the Treaty. It applies in the first place, to identify the terms and conditions for the implementation of Article 108(3) of the Treaty concerning a notification procedure. The Council may pass legal acts concerning the types of State aid that will be exempted from the State aid notification procedure⁸.

In general, almost all State aid cases notified to the European Commission are approved with or without conditions. Where State aid is not notified to the Commission and later investigated, however, the majority of these cases result in prohibition decisions and orders for the recovery of the State aid with interest.

The Treaty rules on State aid are supplemented by a wide range of Commission Guidelines, Notices and Regulations setting out detailed rules for State aid assessment for State aid of particular types (e.g. for regional development) and for 'sensitive' economic sectors. Similar measures also set a *de minimis* threshold for the system and codify procedural rules on the notification, approval and recovery of aid.

⁸ Commission Regulation (EC) No 800/2008 of 6 August 2008 declaring certain categories of aid compatible with the common market in application of Articles 87 and 88 of the Treaty, OJ L 214 of 9 August 2008. This General Block Exemption Regulation (GBER), in force since 29 August 2008, simplifies aid granting procedures for Member States by authorising without prior notification a range of measures fulfilling horizontal common interest objectives.

THIS GLOSSARY

As the Ukrainian State aid regulatory system continues to develop, it is clear that it is a new system of law for Ukraine. For that reason, and given the volume and complexity of EU law in this field, it is necessary for Ukrainian stakeholders (the Government generally, the AMCU as regulator, State aid providers, the business community, lawyers and the courts) to have an accessible resource covering most of the terminology that is specific to State aid regulation.

This Glossary covers specific terminology used in the EU State aid regulatory system. This terminology is drawn in part of the main legal instruments, soft law measures and case law. It also includes certain terms that are not specifically defined in EU law – notably the concept of “aid”, the “market investor principle”, “services of general economic interest” and “general measures”.

Secondly, the Glossary includes all key definitions in the Ukrainian Law on State aid to Undertakings of 2014.

Some further terms, including key definitions of the WTO Subsidies and Countervailing Measures Agreement, 1994 are also included in the Glossary (notably the definition of “subsidy”), underlining that WTO subsidy regulation and EU State aid regulation, while quite different in terms of scope and regulation, are nonetheless inter-connected on substance.

The position in all cases reflects the prevailing legislation and the position at end-February 2015.

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Team Leader

A

"a" areas mean those areas designated in a *regional aid map* in application of the provisions of Article 107(3)(a) of the Treaty.⁹ For the time being all areas of Ukraine are considered as regions where the standard of living is abnormally low or where there is serious underemployment, in other words as areas that could be covered by Article 107 3 (a) of the TFEU.

'aid' means any measure fulfilling all the criteria laid down in Article 107(1) of the Treaty on the Functioning of the European Union (TFEU)¹⁰. Article 107(1) introduces a general prohibition of State aid in EU law. It defines aid that is prohibited and unlawful, i.e. aid provided through State resources that distorts or threatens to distort, competition by favouring certain undertakings or the production of certain goods. Exemptions to this prohibition are provided by the TFEU Article 107(2) and (3). To be covered by the prohibition, Article 107 establishes four conditions that have to be fulfilled for the measure to be classified as State Aid under EU law:

1. there must be a financial intervention by the State or State resources (e.g. grants, interest and tax relieves and provision of goods and services on preferential terms, etc.),
2. this intervention must create a benefit for the recipient undertaking,
3. the intervention must distort or threaten to distort competition and
4. the intervention must actually or potentially affect trade between the EU Member States.

In general, "aid" (or State aid) is a dynamic concept, since a decision on whether a particular measure is aid or not, or prohibited or not, is taken in the light of circumstances in the EU Internal Market at the time the decision is taken. A measure judged at one time not to be aid can later be judged not only to be aid but also to be incompatible with the Internal Market, and a decision requiring its termination can then be taken. (See also '*State aid*').

'ad hoc aid' means aid not awarded on the basis of an *aid scheme*, but under special circumstances for a specific and immediate purpose without previous planning.¹¹

'adjusted aid amount' means the maximum permissible aid amount for a *large investment project*, calculated according to the following formula:

$$\text{maximum aid amount} = R \times (50 + 0,50 \times B + 0,34 \times C)$$

where: R is the maximum aid intensity applicable in the area concerned, excluding the increased *aid intensity* for *SMEs*. B is the part of *eligible costs* between €50 million and € 100 million. C is the part of eligible costs above €100 million.¹²

⁹ Commission Guidelines on Regional State aid for 2014-2020. Official Journal C209 of 23 July 2013, para. 20(a).

¹⁰ Council Regulation (EC) 659/ 1999 OJ 1999 L 83/1, Article 1(a).

¹¹ Commission Regulation (EU) N°651/2014 of 17 June 2014 declaring certain categories of aid compatible with the internal market in application of Articles 107 and 108 of the Treaty, Article 2.17.

¹² Commission Guidelines on regional State aid for 2014-2020. Official Journal C209, 23 July 2013, para.20(c).

'advantage' means a benefit that the recipient *undertaking* of State aid receives. It is any relief from normal costs that are inherent in the economic activity of the beneficiary undertaking. To constitute State aid a measure must exhibit certain characteristics (see also *State aid*). One of the features of the measure that falls within Article 107 (1) is an economic advantage that the measure must confer. The recipient must receive an advantage that it would not have received under normal market conditions. The precise form of the measure is irrelevant in establishing whether it confers an economic advantage on the undertaking. Not only is the granting of positive economic advantages relevant for the notion of State aid, but relief from economic burdens can also constitute an advantage. The latter is a broad category which comprises any mitigation of charges normally included in the budget of an undertaking. This covers all situations in which economic operators are relieved of the inherent costs of their economic activities, even if there is no legal obligation to assume those costs. An obvious example is a preferential loan where the interest rate charged is lower than the average interest rate prevailing in the market because of an interest subsidy. If, by contrast, a Member State provides funding to an undertaking on the same conditions as the market, then the funding does not constitute State aid (see also *market investor principle*).

'aid intensity' means the gross aid amount expressed as a percentage of the *eligible costs*, before any deduction of taxes or other charges. All figures used are calculated before deducting any fees or taxes. Where aid is awarded in a form other than a grant, the aid amount is the *gross grant equivalent* of the aid. Aid payable in several instalments is discounted to its values at the moment of granting the aid. The interest rate that will be used for updating the aid value is the reference rate (set periodically by the European Commission) applicable at the time of the grant. The aid intensity is calculated per beneficiary¹³.

'aid of a social character' means aid provided for certain categories of consumers whose situation justifies social intervention. Article 107 2(a) of TFEU provides that aid having a social character, granted to individual consumers, is permissible. The ultimate beneficiary of the aid must be the individual consumer, rather than an undertaking. Such aid may include a variety of State aid schemes supporting high-risk public sector workers subscribing to sickness and incapacity insurance contracts, the subsidisation of air routes provided the aid is for the benefit of final consumers or aids to low-income groups purchasing digital television equipment.

'aid scheme' means any act on the basis of which, without further implementing measures being required, *individual aid* awards may be made to *undertakings*. Such aid awards must be defined within the act in a general and abstract manner. 'Aid scheme' also means any act on the basis of which aid, which is not linked to a specific project, may be awarded to one or several undertakings for an indefinite period of time and/or for an indefinite amount¹⁴.

Aid schemes are normative acts (statutory acts, regulations or acts of local law) which set forth the terms and conditions, as well as the forms and legal bases for granting aid to undertakings defined in a general and abstractive manner. More specifically, the schemes specify the objective of the aid (e.g. training, research, development and innovation, environment protection, increased employment, restructuring) and its forms (State grants, tax advantages, State guarantees etc.). Aid schemes also identify the aid granting

¹³ Commission Framework for State aid for research and development and innovation 2014/C 198/01, para.15(c).

¹⁴ Council Regulation (EC) 659/ 1999 OJ 1999 L 83/1, Article 1(d).

authorities, *eligible costs*, the maximum *intensity* of the aid, the scheme’s duration and its beneficiaries.

The Law of Ukraine on State Aid to Undertakings does not define ‘State aid scheme’. However, the definition of the ‘State aid programme’ which is similar to that of a ‘State aid scheme’ is used. In accordance with the Ukrainian legislation¹⁵, a State aid programme ‘means a regulatory legal act or a set of acts whereunder State aid is granted to certain categories of undertakings for a certain or an indefinite period of time in a definite or indefinite amount’.

‘aid to culture’ means aid granted for various cultural purposes and activities. EU law allows aid to be given for promoting culture as long as it is notified to the European Commission and the Commission has given its approval or as long as it meets conditions laid down in the Commission Regulation declaring certain categories of aid compatible with the internal market in application of Articles 107 and 108 of the Treaty (GBER)¹⁶.

‘airport charge’ means a price or a levy collected for the benefit of the airport and paid by the airport users for the use of facilities and services which are exclusively provided by the airport and which are related to landing, take-off, lighting and parking of aircraft, and the processing of passengers and freight, including charges or fees paid for ground handling services and fees for centralised ground handling infrastructure¹⁷.

‘airport infrastructure’ means infrastructure and equipment for the provision of airport services by the airport to airlines and the various service providers, including runways, terminals, aprons, taxiways, central ised ground handling infrastructure and any other facilities that directly support the airport services, excluding infrastructure and equipment which is primarily necessary for pursuing non-aeronautical activities, such as car parks, shops and restaurants.¹⁸

‘airport services’ means services provided to airlines by an airport or any of its subsidiaries, to ensure the handling of aircraft, from landing to take-off, and of passengers and freight, so as to enable airlines to provide air transport services, including the provision of ground handling services and the provision of centralised ground handling infrastructure¹⁹.

‘alterations to aid’ –according to the Procedural Regulation²⁰, altered aid means ‘any change, other than modifications of a purely formal or administrative nature which cannot affect the evaluation of the compatibility of the aid measure with the internal market’. Any substantive change in a system of aid will therefore normally constitute an alteration to the aid. However, an increase in the original budget of an existing aid scheme by up to 20% is not considered to be an alteration to existing aid. An alteration to aid constitutes new aid (see also ‘*new aid*’) and must be notified to the Commission (see also ‘*notification requirement*’).

Similar provisions to that laid down in the EU law are set out in the Ukrainian Law on State Aid to Undertakings. According to Article 9 of the Law ‘proposals to make changes in the terms and conditions of existing State aid shall require notification when such changes could

¹⁵ Law of Ukraine on State Aid to Undertakings, Article 1, Part 1.14.

¹⁶ Commission Regulation (EU) N°651/2014 of 17 June 2014 declaring certain categories of aid compatible with the internal market in application of Articles 107 and 108 of the Treaty.

¹⁷ Commission Guidelines on State aid to airports and airlines OJ C 99, 4 April 2014, para 25(4).

¹⁸ Commission Guidelines on State aid to airports and airlines OJ C 99, 4 April 2014, para 25(5).

¹⁹ Commission Guidelines on State aid to airports and airlines OJ C 99, 4 April 2014, para 25(8).

²⁰ Council Regulation (EC) 659/ 1999 OJ 1999 L 83/1, Article 1(c).

have a significant impact on the Authorised Body’s decision on the compatibility of State aid with competition, in particular, when such changes would apply to the purpose, timeframe, scope, financial sources and State aid beneficiaries.’²¹.

‘alternative trading platform’ means a multilateral trading facility as defined in Article 4(1)(15) of Directive 2004/39/EC²² where the majority of the financial instruments admitted to trading are issued by SMEs²³. In effect, an Alternative trading platform a “marketplace” that brings together multiple buyers and multiple sellers of securities – a function historically performed by stock exchanges. It can generally be described as an electronic trading system that provides automated trade matching, and processes buy and sell orders using pre-determined, non-discretionary trading methods. Traditionally, trades in any given security were primarily executed on the exchange listing the security. When an alternative trading platform is used, buyers, sellers and their agents have a growing range of options when deciding where and how to execute a trade. Alternative trading platforms compete with each other and with traditional exchanges by offering, among other things, different operating models, trade types and fee structures.

‘Altmark criteria’ - in the Altmark case²⁴ the European Court of Justice (ECJ)²⁵ held that a State measure is not within the scope of Article 107(1) and does not constitute State aid if certain conditions defined in the case are satisfied. The case concerned the question of whether the grant of subsidies to Altmark Trans for the operation of a public bus service constituted State aid. The Court confirmed that compensation for *public service obligations* provided by undertaking is not State aid if the compensation meets the criteria defined below. The criteria is the following:

- Existence of a service of general economic interest (SGEI). The first Altmark criterion requires the definition of an SGEI task. Member States have a wide margin of discretion in defining a given service as an SGEI and in granting compensation to the service provider. The services to be classified as SGEIs must be addressed to citizens or be in the interest of society as a whole. The public service task must be assigned by way of an act that, depending on the legislation in Member States, may take the form of a legislative act or a contract. The act must specify the content and duration of the public service obligation (PSO), the undertaking and, where applicable, the territory concerned; the nature of any exclusive or special rights assigned to the undertaking by the authority in question; the parameters for calculating, controlling and reviewing the compensation and the arrangements for avoiding and recovering any over-compensation.
- Parameters of compensation. The parameters that serve as the basis for calculating compensation must be established in advance in an objective and transparent manner in order to ensure that they do not confer an economic advantage that could favour the recipient undertaking over competing undertakings. Only the costs directly associated with the provision of the SGEI can be taken into account.
- Avoidance of overcompensation. The compensation must not exceed what is necessary to cover all or part of the costs incurred in the discharge of public service

²¹ Law of Ukraine on State Aid to Undertakings, Article 9, Part 2.

²² Directive 2004/39/EC of the European Parliament and of the Council of 21 April 2004 on markets in financial instruments (OJ L 145, 30 April 2004, p. 1).

²³ Guidelines on risk finance aid for 2014-2020 OJ C19, 22 January 2014, para.52(i).

²⁴ Case C-280/00 Altmark (2003) ECR I-7747.

²⁵ Now the Court of Justice of the European Union (CJEU).

obligations, taking into account the relevant receipts and a reasonable profit. Reasonable profit means the rate of return on capital that would be required by a typical company considering whether or not to provide the service of general economic interest for the whole duration of the period of entrustment, taking into account the level of risk.

Selection of provider. In accordance with the fourth Altmark criterion, the compensation offered must either be the result of a public procurement procedure, which allows for selection of the tenderer capable of providing those services at the least cost to the community, or the result of a benchmarking exercise with a typical undertaking, well run and adequately provided with the necessary means.

‘applied research’ means *industrial research, experimental development*, or any combination of both²⁶. Applied research can be divided into industrial research (meaning planned research or critical investigation aimed at the acquisition of new knowledge and skills for developing new products, processes or services or for bringing about a significant improvement in existing products, processes or services) and experimental development (meaning acquiring, combining, shaping and using existing scientific, technological, business and other relevant knowledge and skills with the aim of developing new or improved products, processes or services).

‘Authorised Body’ means the Commission or the Council in the EU State aid regulatory system and the AMCU in the national system of Ukraine.

‘authorised aid’ means *aid schemes and individual aid* which have been authorised by the European Commission or by the Council²⁷. According to the Ukrainian Law on State Aid to Undertakings, ‘authorised aid’ means State aid programmes and individual State aid which have been authorised by the AMCU.

‘average annual passenger traffic’, in the context of State aid in the air transport sector, means a figure determined on the basis of the inbound and outbound passenger traffic during the two financial years preceding that in which the aid is notified or granted in the case of non-notified aid.²⁸

²⁶ Commission Framework for State aid for research and development and innovation 2014/C 198/01, para.15(e).

²⁷ Council Regulation (EC) 659/ 1999 OJ 1999 L 83/1, Article 1(b)(ii).

²⁸ Commission Guidelines on State aid to airports and airlines OJ C 99, 4 April 2014, para 25(9).

B

'block exemption' means exemption of some specific categories of State aid from the requirement of prior notification to the European Commission. Article 109 of the TFEU grants the powers to the Council to pass new legal acts required for the implementation of Articles 107 and 108 of the Treaty. It applies in the first place, to identify the terms and conditions for the implementation of Article 108(3) of the Treaty concerning a notification procedure. The Council may pass legal acts concerning the types of State aid that will be exempted from the State aid notification procedure. These categories of State aid are compatible with the Treaty if they fulfil certain conditions, thus they are exempt from the requirement of prior notification. According to Commission Regulation (EU) N°651/2014 of 17 June 2014²⁹ block exemption rules currently apply to:

- *regional aid*
- *aid to small and medium-sized enterprises*
- *aid for research and development and innovation*
- *training aid*
- *aid for environmental protection*
- *aid for disadvantaged workers and for workers with disabilities*
- *aid to make good the damage caused by natural disasters*
- *social aid for transport for residents of remote regions*
- *aid for broadband infrastructures*
- *aid for culture and heritage conservation*
- *aid for sport and multifunctional recreational infrastructure*
- *aid for local infrastructure.*

In applying the general exemption, instead of the notification Member States are required to submit to the European Commission a brief summary of information on the application of the exemption in a prescribed format.

According to Article 7 of the Ukrainian Law on State Aid to Undertakings, the Authorized Body (AMCU) 'may define the terms and conditions to relieve certain categories of State aid providers from the obligation to notify'.³⁰

'biofuels' means liquid or gaseous fuel for transport produced from *biomass*³¹.

'biomass' means the bio-degradable fraction of products, waste and residues from agriculture (including vegetal and animal substances), forestry and related industries, as well as the bio-degradable portion of industrial and municipal waste³².

²⁹ Commission Regulation (EU) N°651/2014 of 17 June 2014²⁹ declaring certain categories of aid compatible with the internal market in application of Articles 107 and 108 of the Treaty.

³⁰ Law of Ukraine on State Aid to Undertakings, Article 7.

³¹ Commission Guidelines on State aid for environmental protection and energy 2014-2020 (2014/C 200/01), para.19(7).

³² Commission Guidelines on State aid for environmental protection and energy 2014-2020 (2014/C 200/01), para.19(6).

'buyout', in the context of State aid for risk capital investment, means the purchase of at least a controlling percentage of a company's equity from the current shareholders to take over its assets and operations³³.

³³ Guidelines on Risk Finance aid for 2014-2020 OJ C19, 22 January 2014, para.52(iii).

C

"c" areas, in the context of *regional aid*, mean those areas designated in a *regional aid map* covered by the provision of Article 107(3)(c) of the TFEU³⁴. To ensure that Member States address the needs of the regions that are disadvantaged from an EU perspective, the Commission has predefined eligible regions on the basis of their relative level of development. The most disadvantaged regions with GDP below 75% of EU GDP per capita are considered as *"a" areas*. Other areas (apart from outermost regions and sparsely populated regions) eligible for regional aid are regions with GDP higher 75% but below 100% of EU GDP per capita.

These areas are defined also taking into account other socio-economic criteria, including unemployment, at both EU and national levels.

'capital costs funding gap', in the context of State aid in air transport, means the net present value of the difference between positive and negative cash flows, including investment costs, over the lifetime of an investment in fixed capital assets³⁵.

'Carbon Capture and Storage' (CCS) means a set of technologies that capture carbon dioxide i.e. the capture of CO₂ emitted from industrial plants based on fossil fuels or biomass, including power plants, its transportation to a suitable storage site and the injection of the CO₂ in suitable underground geological formations for the purpose of its permanent storage³⁶.

'co-generation' or 'combined heat and power' (CHP) means the simultaneous generation in one process of thermal energy and electrical and/or mechanical energy³⁷.

'commercial risks', in the context of short-term *export credit insurance*, means risks including, in particular:

- arbitrary repudiation of a contract by a buyer, i.e. any arbitrary decision made by a non-public buyer to interrupt or terminate the contract without a legitimate reason,
- arbitrary refusal of a non-public buyer to accept the goods covered by the contract without a legitimate reason,
- insolvency of a non-public buyer and its guarantor,
- protracted default, i.e. non-payment by a non-public buyer and by its guarantor of a debt resulting from the contract³⁸.

In some situations, exporting firms need to be protected against political risks and

³⁴ Commission Guidelines on Regional State aid for 2014-2020. Official Journal C209 of 23 July 2013, para.20(a).

³⁵ Commission Guidelines on State aid to airports and airlines OJ C 99, 4 April 2014, para 25(11).

³⁶ Commission Guidelines on State aid for environmental protection and energy 2014-2020 (2014/C 200/01), para.19(33).

³⁷ Commission Guidelines on State aid for environmental protection and energy 2014-2020 (2014/C 200/01), para.19(12).

³⁸ Communication from the Commission to the Member States on the application of Articles 107 and 108 of the Treaty on the Functioning of the European Union to short-term export-credit insurance (2012/C 392/01), para.9.

commercial risks beyond the control of the market. Such commercial events which can prevent the firm from being paid include the buyer's insolvency.

'contaminated site' means a site where there is a confirmed presence, caused by man, of hazardous substances of such a level that they pose a significant risk to human health or the environment taking into account the current and approved future use of the land³⁹.

³⁹ Commission Guidelines on State aid for environmental protection and energy 2014-2020 (2014/C 200/01), para.19(29).

D

'date of granting the aid' means the date when the legal right to receive the aid is conferred on the beneficiary under the applicable national legal regime⁴⁰. Assistance may have various forms (grants, loans, tax exemptions etc.). Amounts which are not in the form of a cash grant must be converted into their *grant equivalent*. All figures have to be gross, before deduction for direct taxation. Aid payable in several instalments has to be discounted to its value at the moment it is granted. The interest rate to be used for discounting purposes has to be the discount rate applicable at the time the aid is granted. The date of granting of aid is also used in regard to the recovery of illegal State aid and the application of the 10 year rule applicable to the *recovery of aid*.

'de minimis aid' means aid measures that are deemed not to meet all the criteria in Article 107(1) of the Treaty, and are therefore exempt from the notification requirement in Article 108(3) of the Treaty⁴¹. In general terms, these are aid measures of up to €200,000 per firm over any period of 3 fiscal years. The total amount of de minimis aid granted per Member State to a single undertaking performing road freight transport for hire or reward is limited to € 100,000 over any period of three fiscal years. This de minimis aid may not be used for the acquisition of road freight transport vehicles⁴². Under special arrangements for the restructuring of the banking sector, de minimis aid for that sector is €500,000. De minimis aid is considered not to constitute State aid within the meaning of the Treaty (on the basis that its low value does not affect trade) which means that Member States can grant these amounts of aid without any procedural burden. However, Member States are required to monitor de minimis aid to ensure that it is not, in fact, exceeded. De minimis aid is deemed to be granted at the moment the legal right to receive the aid is conferred on the undertaking under the applicable national legal regime irrespective of the date of payment of the de minimis aid to the undertaking⁴³. According to the Ukrainian Law on State Aid to undertakings 'de minimis aid' is 'State aid to a single undertaking of up to the UAH equivalent of €200,000 in total over any period of three fiscal years, according to the official rate, set by the National bank of Ukraine, effective as at the last day of the financial year.'⁴⁴.

'debt investment instruments' means loans and other funding instruments which provide the lender/investor with a predominant component of fixed minimum remuneration and are at least partly secured.

'difficult audio-visual works', in the context of State aid supporting film production, means works identified as such by Member States on the basis of pre-defined criteria when setting up schemes or granting aid and may include films whose sole original version is in a language of a Member State with a limited territory, population or language area, short films, films by first-time and second-time directors, documentaries, or low budget or otherwise

⁴⁰ Commission Framework for State aid for research and development and innovation 2014/C 198/01, para.15(g).

⁴¹ Commission Regulation (EC) 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, Article 3.1.

⁴² Commission Regulation (EC) 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, Article 3.2.

⁴³ Commission Regulation (EC) 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, Article 3.4.

⁴⁴ Law of Ukraine on State Aid to Undertakings, Article 1, Part 1.7.

commercially difficult works. However, under the subsidiarity principle, it is up to each Member State to establish a definition of difficult films according to national parameters⁴⁵.

'disadvantaged worker' means any person who:

- has not been in regular paid employment for the previous 6 months; or
- is between 15 and 24 years of age; or
- has not attained an upper secondary educational or vocational qualification or is within two years after completing full-time education and who has not previously obtained his or her first regular paid employment; or
- is over the age of 50 years; or
- lives as a single adult with one or more dependents; or
- works in a sector or profession in a Member State where the gender imbalance is at least 25% higher than the average gender imbalance across all economic sectors in that Member State, and belongs to that underrepresented gender group; or
- is a member of an ethnic minority within a Member State and who requires development of his or her linguistic, vocational training or work experience profile to enhance prospects of gaining access to stable employment.⁴⁶

In accordance with the Ukrainian Law on State Aid to Undertakings a 'disadvantaged person' is a worker that cannot compete on equal terms in the labour market and is a person who fulfils the following criteria:

- aged from 15 to 24 years and older than 50 years;
- has not been in regular paid employment for the previous 6 months;
- has not attained an upper secondary educational or vocational qualification or has attained such education no later than two years before and did not had regular paid employment;
- live as a single adult with one or more dependents;
- works in a sector or profession where the gender imbalance is at least 25% higher than the average gender imbalance across all economic sectors, and belongs to that underrepresented gender group;
- is a member of an ethnic minority and who requires development of his or her linguistic, vocational training or work experience profile to enhance prospects of gaining access to stable employment⁴⁷.

'district heating' means the supply of heat, either in the form of steam or hot water, from a central source of production through a transmission and distribution system to multiple buildings, for the purpose of heating.

⁴⁵ Communication from the Commission on State aid for films and other audiovisual works 2013/C 332/01, para 52.2.

⁴⁶ Commission Regulation (EU) N°651/2014 of 17 June 2014 declaring certain categories of aid compatible with the internal market in application of Articles 107 and 108 of the Treaty, Article 2.

⁴⁷ Law of Ukraine on State Aid to Undertakings, Article 1, Part 1.6.

'dual use goods' are goods, software and technology normally used for civilian purposes but which may have military applications, or may contribute to the proliferation of Weapons of Mass Destruction.

E

'eco-innovation' means all forms of innovation activities resulting in or aimed at significantly improving environmental protection. Eco-innovation includes new production processes, new products or services, and new management and business methods; the use or implementation of which is likely to prevent or substantially reduce the risks for the environment, pollution and other negative impacts resulting from the use of resources, throughout the life cycle of related activities. The following are *not* considered innovations:

- minor changes or improvements;
- an increase in production or service capabilities through the addition of manufacturing or logistical systems which are very similar to those already in use;
- changes in business practices, workplace organisation or external relations that are based on organisational methods already in use in the undertaking;
- changes in management strategy;
- mergers and acquisitions;
- ceasing to use a process;
- simple capital replacement or extension;
- changes resulting purely from changes in factor prices, customisation, regular seasonal and other cyclical changes;
- trading of new or significantly improved products.⁴⁸

'economic activity' means any activity consisting in offering goods and services on a market. It follows from CJEU case-law that Article 107 of TFEU does not apply where the State acts "by exercising public power" or where public entities act "in their capacity as public authorities". An 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 a Member State 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. In so far as a public entity exercises an economic activity which can be separated from the exercise of public powers, that entity, in relation to that activity, acts as an undertaking and engages in economic activity. On the contrary, if an economic activity cannot be separated from the exercise of public powers, the activities exercised by that entity as a whole remain connected with the exercise of those public powers and are therefore not carried out by an undertaking (see also '*undertaking*').

'effective collaboration', in the context of aid for research, development and innovation,

⁴⁸ Commission Guidelines on State aid for environmental protection and energy 2014-2020 (2014/C 200/01), para.19(4)

means collaboration to exchange knowledge or technology, or to achieve a common objective based on the division of labour where the parties jointly define the scope of a collaborative project and share its risks and outputs. Sub-contracting is not considered to be effective collaboration⁴⁹.

‘eligible costs’ means, for the purpose of investment aid, tangible and intangible assets related to an initial investment or to the wage costs of new employment⁵⁰. An eligible investment project must relate to setting up a new establishment, extending an existing establishment, diversifying into new additional products or a fundamental change in production process and must create employment directly related to the realisation of this project. For example, State aid may be awarded on the basis of a percentage of eligible costs of either new investment or new jobs created directly as a result of the investment project. In the case of all EU secondary rules on State aid of different types, eligible cost rules are set out to ensure that State aid limits are calculated on a comparable and acceptable cost basis.

‘energy-efficiency’ means an amount of saved energy determined by measuring and/or estimating consumption before and after the implementation of an energy-efficiency improvement measure, while ensuring the normalisation of external conditions that affect energy consumption⁵¹.

In the EU, a common framework of measures for the promotion of energy efficiency within the Union (in order to ensure the achievement of the Union’s 2020 20 % target on energy efficiency and to pave the way for further energy efficiency improvements beyond that date) was established. All EU countries are thus required to use energy more efficiently at all stages of the energy chain – from the transformation of energy and its distribution to its final consumption.

‘energy-efficient district heating and cooling’ means district heating and cooling which satisfies the definition of efficient district heating and cooling system as set out in Article 2(41) and (42) of Directive 2012/27/EU⁵². The definition includes the heating/cooling of production plants and the network (including related facilities) necessary to distribute the heat/cooling from the production units to the customer’s premises⁵³.

‘energy from renewable energy sources’ means energy produced by plants using only renewable energy sources, as well as the share in terms of calorific value of energy produced from renewable energy sources in hybrid plants which also use conventional energy sources and includes renewable electricity used for filling storage systems, but excludes electricity produced as a result of storage systems.

Renewable energy resources, such as wind, solar, biomass energy, hydrogen, ocean energy and hydropower, offer clean alternatives to fossil fuels as they produce little or no pollution or greenhouse gases, and they will never run out. The EU adopted the Directive on the promotion of the use of energy from renewable sources in 2009 in order to control European energy consumption and to increase energy savings and energy efficiency, to reduce greenhouse gas emissions and comply with the Kyoto Protocol to the United Nations

⁴⁹ Commission Framework for State aid for research and development and innovation 2014/C 198/01, para.15(i).

⁵⁰ Commission Guidelines on regional State aid for 2014-2020. Official Journal C209, 23 July 2013, para.20(e).

⁵¹ Commission Guidelines on State aid for environmental protection and energy 2014-2020 (2014/C 200/01), para.19(2).

⁵² OJ L 315, 14 November 2012.

⁵³ Commission Guidelines on State aid for environmental protection and energy 2014-2020 (2014/C 200/01), para.19(14).

Framework Convention on Climate Change together with further EU and international greenhouse gas emission reduction commitments.

'environmental protection' means any action designed to remedy or prevent damage to physical surroundings or natural resources by the beneficiary's own activities, to reduce risk of such damage, or to lead to a more efficient use of natural resources, including energy-saving measures and the use of renewable sources of energy⁵⁴. The TFEU sets the achievement of a high level of protection and improvement of the quality of the environment among the objectives of the EU. The EU common environment policy has the following objectives: preserving, protecting and improving the quality of the environment; protecting human health; rationalising the use of natural resources; promoting measures at international level to deal with regional or world-wide environmental problems and, in particular, combating climate change (Article 191 TFEU).

'environmental tax' means a tax whose specific tax base has a clear negative effect on the environment or which seeks to tax certain activities, goods or services so that the environmental costs may be included in their price and/or to enable producers and consumers to be oriented towards activities which better respect the environment.

European statistics distinguish four different types of environmental taxes relating to: energy, transport, pollution and resources. Environmental taxes have been increasingly used to influence the behaviour of economic operators, whether producers or consumers; these taxes generate revenue that can potentially be used to promote further environmental protection.

For example, according to statistics for 2011, the total revenue from environmental taxes in the EU was about €302.9 billion⁵⁵.

'equity' means an ownership interest in a company, represented by the shares issued to investors.

'equity investment' means the provision of capital to an undertaking, invested directly or indirectly, in return for the ownership of a corresponding share of that *undertaking*.⁵⁶

'exceptional occurrences', in the context of the de jure exemption of Article 107(2) of the TFEU, means exceptional situations and incidents. Exceptional occurrences typically include war, serious civil disturbance, nuclear explosions and other cases of *force majeure*.

⁵⁴ Commission Guidelines on State aid for environmental protection and energy 2014-2020 (2014/C 200/01), para.19(1).

⁵⁵ Eurostat 2013 http://epp.eurostat.ec.europa.eu/statistics_explained/index.php/Environmental_tax_statistics.

⁵⁶ Guidelines on risk finance aid for 2014-2020 OJ C19, 22 January 2014, para.52(vi).

'existing State aid' – according to the Ukrainian Law on State Aid to Undertakings existing (or current) State aid means 'a State aid programme or individual State aid existing as of the effective date of this Law or found compatible with competition by the Authorised Body and which has not been expired yet.'⁵⁷ Under Article 108 of the TFEU, the European Commission has a specific obligation to keep existing aid under constant review. According to EU State aid law⁵⁸ existing State aid includes the following aid measures:

- authorised State aid i.e. State aid schemes and individual State aid which have been authorised by the Commission or by the Council;
- all State aid which existed prior to the entry into force of the Treaty, i.e. State aid schemes and individual State aid which were put into effect before, and are still applicable after, the entry into force of the Treaty;
- State aid which is deemed to have been authorised when the Authorised Body fails to commence a State aid case within the period for review of a new State aid notification;
- any State aid with regard to which the limitation period has expired;
- State aid which is deemed to be an existing aid because it can be established that at the time it was put into effect it did not constitute State aid, and subsequently became State aid due to the evolution of the market and without having been altered by the State aid provider. Where certain measures become State aid following the liberalisation of an activity by national law, such measures shall not be considered as existing aid after the date fixed for liberalisation.

'experimental development', in the context of State aid for research, development and innovation, means acquiring, combining, shaping and using existing scientific, technological, business and other relevant knowledge and skills with the aim of developing new or improved products, processes or services. This may also include, for example, activities aiming at the conceptual definition, planning and documentation of new products, processes or services.

Experimental development may comprise prototyping, demonstrating, piloting, testing and validation of new or improved products, processes or services in environments representative of real life operating conditions where the primary objective is to make further technical improvements to products, processes or services that are not substantially set. This may include the development of a commercially usable prototype or pilot which is necessarily the final commercial product and which is too expensive to produce for it to be used only for demonstration and validation purposes.

Experimental development does not include routine or periodic changes made to existing products, production lines, manufacturing processes, services and other operations in progress, even if such changes may represent improvements⁵⁹.

'export aid' means aid to export-related activities, namely aid directly linked to the

⁵⁷ Law of Ukraine on State Aid to Undertakings, Article 1, Part 1.18.

⁵⁸ Council Regulation (EC) 659/ 1999 OJ 1999 L 83/1, Article 1(b).

⁵⁹ Commission Framework for State aid for research and development and innovation 2014/C 198/01, para.15(j).

quantities exported, to the establishment and operation of a distribution network or to other current expenditure linked to the export activity⁶⁰. Even though export aid may be of general application to all domestic exporters, the EU view is that export aid seriously affects trade. Accordingly, export aid is prohibited and is also excluded from the concept of *de minimis State* aid. Aid favouring domestic over imported goods is also prohibited. However, financial aid to cover promotion, exhibition and training costs related to exports is not considered as export aid and is allowed under EU law. (See also *export subsidy*).

'export-credit insurance' means an insurance product whereby the insurer provides insurance against a commercial and political risk related to payment obligations in an export transaction⁶¹. The purpose of export credit insurance is to protect the exporting firm. Export credit insurance can protect the firm from the time the firm signs an export contract with the buyer (pre-shipment cover) or from the time the firm ships the goods to its buyer (post-shipment cover). The insurance policies available to an exporting firm depend on the payment terms of its export contract and are generally:

- short-term credit insurance, for payment terms of less than two years (and usually for terms of around 180 days or less); or
- medium- to long-term credit insurance, for payment terms of two years or more.

Each export credit insurance policy is tailored to the circumstances of the firm's export business, industry and the provisions of the firm's export contracts. Important variations between policies include:

- for a multi-buyer policy, the amount of cover the insurer will provide for each individual buyer;
- the level of indemnity (cover) the seller receives for a loss (expressed as a percentage of the total loss). The indemnity may differ for commercial and political events and the qualifying period i.e. how long the firm must wait before the insurer settles a claim.

In some Member States official export-credit agencies insure short-term export risks by means of State guarantees covering transactions with a large number of third countries. From a competition point of view, the fact that these credit insurance agencies enjoy certain financial advantages granted by the State enables them to offer better credit insurance terms, and this may distort competition in relation to private insurers.

'export subsidy' refers to support measures linked to the quantity of goods exported and measures supporting the operations of sales or distribution in foreign markets. Even though these may be of general application to all domestic exporters, the EU view is that they seriously affect trade. According to Article 3 of the WTO Agreement on Subsidies and Countervailing Measures, there is a distinct prohibition on subsidies contingent, in law or in fact, whether solely or as one of several other conditions, upon export performance⁶² and the Annex to the Agreement provides detailed examples (See also *export aid*).

⁶⁰ Commission Regulation (EC) 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, Article 1.1(d).

⁶¹ Communication from the Commission to the Member States on the application of Articles 107 and 108 of the Treaty on the Functioning of the European Union to short-term export-credit insurance (2012/C 392/01), para.9

⁶² Agreement on Subsidies and Countervailing Measures, Article 3.

F

'fair rate of return', in the context of States aid for risk capital, means the expected internal rate of return equivalent to a risk-adjusted discount rate reflecting the level of risk of an investment and the nature and volume of the capital to be invested by the private investors⁶³.

In this situation, a State aid measure must be limited to the minimum needed to induce the additional investment or activity by the undertaking(s) concerned. As a general rule, at the level of the final beneficiaries, risk finance aid is considered to be proportionate if the total amount of syndicated funding (public and private) provided under the risk finance measure is limited to the size of the funding gap identified in the *ex ante* assessment. At the level of the investors, aid must be limited to the minimum necessary to attract private capital in order to achieve the minimum leverage effect and bridge the funding gap. The exact nature and value of the incentives must be determined through an open and non-discriminatory selection process; in the context of which financial intermediaries, as well as fund managers or investors are called to present competing bids. Where private investors are not selected through such a process (e.g. because the selection procedure has proven to be ineffective or inconclusive) the fair rate of return must be established by an independent expert on the basis of an analysis of market benchmarks and market risk using the discounted cash flow valuation methodology in order to avoid any over-compensation of investors. In such a case investors can be chosen by public invitation. (See also *risk finance investment*).

'feasibility study', in the context of State aid for research, development and innovation, means the evaluation and analysis of the potential of a project, which aims at supporting the process of decision making by objectively and rationally uncovering its strengths and weaknesses, opportunities and threats, as well as identifying the resources required to carry it through and ultimately its prospects for success⁶⁴. A feasibility study is required before applying for State aid and involves an analysis of the viability of an idea.

'final beneficiary' means an eligible undertaking that has received investment under a risk finance State aid measure⁶⁵. However, in cases when risk finance is provided, three levels of possible State aid beneficiaries can be distinguished. State aid in principle can be provided for investors, intermediaries and undertakings. Accordingly, to establish if State aid has been granted, a thorough analysis is needed at each of these levels.

'financial intermediary', in the context of State aid for risk capital, means any financial institution, regardless of its form and ownership, including private investment funds, public investment funds, banks, microfinance institutions and guarantee societies⁶⁶. Normally, the fund is merely a vehicle for the transfer of aid, rather than being an aid beneficiary itself. However, in certain cases (notably existing funds with several investors), the fund may have the character of an independent enterprise. Where the manager of the financial intermediary or the management company are chosen through an open, transparent, non-discriminatory and objective selection procedure or the manager's remuneration fully reflects the current market levels in comparable situations, it will be presumed that the manager does not receive State aid.

⁶³ Guidelines on risk finance aid for 2014-2020 OJ C19, 22.01.2014, para.52(viii).

⁶⁴ Commission Framework for State aid for research and development and innovation 2014/C 198/01, para.15(k).

⁶⁵ Guidelines on risk finance aid for 2014-2020 OJ C19, 22 January 2014, para.52(ix).

⁶⁶ Guidelines on risk finance aid for 2014-2020 OJ C19, 22 January 2014, para.52(x).

'follow-on investment' means an additional investment in a company subsequent to one or more previous risk finance investment rounds⁶⁷.

'fundamental research' means experimental or theoretical work undertaken primarily to acquire new knowledge of the underlying foundations of phenomena and observable facts, without any direct commercial application or use in view⁶⁸. To qualify as fundamental research, the work should not be linked to any industrial or commercial objectives or a particular enterprise and a wide dissemination of the results of the research must be guaranteed.

⁶⁷ Guidelines on risk finance aid for 2014-2020 OJ C19, 22 January 2014, para.52(xiii).

⁶⁸ Commission Framework for State aid for research and development and innovation 2014/C 198/01, para.15(m).

G

'general measures' mean measures of general economic policy implementation that are available to all undertakings and that are not selective. The restrictions provided for by Article 107 of the Treaty are applicable only to those support measures that are intended to selectively benefit the production of certain goods or the assistance of certain undertakings. General economic policy implementation measures that are available to all undertakings do not constitute State aid. Such measures may include, for example,:

- advantageous crediting terms,
- reduction of interest rates,
- reduction of the general tax burden (e.g., corporate income tax) in respect of all undertakings, etc.

'gross grant equivalent' or 'GGE' means the discounted value of the aid expressed as a percentage of the discounted value of the eligible costs, as calculated at the time of award of the aid on the basis of the reference rate applicable on that date⁶⁹. The precise form of the measure is irrelevant in establishing whether it confers an economic advantage on the undertaking. Not only is the granting of positive economic advantages relevant for the notion of State aid, but relief from economic burdens can also constitute an advantage. The latter is a broad category which comprises any mitigation of charges normally included in the budget of an undertaking. This covers all situations in which economic operators are relieved of the inherent costs of their economic activities, even if there is no legal obligation to assume those costs. When State aid is provided in a form other than subsidy, it is necessary to calculate the value of the aid in terms of its gross grant equivalent.

'guarantee' means a written commitment to assume responsibility for all or part of a third party's newly originated quasi-equity or loan transactions, to the exclusion of existing loans.

State guarantees are an important tool to support the development of companies and to facilitate their access to finance. This is of particular importance for SMEs. State guarantees are also used by Member States to expand the impact of their State budgets. They can increase private loans notably for SMEs without requiring an immediate contribution by the State, as the payment of the guarantee is only needed in case of default.

Guarantees are of particular importance for SMEs, as they often have low share capital and a lack of stable resources. Therefore, the Notice on State aid in the form of Guarantees⁷⁰ sets out particular rules for SMEs which will allow them to assess the aid element of a guarantee in a simple way. Various forms of guarantee may exist, depending on their legal basis, the type of transaction covered, their duration, etc.

'ground handling services' means services provided to airport users at airports as described

⁶⁹ Commission Guidelines on regional State aid for 2014-2020. Official Journal C209, 23 July 2013, para.20(f).

⁷⁰ Commission Notice on the application of Articles 87 and 88 of the EC Treaty to State aid in the form of guarantees Official Journal C 155 of 20 June 2008.

in the Annex to Directive 96/67/EC, and any subsequent legislation on access to the ground handling market at airports⁷¹.

'guarantee rate' means the percentage loss coverage of each and every transaction of the guaranteed portfolio.

⁷¹ Commission Guidelines on State aid to airports and airlines OJ C 99, 4 April 2014, para 25(16).

H

'highly qualified personnel' means means staff having a third level education degree and at least five years of relevant professional experience which may also include doctoral education⁷².

'horizontal aid' means aid granted for the purpose of eliminating difficulties of a certain nature that may arise in any economic sector. It is represented by horizontal measures applied in pursuit of a specific goal. Horizontal State aid is aid provided for the following purposes:

- *State aid provided for small and medium-sized enterprises (SMEs).*
- *aid for Research and Development and Innovation (R&D&I)*
- *environmental State aid*
- *training aid*
- *employment State aid*
- *regional aid*
- *risk capital State aid*
- *rescue and restructuring State aid*
- *de minimis aid*
- *State aid provided for other horizontal objectives.* The assessment and criteria depends on the objective of the measure (for example, aid for culture).

⁷² Commission Framework for State aid for research and development and innovation 2014/C 198/01, para.15(o).

I

'illegal aid' means aid which is unlawful (see also: *unlawful aid*).

According to the provisions of the Ukrainian Law on State Aid to Undertakings, illegal aid means 'new State aid granted without notification to the Authorised Body or during the post-notification period but before the Authorised Body takes a decision finding that such State aid is compatible with competition or granted in violation of the Authorised Body's decision finding such State aid incompatible with competition except for categories of State aid which providers are relieved from their obligation to notify of new State aid pursuant to this Law'⁷³.

'inappropriate use of State aid' – according to the Law on State Aid to Undertakings inappropriate use of State aid means 'any use of State aid by State aid beneficiary in violation of the Authorised Body's decision with regard to aid compatibility with competition'⁷⁴. (See also '*misused aid*').

'individual aid' means:

- (a) *ad-hoc aid*; and
- (b) notifiable awards of aid on the basis of an *aid scheme*.

In other words, individual aid may be granted on the basis of a contract or decision which is addressed directly to the specific undertaking (this is *ad-hoc aid*) or may be granted as aid which is subject to the individual notification requirements of an aid scheme.

Pursuant to the provisions of the TFEU (Article 108(3)), each Member State is obliged to inform the Commission of any plan to grant aid (excluding *de minimis aid* and aid granted within *block exemptions*) and refrain from granting it until it is approved by the European Commission (standstill clause). The European Commission is the sole competent authority to determine the compliance of granted aid with the law of the European Union and its decisions are subject to review by the European courts.

According to the to the Ukrainian Law on State Aid to Undertakings 'individual aid means a State aid measure taken other than through a State aid programme as well as individual measures of State aid taken as a part of the State aid programme but subject to notification pursuant to the terms and conditions of such programme and this Law.'⁷⁵. Under the terms of Article 9 of the Law, each State aid provider is obliged to inform the AMCU of any plan to grant State aid (excluding *de minimis State aid* and State aid granted within block exemptions) and refrain from granting it until AMCU's approval (standstill clause). According to Article 8 of the Law, the AMCU is the competent authority to determine the compliance of granted State aid with the provisions of the Law.

'industrial research' means planned research or critical investigation aimed at the acquisition of new knowledge and skills for developing new products, processes or services or for bringing about a significant improvement in existing products, processes or services.

It comprises the creation of component parts of complex systems and may include the construction of prototypes in a laboratory environment or in an environment with simulated interfaces to existing systems as well as of small scale pilot lines to test and validate the

⁷³ Law of Ukraine on State Aid to Undertakings, Article 1, Part 1.8

⁷⁴ Law of Ukraine on State Aid to Undertakings, Article 1, Part 1.9

⁷⁵ Law of Ukraine on State Aid to Undertakings, Article 1, Part 1.3

manufacturing method performance, when necessary for the industrial research and notably for generic technology validation⁷⁶.

'infrastructure' means the basic physical and organisational structures and facilities (e.g. buildings, machinery, equipment, roads, canals, water and power lines, power supplies) needed for the operation of a society or enterprise.

'initial investment' means:

(a) an investment in tangible and intangible assets related to:

- the setting-up of a new establishment,
- the extension of the capacity of an existing establishment,
- the diversification of the output of an establishment into products not previously produced in the establishment, or
- a fundamental change in the overall production process of an existing establishment; or

(b) an acquisition of assets directly linked to an establishment provided the establishment has closed or would have closed if it had not been purchased, and is bought by an investor unrelated to the seller. The sole acquisition of the shares of an undertaking does not qualify as an initial investment.⁷⁷.

The definition of the term of 'initial investment' is applied to national regional investment aid. According to the point 15 of the Guidelines on Regional Aid, if the regional aid is granted to large undertakings for initial investments that create new economic activities or for the diversification of existing establishments into new products or new process innovations, such aid may be compatible with the internal market under Article 107(3)(c) of the TFEU.

'initial investment in favour of new economic activity' means:

a) an investment in tangible and intangible assets related to:

- the setting up of a new establishment, or
- the diversification of the activity of an establishment, under the condition that the new activity is not the same or a similar activity to the activity previously performed in the establishment; or

b) the acquisition of the assets belonging to an establishment that has closed or would have closed if it had not been purchased, and is bought by an investor unrelated to the seller, under the condition that the new activity to be performed using the acquired assets is not a same or similar activity to the activity performed in the establishment prior to the acquisition.

'innovation advisory services' means consultancy, assistance and training in the fields of knowledge transfer, acquisition, protection and exploitation of intangible assets and the use of standards and regulations embedding them⁷⁸.

As regards innovation advisory services, the following costs are *eligible costs*: management consulting; technological assistance; technology transfer services; training; consultancy for

⁷⁶ Commission Framework for State aid for research and development and innovation 2014/C 198/01, para.15(q).

⁷⁷ Commission Guidelines on regional State aid for 2014-2020. Official Journal C209, 23 July 2013, para.20(h).

⁷⁸ Commission Framework for State aid for research and development and innovation 2014/C 198/01, para.15(r).

acquisition, protection and trade in Intellectual Property Rights and for licensing agreements and consultancy on the use of standards.

'innovation clusters' mean structures or organised groups of independent undertakings (such as innovative start-ups, small, medium and large undertakings, as well as research and knowledge dissemination organisations, non-for-profit organisations and other related economic actors) designed to stimulate innovative activity by promoting, sharing of facilities and exchange of knowledge and expertise and by contributing effectively to knowledge transfer, networking, information dissemination and collaboration among the undertakings and other organisations in the cluster⁷⁹.

Aid for innovation clusters aims at tackling market failures linked with coordination problems hampering the development of clusters, or limiting the interaction and knowledge flows within clusters. State aid can contribute in two ways to this problem: first by supporting the investment in open and shared infrastructures for innovation clusters, and secondly by supporting (for no longer than 10 years) the operation of clusters for the enhancement of collaboration, networking and learning.

Investment aid may be granted for the setting up, expansion and animation of innovation clusters exclusively to the legal entity operating the innovation cluster. Such aid may be granted for the following facilities:

- facilities for training and research centre;
- open-access research infrastructures: laboratory, testing facility;
- broadband network infrastructures.

'innovation support services' means the provision of office space, data banks, libraries, market research, laboratories, quality labelling, testing and certification for the purpose of developing more effective products, processes or services⁸⁰.

As regards innovation support services, the following are *eligible costs*: office space; data banks; technical libraries; market research; use of laboratory; quality labelling, testing and certification.

'intangible assets' mean assets acquired through a transfer of technology such as patent rights, licences, know-how or other intellectual property⁸¹. An 'Intangible asset' is therefore an asset that is not physical in nature. Corporate intellectual property (such as patents, trademarks, copyrights, business methodologies), goodwill and brand recognition are all common intangible assets. An intangible asset can be classified as either indefinite or definite depending on the specifics of that asset. A company brand name is considered to be an indefinite asset and a patent is a definite asset as it has a limited duration.

'interested party' means any Member State and any person, undertaking or association of undertakings whose interests might be affected by the granting of aid⁸². According to the

⁷⁹ Commission Framework for State aid for research and development and innovation 2014/C 198/01, para.15(s).

⁸⁰ Commission Framework for State aid for research and development and innovation 2014/C 198/01, para.15(t).

⁸¹ Commission Guidelines on regional State aid for 2014-2020. Official Journal C209, 23 July 2013, para.20(j),

⁸² Council Regulation (EC) 659/ 1999 OJ 1999 L 83/1, Article 1(h).

Ukrainian Law on State Aid to undertakings 'interested party' means 'State aid providers and beneficiaries, undertakings, other legal entities and natural persons, associations thereof whose business activity may be affected by the provision of State aid'⁸³.

'**internalising costs**' means the principle that all costs associated with the protection of the environment should be included in the production costs of the polluting undertaking⁸⁴.

⁸³ Law of Ukraine on State Aid to Undertakings, Article 1, Part 1.2.

⁸⁴ Commission Guidelines on State aid for environmental protection and energy 2014-2020 (2014/C 200/01), para.19(25).

J

'job creation' means a net increase in the number of employees in the establishment concerned compared with the average over the previous 12 months after deducting from the apparent created number of jobs any job lost during that period⁸⁵.

⁸⁵ Commission Guidelines on regional State aid for 2014-2020. Official Journal C209, 23 July 2013, para.20(k).

L

'large enterprises' mean undertakings not coming under the definition of small and medium-sized enterprises. As it is laid down in the GBER⁸⁶, these are undertakings not fulfilling the criteria laid down in Annex I of that Regulation.

'large investment project' means an *initial investment* with *eligible costs* exceeding €50 million, calculated at prices and exchange rates on the date of award of the aid⁸⁷.

'loan instrument' means an agreement which obliges the lender to make available to the borrower an agreed amount of money for an agreed period of time and under which the borrower is obliged to repay the amount within the agreed period. Debt instruments may take the form of loans and other funding instruments including leases, which provide the lender/investor with a predominant component of minimum yield. The refinancing of existing loans is not regarded as an eligible loan instrument for State aid purposes.

'local resources' – according to the Ukrainian Law on State Aid to Undertakings, local resources mean 'moveable and immovable property, local budget funds, other funds, land, natural resources owned by local communities in villages, townships, cities, and municipal districts as well as their jointly owned facilities which are managed by district and regional councils, property owned by the Autonomous Republic of Crimea and managed by the Council of Ministers of the Autonomous Republic of Crimea.'⁸⁸ See also '*State resources*'.

⁸⁶ Commission Regulation (EU) N°651/2014 of 17 June 2014 declaring certain categories of aid compatible with the internal market in application of Articles 107 and 108 of the Treaty, Article 2.24

⁸⁷ Commission Guidelines on regional State aid for 2014-2020. Official Journal C209, 23 July 2013, para.20(l).

⁸⁸ Law of Ukraine on State Aid to Undertakings, Article 1, Part 1.16.

M

"maritime transport" means transport of goods and persons by sea as defined in Regulation (EEC) No 4055/86⁸⁹ and in Regulation (EEC) No 3577/92⁹⁰. It also, in specific parts, relates to towage and dredging.

'market investor principle' In order to establish whether or not an undertaking receives an exceptional economic benefit (that it would not have received operating under normal market conditions), the market economy investor principle has been developed by the European Commission to assist this analysis. This principle is applicable in the event that public institutions provide funding to undertakings in which the major share of the capital is State-owned, in order to establish whether or not a private investor operating under market conditions would behave the same way, i.e. whether or not a private investor under identical conditions would provide funding to the undertaking. If the State behaves as any private investor or creditor then no State aid is involved. For example, when providing funding to an undertaking suffering from economic difficulties, the issue of whether a private investor would behave the same way is considered. The related *private creditor test* is applied to examine whether debt renegotiations by public creditors involve State aid; comparing the behaviour of a public creditor to that of hypothetical private creditors that find themselves in a similar situation. Finally, the EU Courts have developed a variant called the *'private vendor test'* to assess whether a sale carried out by a public body involves State aid. This considers whether a private vendor, under normal market conditions, could have obtained the same or a better price. These principles or tests are variations of the same basic concept that the behaviour of public authorities or undertakings should be compared to that of similar private economic operators under normal market conditions to determine whether the economic transactions carried out by such authorities or undertakings grant an advantage or selective benefit to their counterparts.

'marketable risks', in the context of short-term export credit insurance, means commercial and political risks with a maximum risk period of less than two years, on public and non-public buyers⁹¹ in the countries listed in the Annex to the Communication from the Commission to the Member States on the application of Articles 107 and 108 of the Treaty on the Functioning of the European Union to short-term export-credit insurance. All other risks are considered non-marketable for the purposes of this Communication. The Communication stipulates that marketable risks cannot be covered by export-credit insurance with the support of Member States. The Communication does not deal with the insurance of medium and long term export credit risks, which are considered non-marketable for the time being. That means that private companies do not insure from such risks because of lack of resources and high risks. Only publicly supported players can deal in this area. Notwithstanding the definition of marketable risks, certain commercial and political risks on buyers established in the countries listed in the Annex, are considered

⁸⁹ Council Regulation (EEC) No 4055/86 of 22 December 1986 applying the principle of freedom to provide services to maritime transport between Member States and between Member States and third countries, OJ L 117, 5 May 1988.

⁹⁰ Council Regulation (EEC) No 3577/92 applying the principle of freedom to provide services to maritime transport within Member States (maritime cabotage), OJ L 364, 12 December 1992, p. 7.

⁹¹ Communication from the Commission to the Member States on the application of Articles 107 and 108 of the Treaty on the Functioning of the European Union to short-term export-credit insurance (2012/C 392/01), Para.9

temporarily non-marketable if the Commission decides to temporarily remove one or more countries from the list of marketable risk countries in the Annex, because the capacity of the private insurance market is insufficient to cover all economically justifiable risks in the country or countries concerned or if the Commission decides that the risks are temporarily non marketable.

'misused aid' means aid used outside of the parameters set in a Commission approval decision. If the Commission finds that aid granted by a State or through State resources is being misused, it is required to decide that the State concerned shall abolish or alter such aid within a period of time to be determined by the Commission. According to the Ukrainian Law on State Aid to Undertakings 'misused aid' or 'inappropriate use of State aid' means 'use of State aid by a State aid beneficiary in violation of the Authorised Body's decision with regard to aid compatibility with competition.'⁹² See also '*inappropriate use of State aid*'.

⁹² Law of Ukraine on State Aid to Undertakings, Article 1, Part 1.9.

N

‘natural disasters’ is a term in TFEU Article 107(2) referring to de jure exemption for aid to make good the damage caused by natural disasters or *exceptional occurrences*. In that context, ‘natural disasters’ means material damage caused by earthquakes⁹³, floods⁹⁴ tornadoes⁹⁵ avalanches landslides and rockslides⁹⁶. An exceptional occurrence is by its nature unforeseeable and the exemption cannot therefore be applied to preventive measures⁹⁷. In particular, bad weather is not normally accepted as a natural disaster or an exceptional occurrence. Also plant and animal diseases are not normally covered by the exemption (e.g. an attack by field mice on Greek melon and watermelon crops rejected as this was a recurring phenomenon in Greece⁹⁸) but the BSE (mad cow disease) outbreak in the United Kingdom was accepted as was aid to compensate Irish pigmeat producers following the discovery of dioxin contamination⁹⁹. Compensation for the short-term effects on civil aviation of the 11 September 2001 terrorist attacks in New York and the Icelandic volcanic cloud disruptions in 2011 were accepted as exemptible, but with specific limitations as to what could be compensated¹⁰⁰. The exemptions also do not cover compensation related to normal commercial conduct¹⁰¹ and may not be used to compensate for the absence of commercial due diligence (e.g. taking out normal commercial insurance)¹⁰².

‘new aid’ means all aid, i.e. aid schemes and individual aid, which is not existing aid, including substantial alterations to existing aid¹⁰³. According to the Ukrainian Law on State Aid to undertakings ‘new State aid means support to undertakings other than current (existing) State aid as well as changes made to the terms and conditions of current State aid’¹⁰⁴.

‘non-aeronautical activities’ mean commercial services to airlines or other users of an airport, such as ancillary services to passengers, freight forwarders or other service providers, renting out of offices and shops, car parking and hotels¹⁰⁵.

‘non-designated areas’ mean non-assisted areas in the context of Regional Aid. All EU regions should not, in practice, qualify for State aid regional exemptions under Article 107(3)

⁹³ Commission Decision N/459/A/2009 *Earthquake in Abruzzo* (16 October 2009, Commission Decision SA 35482 *Earthquakes of 20 to 29 May 2012* (19 December 2012).

⁹⁴ Commission Decision N 43a/2006 *Flood reconstruction loans* (11 December 2006) and Commission Decision N 235a/2010 *Floods in Poland* (6 August 2010).

⁹⁵ Commission Decision N 294/2010 *Tornadohilfe Sachsen* (21 October 2010).

⁹⁶ Commission Decision N 424/2009 *Aid for the damage caused by natural disasters* (7 October 2009).

⁹⁷ Commission Decision 2000/625/EC *Sea Transport of Irish Livestock* (2000).

⁹⁸ Commission Decision 2001/259/EC *Greek fruit and vegetable growers* (2001).

⁹⁹ Commission Decision NN 46/2001 *Aid to stock farmers hit by the BSE crisis* (25 July 2001) and Commission Decision N 643/2008 of 23 December 2008.

¹⁰⁰ European Commission: *Communication on the repercussions of the terrorist attacks in the United States on the air transport industry*, COM(2001) 574 Final.

¹⁰¹ Commission Decision 2000/625/EC *Sea Transport of Irish Livestock* (2000).

¹⁰² Commission Decision N 147/2009 *Pigmeat processors* (8 April 2009), para. 40.

¹⁰³ Council Regulation (EC) 659/ 1999 OJ 1999 L 83/1, Article 1(c).

¹⁰⁴ Law of Ukraine on State Aid to Undertakings, Article 1, Part 1.10.

¹⁰⁵ Commission Guidelines on State aid to airports and airlines OJ C 99, 4 July 2014, para 25(20).

(a) and (c). Regional aid can be effective if it is awarded to induce additional investment in the most underdeveloped regions of the EU. Under the Regional aid guidelines 2014-2020¹⁰⁶ the mapping approach was based on population scope limits on eligibility for Article 107 (3) (a) and (c) exemptions. The overall share of regions where regional aid can be granted is 47.2 % of the EU population. Today, only about one out of four Europeans lives in less developed regions (regions with GDP below 75% of the EU average) compared to one out of three at the time when the previous guidelines for 2007-2013 were adopted. Despite this reduction in regional disparities, the Commission has taken account of the effects of the economic crisis and therefore increased the population coverage. Regional State aid also can be granted to outermost regions and sparsely populated areas. Other more developed areas of the EU are non-assisted areas which are not eligible for regional State aid.

'notification requirement' - according to Article 108 of the TFEU, any State aid measure must be notified in advance to the European Commission, giving it the possibility to assess the measure under EU State aid rules. Member States are under an obligation not to implement the aid measure before the Commission has taken its position: either declaring the measure compatible with the internal market under Article 107 TFEU, not raising any objections or considering that the measure does not constitute aid. Article 108 of TFEU requires Member States to notify the introduction of a new aid or the modification of an existing aid. In both cases the State aid is considered as new aid. This means that any such aid must not be implemented or granted before the Commission has approved it. In this sense it is important to know whether the aid is new or existing. According to the Ukrainian Law on State Aid to Undertakings a notification of new State aid means 'information on new State aid programmes or individual State aid to be submitted to the Authorised Body to make a decision whether such State aid is compatible with competition'¹⁰⁷. See also '*new aid*' and '*existing aid*'.

'NUTS regions' – regions of Member States classified by using the common classification of territorial units for statistical purposes. NUTS means "*Nomenclature of Units for Territorial Statistics*" and is a legal framework for the geographical division of the territory of the European Union in order to harmonise the collection, transmission and publication of national and Community statistics. The NUTS classification divides up the economic territory of the Member States. It subdivides each Member State into three levels: NUTS levels 1, 2 and 3. The second and third levels are subdivisions of the first and second levels respectively. Member States may decide to go further still in terms of hierarchical levels by sub-dividing NUTS level 3.

Under the prevailing EU Regulation¹⁰⁸, NUTS Regions are delineated as follows with reference to population:

¹⁰⁶ Commission Guidelines on regional State aid for 2014-2020. Official Journal C209, 23 July 2013.

¹⁰⁷ Law of Ukraine on State Aid to Undertakings, Article 1, Part 1.12.

¹⁰⁸ Regulation (EC) No 1059/2003 of the European Parliament and of the Council of 26 May 2003 on the establishment of a common classification of territorial units for statistics (NUTS) OJ L 154 of 21 June 2003. The NUTS nomenclature is used by EUROSTAT as a reference for the collection, development and harmonisation of EU regional statistics and for socio-economic analyses of the regions

"Harmonisation of Public Procurement System in Ukraine with EU Standards"
GLOSSARY OF TERMS FOR STATE AID REGULATION

Level	Minimum	Maximum
NUTS I	3 million	7 million
NUTS II	800,000	3 million
NUTS III	150,000	800,000

O

'operating aid' means aid to reduce an undertaking's current expenditure that is not related to an initial investment. Operating aid is generally prohibited but may be allowed exceptionally in the context of regional development. Operating aid includes cost categories such as personnel costs, materials, contracted services, communications, energy, maintenance, rent, administration, etc., but excludes depreciation charges and the costs of financing if these have been included in eligible costs related to *regional investment aid*¹⁰⁹. Operating aid can be granted only in certain well-defined cases, related to regional aid, when justified by severe structural handicaps of a region. Justifiable operating aid is subject to the following conditions:

- it should be justified in terms of its contribution to regional development and its nature;
- its level should be proportional to the handicaps it seeks to alleviate;
- it should be limited in time and progressively reduced.

'operating benefits', in the context of environmental aid means, for the purposes of calculating *eligible costs*, in particular cost savings or additional ancillary production directly linked to an extra investment for environmental protection and, where applicable, benefits accruing from other support measures whether or not they constitute State aid, including operating aid granted for the same eligible costs, feed-in tariffs or other support measures¹¹⁰. By contrast, proceeds flowing from the sale by the undertaking of tradable permits issued under the European Trading System will not be deemed to constitute operating benefits.

'operating costs' means, for the purposes of calculating eligible costs, in particular additional production costs such as maintenance costs flowing from an extra investment for environmental protection¹¹¹.

'organisational innovation' means the implementation of a new organisational method in an undertaking's business practices, workplace organisation or external relations; excluding changes that are based on organizational methods already in use in the undertaking, changes in management strategy, mergers and acquisitions, ceasing to use a process, simple capital replacement or extension, changes resulting purely from changes in factor prices, customisation, localisation, regular, seasonal and other cyclical changes and trading of new or significantly improved products¹¹².

Innovations in workplace organisation involve the implementation of new methods for distributing responsibilities and decision making among employees for the division of work

¹⁰⁹ Commission Guidelines on regional State aid for 2014-2020. Official Journal C209, 23 July 2013, para.20(q).

¹¹⁰ Commission Guidelines on State aid for environmental protection and energy 2014-2020 (2014/C 200/01), para.19(21).

¹¹¹ Commission Guidelines on State aid for environmental protection and energy 2014-2020 (2014/C 200/01), para.19(22).

¹¹² Commission Framework for State aid for research and development and innovation 2014/C 198/01, para.15(y).

within and between firm activities (and organisational units), as well as new concepts for the structuring of activities, such as the integration of different business activities. An example of an organisational innovation in workplace organisation is the first implementation of an organisational model that gives the firm's employees greater autonomy in decision making and encourages them to contribute their ideas¹¹³. (See also *process innovation*).

¹¹³ OECD: "The Measurement of Scientific and Technological Activities: Guidelines for Collecting and Interpreting Innovation Data: Oslo Manual, Third Edition" prepared by the Working Party of National Experts on Scientific and Technology Indicators, OECD, Paris, 2005, para. 177.

P

'parties concerned' mean State aid providers and beneficiaries, undertakings, other legal entities and natural persons, associations thereof whose business activity may be affected by the provision of State aid.

'personnel costs' means the costs of researchers, technicians and other supporting staff to the extent employed on the relevant project or activity¹¹⁴. Personnel costs also include taxes and employees' social security contributions retained by the unit as well as the employer's compulsory and voluntary social contributions.

'political risks', in the context of State aid for export insurance, means risks including:

- the risk that a public buyer or country prevents the completion of a transaction or does not pay on time,
- a risk that is beyond the scope of an individual buyer or falls outside the individual buyer's responsibility,
- the risk that a country fails to transfer to the country of the insured the money paid by buyers domiciled in that country,
- the risk that a case of force majeure occurs outside the country of the insurer, which could include warlike events, in so far as its effects are not otherwise insured.¹¹⁵

'polluter pays principle', in the context of State aid for environmental protection, means that the costs of measures to deal with pollution should be borne by the polluter who causes the pollution¹¹⁶. Pollution in this context is the damage caused by the polluter by directly or indirectly damaging the environment, or by creating conditions leading to such damage to physical surroundings or natural resources.

The polluter would be the person, company, or other organization whose activities are generating the pollution. The payment should equal the damage and be made to the person or persons being harmed.

'private equity' means private (as opposed to public) capital equity investment in companies not listed on a stock-market, including venture capital, replacement capital and buy-outs.

'process innovation' means the implementation of a new or significantly improved production or delivery method (including significant changes in techniques, equipment or software); but excluding minor changes or improvements, increases in production or service capabilities through the addition of manufacturing or logistical systems which are very similar to those already in use, ceasing to use a process, simple capital replacement or

¹¹⁴ Commission Framework for State aid for research and development and innovation 2014/C 198/01, para.15(z).

¹¹⁵ Communication from the Commission to the Member States on the application of Articles 107 and 108 of the Treaty on the Functioning of the European Union to short-term export-credit insurance (2012/C 392/01), para.9.

¹¹⁶ Commission Guidelines on State aid for environmental protection and energy 2014-2020 (2014/C 200/01), para.19(28).

extension, changes resulting purely from changes in factor prices, customisation, localisation, regular, seasonal and other cyclical changes and trading of new or significantly improved products¹¹⁷. (See also *organizational innovation*).

'professional sport' means the practice of sport in the nature of gainful employment or remunerated service, irrespective of whether or not a formal labour contract has been established between the professional sports person and the relevant sport organisation, where the compensation exceeds the cost of participation and constitutes a significant part of the income for the athlete. It is clear that professional sport is an economic activity and it takes part in the Internal Market of the EU. It has been made clear in European Court of Justice jurisprudence¹¹⁸ that professional sport is an economic activity and that EU laws and policies are fully applicable to professional sport.

'public passenger transport' means passenger transport services of general economic interest provided to the public on a non-discriminatory and continuous basis¹¹⁹.

'public service compensation' means any benefit, particularly financial, granted directly or indirectly by a competent authority from public funds during the period of implementation of a public service obligation or in connection with that period¹²⁰.

'public transport service obligation' means a requirement defined or determined by a competent authority in order to ensure public passenger transport services in the general interest that an operator, if it were considering its own commercial interests, would not assume or would not assume to the same extent or under the same conditions without reward¹²¹.

'public transport service contract' means one or more legally binding acts confirming the agreement between a competent authority (any public authority or group of public authorities of a Member State or Member States which has the power to intervene in public passenger transport in a given geographical area or any body vested with such authority) and a public service operator to entrust to that public service operator the management and operation of public passenger transport services subject to public service obligations; depending on the law of the Member State, the contract may also consist of a decision adopted by the competent authority:

- taking the form of an individual legislative or regulatory act, or
- containing conditions under which the competent authority itself provides the services or entrusts the provision of such services to an internal operator¹²².

¹¹⁷ Commission Framework for State aid for research and development and innovation 2014/C 198/01, para.15(bb).

¹¹⁸ Communication from the Commission on State aid for films and other audiovisual works (2013/C 332/01).

¹¹⁹ Regulation (EC) No 1370/2007 of the European Parliament and of the Council of 23 October 2007 on public passenger transport services by rail and by road and repealing Council Regulations (EEC) Nos 1191/69 and 1107/70 OJ L 315, 3.12.2007, Article 2(a).

¹²⁰ Regulation (EC) No 1370/2007 of the European Parliament and of the Council of 23 October 2007 on public passenger transport services by rail and by road and repealing Council Regulations (EEC) Nos 1191/69 and 1107/70 OJ L 315, 3 December 2007, Article 2(g).

¹²¹ Regulation (EC) No 1370/2007 of the European Parliament and of the Council of 23 October 2007 on public passenger transport services by rail and by road and repealing Council Regulations (EEC) Nos 1191/69 and 1107/70 OJ L 315, 3 December 2007, Article 2(e).

¹²² Regulation (EC) No 1370/2007 of the European Parliament and of the Council of 23 October 2007

'public transport service operator' means any public or private undertaking or group of such undertakings which operates public passenger transport services or any public body which provides public passenger transport services.

on public passenger transport services by rail and by road and repealing Council Regulations (EEC) Nos 1191/69 and 1107/70 OJ L 315, 3 december 2007, Article 2(i).

Q

'quasi-equity investment instruments', in the context of State aid supporting risk capital, means instruments whose return for the holder (investor/lender) is predominantly based on the profits or losses of the underlying target company and which are unsecured in the event of default. A related term 'Quasi-equity investment' means a type of financing that ranks between equity and debt, having a higher risk than senior debt and a lower risk than common equity and whose return for the holder is predominantly based on the profits or losses of the underlying target undertaking and which is unsecured in the event of default. Quasi-equity investments may be structured as debt, unsecured and subordinated, including mezzanine debt, and in some cases convertible into equity, or as preferred equity¹²³.

¹²³ Guidelines on risk finance aid for 2014-2020 OJ C19, 22 January 2014, para.52(xxv).

R

'R&D project' means an operation that includes activities spanning over one or several categories of research and development and that is intended to accomplish an indivisible task of a precise economic, scientific or technical nature with clearly pre-defined goals. A R&D project may consist of several work packages, activities or services, and includes clear objectives, activities to be carried out to achieve those objectives (including their expected costs), and concrete deliverables to identify the outcomes of those activities and compare them with the relevant objectives. When two or more R&D projects are not clearly separable from each other, and in particular when they do not have independent probabilities of technological success, they are considered as a single project¹²⁴.

'recovery of aid' means reimbursement of the aid by the recipient. It is the consequence of an aid that is unlawfully granted and incompatible with the internal market. The recovery aims at reinstating the position *ex ante*: i.e. before the distortion of competition caused by the granting of aid had taken place. The Commission's power to recover aid where it takes a negative decision is laid in the Procedural Regulation¹²⁵. It provides that, if the Commission takes a negative decision and requires the recovery of State aid, the Member State concerned must take all necessary measures to recover the aid. Recovery shall be effected without delay and in accordance with the procedures under the national law of the Member State concerned, provided that they allow the immediate and effective execution of the Commission's decision. To this effect, and in the event of a procedure before national courts, the Member States concerned must take all necessary steps which are available in their respective legal systems.

The Ukrainian Law on State Aid to Undertakings also sets out provisions concerning recovery. Article 14 of the Law provides that the "Authorised Body" shall take its decision to have illegitimate State aid returned once such aid is found incompatible with competition. The decision to return such State aid shall be sent to the State aid provider within three days upon adoption. The State aid provider shall take every effort to ensure the State aid is returned and shall notify the Authorised Body thereof¹²⁶.

'regional aid' - Member States can grant State aid to companies to support investments in new production facilities in the less advantaged regions of Europe or to extend or modernise existing facilities. In the Guidelines on Regional State aid¹²⁷, the Commission sets out the conditions under which regional aid may be considered to be compatible with the internal market and establishes the criteria for identifying the areas that fulfil the conditions of Article 107(3)(a) and (c) of the TFEU. Regional aid can only play an effective role if it is used sparingly and proportionately and is concentrated on the most disadvantaged regions of the European Union¹²⁸. In particular, the permissible aid ceilings should reflect the relative seriousness of the problems affecting the development of the regions concerned. Furthermore, the advantages of the aid in terms of the development of a less-favoured region must outweigh any resulting distortions of competition.

¹²⁴ Commission Framework for State aid for research and development and innovation 2014/C 198/01, para.15(cc).

¹²⁵ Council Regulation (EC) 659/ 1999 OJ 1999 L 83/1.

¹²⁶ Law of Ukraine on State Aid to Undertakings, Article 14, Part 1.

¹²⁷ Commission Guidelines on regional State aid for 2014-2020. Official Journal C209, 23 July 2013.

¹²⁸ Each Member State may identify these areas in a regional aid map on the basis of the conditions laid down in the Guidelines on national regional aid.

'regional aid map' means the list of areas designated by a Member State in accordance with the conditions laid down in the Regional Aid Guidelines and approved by the Commission¹²⁹. The map sets the limits and conditions for regional aid in every EU country. The map identifies in which geographical areas companies can receive investment aid and at what level. In other words, the Regional map specifies certain limits of State aid amounts and the intensity of State aid that may be granted in the specific region. According to the EU-Ukraine Association Agreement Ukraine is obliged to complete a 'State aid mapping' exercise with the European Commission within 4 years of the entry into force of the Agreement¹³⁰.

'regional airport' means an airport with annual passenger traffic volume of up to 3 million persons¹³¹.

'renewable energy sources' means the following renewable non-fossil energy sources: wind, solar, aerothermal, geothermal, hydrothermal and ocean energy, hydropower, biomass, landfill gas, sewage treatment plant gas and biogases¹³². In other words, renewable energy comes from natural sources that are constantly and sustainably replenished. For example, the EU aims to get 20% of its energy from renewable sources by 2020. More renewable energy will enable the EU to cut greenhouse emissions and make it less dependent on imported energy. And boosting the renewables industry will encourage technological innovation and employment in Europe.

'repayable advance', in the context of State aid for research, development and innovation (R&D&I), means a loan for a project which is paid in one or more instalments and the conditions for the reimbursement of which depend on the outcome of an R&D&I project¹³³.

'replacement capital' means the purchase of existing shares in a company from an earlier investor or shareholder¹³⁴. Replacement capital is also called a secondary purchase.

'rescue aid' is by nature temporary and its primary objective is to make it possible to keep an ailing firm afloat for the time needed to work out a restructuring or liquidation plan. The general principle is that rescue aid makes it possible temporarily to support a company confronted with an important deterioration of its financial situation reflected by an acute liquidity crisis or technical insolvency. Such temporary support should allow time to analyse the circumstances which gave rise to the difficulties and to develop an appropriate plan to remedy those difficulties¹³⁵. Moreover, rescue aid must be limited to the minimum necessary. In other words, rescue aid offers a short respite, not exceeding six months, to a firm in difficulty. The aid must consist of reversible liquidity support in the form of loan guarantees or loans, with an interest rate at least comparable to those observed for loans to healthy firms and in particular the reference rates adopted by the Commission. Structural measures which do not require immediate action, such as, the irremediable and automatic participation of the State in the own funds of the firm, cannot be financed through rescue

¹²⁹ Commission Guidelines on regional State aid for 2014-2020. Official Journal C209, 23 July 2013, para.20(r).

¹³⁰ On this, see also "Report on State Aid Mapping for Ukraine", Dr. Eugene Stuart, Sigita Cemnolonskis and Iana Roginska, November 2014 accessible at www.eupublicprocurement.org.ua.

¹³¹ Commission Guidelines on State aid to airports and airlines OJ C 99, 4 April 2014, para. 25(26).

¹³² Commission Guidelines on State aid for environmental protection and energy 2014-2020 (2014/C 200/01), para.19(5).

¹³³ Commission Framework for State aid for research and development and innovation 2014/C 198/01, para.15(dd).

¹³⁴ Guidelines on risk finance aid for 2014-2020 OJ C19, 22 January 2014, para.52(xxiii).

¹³⁵ Commission Guidelines on State aid for rescuing and restructuring non-financial undertakings in difficulty, O J C 249, 31 July 2014, para.26.

aid. (See also '*restructuring aid*')

A '**research and knowledge-dissemination organisation**' means an entity (such as universities or research institutes, technology transfer agencies, innovation intermediaries, research-oriented physical or virtual collaborative entities), irrespective of its legal status (organised under public or private law) or way of financing, whose primary goal is to independently conduct fundamental research, industrial research or experimental development, or to widely disseminate the results of such activities by way of teaching, publication or knowledge transfer.

Where such an entity also pursues economic activities, the financing, the costs and the revenues of those economic activities must be accounted for separately. Undertakings that can exert influence upon such an entity, in the quality of, for example, shareholders or members, may not enjoy a preferential access to its research capacities or to the results generated by it.

'**research infrastructure**' means facilities, resources and related services that are used by the scientific community to conduct research in their respective fields and covers scientific equipment or sets of instruments, knowledge-based resources such as collections, archives or structured scientific information, enabling information and communication technology-based infrastructures such as grid, computing, software and communication, or any other entity of a unique nature essential to conduct research. Such infrastructures may be 'single-sited' or 'distributed' (an organised network of resources)¹³⁶.

The European Commission lists examples of research infrastructures. These examples include singular large-scale research installations, collections, special habitats, libraries, databases, biological archives, clean rooms, integrated arrays of small research installations, high-capacity/high speed communication networks, highly distributed capacity and capability computing facilities, data infrastructure, research vessels, satellite and aircraft observation facilities, coastal observatories, telescopes, synchrotrons and accelerators, networks of computing facilities, as well as infrastructural centres of competence which provide a service for the wider research community based on an assembly of techniques and know-how.

'**restructuring aid**' is based on a practical plan for restoring a firm's long-term viability. Any aid granted following the adoption and implementation of a restructuring or liquidation plan for which aid has been requested will be considered as restructuring aid. Restructuring usually involves one or more of the following elements: the reorganisation and rationalisation of the firm's activities on to a more efficient basis, typically involving the withdrawal from loss-making activities, the restructuring of those existing activities that can be made competitive again and, possibly, diversification in the direction of new and viable activities. Financial restructuring (capital injections, debt reduction) usually has to accompany the physical restructuring. 'Restructuring aid often involves more permanent assistance and must restore the long-term viability of the beneficiary on the basis of a feasible, coherent and far-reaching restructuring plan, while at the same time allowing for an adequate own contribution and burden sharing and limiting the potential distortions of competition'¹³⁷.

¹³⁶ Commission Framework for State aid for research and development and innovation 2014/C 198/01, para.15(ff).

¹³⁷ Commission Guidelines on State aid for rescuing and restructuring non-financial undertakings in difficulty, Official Journal C 249, 31 July 2014, para.27.

'review of existing aid' – in cooperation with the Member States the Commission pursuant to Article 108(1) of the TFEU and Regulation (EC) No 659/1999¹³⁸ keeps under constant review all systems of aid (individual cases and State aid schemes) existing in the Member States. Existing aid may be implemented as long as the Commission has not found it to be incompatible with the Internal Market. Following this review, the Commission if need be is required to propose to the Member States any appropriate measures concerning existing State aid. If the Member State concerned does not accept the Commission's proposals, the Commission must initiate the formal investigation procedure under Article 108(2) of the TFEU.

According to Article 15 of the Ukrainian Law on State Aid to Undertakings, the Authorised Body is enabled to check all existing State aid and if need be to send recommendations to the respective State aid provider to make necessary changes in the State aid programmes or even to terminate the implementation of a State aid programme. (See also *'existing State aid'*).

'risk finance investment' means equity and quasi-equity investments, loans including leases, guarantees, or a mix thereof to eligible undertakings for the purposes of making new investments¹³⁹.

¹³⁸ Council Regulation (EC) 659/ 1999 OJ 1999 L 83/1, Article 17.

¹³⁹ Guidelines on risk finance aid for 2014-2020 OJ C19, 22 January 2014, para.52(xxiv).

S

'scheme targeted at specific sectors of economic activity' means a State aid scheme which covers only one or a limited number of activities within manufacturing or services.

'secondment' means the temporary employment of staff by a beneficiary with the right to return to the previous employer¹⁴⁰. The parties to such an arrangement must be clear as to the meaning of secondment under the contract and have regard to applicable employment laws. In broad terms, a secondment may take one of two forms:

- *Placement secondment*: this type of secondment usually means that the employee remains an employee of the existing employer. A commercial agreement is entered into between the employing entity and a third party company under which the employee will perform duties for the benefit of that third party company. At no time does the employee become employed by the host company;
- *Transfer secondment*: this usually refers to an employment relationship that is established between the employee and the host company in the secondment location. Sometimes, the existing employment relationship with the original entity is terminated. Alternatively, the existing relationship can also be kept in existence but 'frozen' or placed in abeyance to some extent. This gives rise to a dual employment scenario. Typically, in this scenario the employee will not be required to perform duties for the host company and the host company will not be required to pay a salary.

'sectoral aid' refers to aid to assist certain specific sectors of the economy which are covered by particular sectoral rules in the EU system. As regards the Ukrainian legislation it is to be noted that the Law on State Aid to Undertakings¹⁴¹ excludes certain sectors or situations from the scope of its application. Sectors to which particular rules apply in the EU system that are relevant in the Ukrainian context and that are not excluded from the scope of application of the Law are the following:

- *audiovisual production*
- *State aid for broadband*
- *State aid for broadcasting*
- *State aid to the coal industry*
- *State aid to the electricity sector (stranded costs)*
- *State aid to the postal sector*
- *State aid for shipbuilding*
- *State aid to the steel sector*
- *State aid to the transport sector*

¹⁴⁰ Commission Framework for State aid for research and development and innovation 2014/C 198/01, Para.15(gg)

¹⁴¹ Law of Ukraine on State Aid to Undertakings, Article 3

'selective benefit' – a financial contribution by a government is not a subsidy (WTO) or a State aid (EU system) unless it confers a "benefit." In many cases, as in the case of a cash grant, the existence of a benefit and its valuation will be clear. In some cases, however, the issue of benefit will be more complex (e.g. in the case of loans, an equity infusion or the purchase by a government of goods or services under special conditions, including *services of general economic interest*). The existence of a benefit is to be determined by comparison with the market-place (i.e., on the basis of what the recipient could have received in the market). Assuming that a measure is a subsidy and confers a benefit, it nevertheless is not subject to the State aid rules unless it has been specifically provided to an enterprise or industry or group of enterprises or industries (and also meets the other criteria of State aid). There are several types of "specificity" such as for example:

- Enterprise-specificity. A government targets a particular company or companies to be subsidised or assisted in some other way;
- Industry-specificity. A government targets a particular sector or sectors to be subsidised or assisted in some other way;
- Regional specificity. A government targets producers in specified parts of its territory for to be subsidised or assisted in some other way.

'sensitive sectors' are certain specific sectors which are covered by particular sectoral rules in the EU system. The European Commission has adopted special rules for those sectors which have experienced particularly severe economic problems and are considered sensitive because of the level of distortion in competition that may arise if State aid is applied to the sector concerned. The rules on sectoral State aid cover such sectors as:

- agriculture,
- fisheries
- audiovisual production,
- broadband,
- broadcasting,
- coal industry,
- steel industry
- electricity (stranded costs)

For these sectors, the State aid rules are, in general, more restrictive than the rules applying to other industries. In most cases, the possibility of aid for investment leading to increased production capacity is severely limited or even prohibited. In some cases, aid is allowed only on condition that it is accompanied by capacity reductions by assisted undertakings. In almost all of these sectors, special notification requirements are imposed on Member States (obligation to notify the Commission of each case individually, even if there is an approved national State aid scheme. See also *'notification requirement'*).

‘services of general economic interest’ are services that have special characteristics as compared with those of other economic activities. In the absence of specific Union rules defining the scope for the existence of an SGEI, Member States have a wide margin of discretion in defining a given service as an SGEI and in granting compensation to the service provider. The European Commission’s Communication on the application of State aid rules to compensation granted for the provision of SGEI¹⁴² notes that *“the entrustment of a ‘particular public service task’ implies the supply of services which, if it were considering its own commercial interest, an undertaking would not assume or would not assume to the same extent or under the same conditions. Applying a general interest criterion, Member States or the Union may attach specific obligations to such services.”* The services to be classified as SGEIs must be addressed to citizens or be in the interest of society as a whole. Examples of areas in which services of general interest can be identified include:

- Public transport
- Postal services
- Energy sector
- Water and waste management
- Financial services
- Public broadcasting
- Broadband infrastructure
- Health care
- Social services

According to the Ukrainian Law on State Aid to Undertakings, services of general economic interest ‘mean services associated with satisfaction of very important public needs which cannot be met on a commercial basis unless supported by State aid.’¹⁴³

¹⁴² Communication from the Commission on the application of the European Union State aid rules to compensation granted for the provision of services of general economic interest OJ C8, 11 January 2012, para.47.

¹⁴³ Law of Ukraine on State Aid to Undertakings, Article 1, Part 1.13.

'small and medium-sized enterprises (SMEs)' means small and medium-sized enterprises as well as micro-enterprises.

A *medium-sized enterprise* is an enterprise satisfying all of the following criteria:

- has fewer than 250 employees and
- has either an annual turnover not exceeding €50 million, and/or a balance-sheet total not exceeding €43 million.

A *small enterprise* is an enterprise that satisfies all of the following criteria:

- has fewer than 50 employees and
- has either an annual turnover and/or a balance-sheet total not exceeding €10 million.

A micro-enterprise is an enterprise that satisfies all of the following criteria:

- has fewer than 10 employees and
- has either an annual turnover and/or a balance-sheet total not exceeding €2 million.¹⁴⁴

The criteria must be applied to the company as a whole (including subsidiaries located in other Member States and outside the EU). The Commission Recommendation of 6 May 2003 provides definitions of an autonomous enterprise, partner enterprise and linked enterprise in order to assess the real economic position of the SME in question. Except for some cases set out in this Commission Recommendation, an enterprise cannot be considered an SME if 25% or more of the capital or voting rights are directly or indirectly controlled, jointly or individually, by one or more public bodies.

'subsidy' – According to Part I of the WTO Subsidies and Countervailing Measures Agreement (SCMA), a subsidy shall be deemed to exist if: (a)(1) there is a financial contribution by a government or any public body within the territory of a Member, i.e. where: (i) a government practice involves a direct transfer of funds (e.g. grants, loans, and equity infusion), potential direct transfers of funds or liabilities (e.g. loan guarantees); (ii) government revenue that is otherwise due is foregone or not collected (e.g. fiscal incentives such as tax credits) ; (iii) a government provides goods or services other than general infrastructure, or purchases goods; (iv) a government makes payments to a funding mechanism, or entrusts or directs a private body to carry out one or more of the type of functions illustrated in (i) to (iii) above which would normally be vested in the government and the practice, in no real sense, differs from practices normally followed by governments; or (a)(2) there is any form of income or price support in the sense of Article XVI of GATT 1994; and (b) a benefit is thereby conferred¹⁴⁵. Another pre-condition is that such a measure should be specific. It has to be specifically provided to an enterprise or industry or group of enterprises or industries. Where a subsidy is widely available within an economy, such a distortion in the allocation of resources is presumed not to occur. Thus, only "specific" subsidies are subject to the SCMA disciplines. There are four types of "specificity" within the meaning of the SCMA:

- Enterprise-specificity. A government targets a particular company or companies for subsidization;

¹⁴⁴ Commission Recommendation of 6 May 2003 concerning the definition of micro, small and medium-sized enterprises (2003/361/EC), Article 2.

¹⁴⁵ WTO: Agreement on Subsidies and Countervailing Measures. 1994, Part I, Article 1.

- Industry-specificity. A government targets a particular sector or sectors for subsidization.
- Regional specificity. A government targets producers in specified parts of its territory for subsidization.
- Prohibited subsidies. A government targets export goods or goods using domestic inputs for subsidization.

Thus the definition contains three basic elements: (i) there is financial contribution or revenue foregone (ii) it is provided by a government or any public body within the territory of a Member (iii) and it confers a benefit. All three of these elements must be satisfied in order for a subsidy to exist.

‘sunken cost’ is a cost that has already been incurred and cannot be recovered. A sunken cost differs from other, future costs that a business may face, such as inventory costs or R&D expenses, because it has already happened. Sunken costs are independent of any event that may occur in the future. They should be considered irrelevant to future decision making. This term is from the oil industry where the decision to abandon or operate an oil well is made on the basis of its expected cash flows and not on how much money was spent in drilling it.

‘standstill clause’ means **the** requirement that prohibits the granting of any State aid before the Commission has been in position to assess its compatibility with the internal market. Article 108 (3) of the TFEU provides for the duty of Member States to notify the European Commission of all their intentions to grant or alter State aid. The last sentence of Article 108(3), providing that the aid may not be implemented until it has been approved by the Commission, is reproduced in Article 3 of the Procedural Regulation and is often referred to as the ‘standstill clause’. As provided for in that Regulation *“aid notifiable... shall not be put into effect before the Commission has taken, or is deemed to have taken, a decision authorising such aid”*¹⁴⁶. Its effect is that all aid that falls within the conditions set out in Article 107(1) must be notified and approved before implementation. Violation of this rule makes the State aid unlawful or illegal. The standstill clause in Article 108(3) of the TFEU has direct effect and therefore can be invoked before the national courts of the Member States. National courts must give full effect to this obligation and declare invalid all aid measures granted without prior notification and authorisation by the Commission. (See also *‘unlawful aid’*).

The standstill provision is also laid down in the Ukrainian Law on State Aid to Undertakings. According to Article 9 (part 4) of the Law: ‘new State aid subject to notification may be granted once the Authorised Body’s decision is issued’¹⁴⁷.

‘State aid’ – While the term State aid does not appear in the TFEU (which refers only to ‘aid’) and is largely a term of usage, it does appear in the EU-Ukraine Association Agreement, for example. Apart from the cumulative criteria in Article 107(1) of the TFEU that characterize aid potentially subject to prohibition in the EU system, there has never been an attempt to formally define ‘aid’ or ‘State aid’. This has been a distinct EU policy to avoid circumvention of a definition and has resulted in the European Courts developing a range of tests for the identification of State aid via its effects. At the same time, the European Commission has taken a degree of credit for the WTO ‘subsidy’ definition (See *‘subsidy’*) in the SCMA as being essentially in line with the notion of State aid in the EU system. According to the Law of

¹⁴⁶ Council Regulation (EC) 659/ 1999 OJ 1999 L 83/1, Article 3.

¹⁴⁷ Law of Ukraine on State Aid to Undertakings, Article 9, Part 4.

Ukraine on State Aid to Undertakings, State aid means *"any support to undertakings through State resources or local resources in any form whatsoever which distorts or threatens to distort economic competition by creating advantages for the production of certain kinds of goods or for carrying out certain business activities"*¹⁴⁸. (See also 'aid').

'State aid beneficiary' means an undertaking which receives State aid¹⁴⁹. The scope of Article 107 is very broad and it applies to all gainful activity, to any entity engaged in an economic activity, irrespective of its legal form. Therefore, the *'undertaking'* covered by this Article may be public or private sector bodies. This also includes self-employed persons and family businesses, as well as partnerships or associations regularly engaged in an economic activities.

'State aid category' - aid may be classified according to the objectives of aid – hence, *regional aid*, other *horizontal aid*, also aid granted to support individual sectors (*vertical/sectoral aid*). In certain sectors special rules on aid provision operate in parallel with the general provisions. *Ad-hoc aid* may also be considered as a separate category of State aid. (See also *'horizontal aid'*, *'sectoral aid'* and *'ad hoc aid'*). According to Article 6 of the Ukrainian Law on State Aid to Undertakings, the Cabinet of Ministers of Ukraine is required to establish the criteria for the assessment of the compatibility of the following categories of State aid:

- 1) State aid for regional development;
- 2) State aid for the support of small and medium – sized enterprises;
- 3) State aid for support for training;
- 4) State aid for the employment of certain categories of workers and for employment creation;
- 5) State aid assisting the rescue and restructuring of undertakings;
- 6) State aid supporting activities concerning environmental protection;
- 7) State aid for the promotion of research, development and innovation;
- 8) State aid supporting specific sectors of the national economy.

The category to which a State aid belongs determines the manner in which it will be assessed by the State aid monitoring authority. Any of the aid types may arise in each and all of the State aid categories but different categories will tend to be subject to different regulations.

'State aid monitoring'- according to the provisions of the Ukrainian Law on State to Undertakings, State aid monitoring means the accumulation and analysis of information on State aid in order to control compliance with the requirements of the Law and decisions of the Authorised Body as set forth by the Law as well as the preparation and submission of State aid reports¹⁵⁰.

'State aid programme' – according to the Ukrainian Law on State Aid to Undertakings a State aid programme means a regulatory legal act or a set of acts whereunder State aid is

¹⁴⁸ Law of Ukraine on State Aid to Undertakings, Article 1, Part 1.1

¹⁴⁹ Law of Ukraine on State Aid to Undertakings, Article 1, Part 1.11

¹⁵⁰ Law of Ukraine on State Aid to Undertakings, Article 1, Part 1.4

granted to certain categories of undertakings for a certain or an indefinite period of time in a definite or indefinite amount¹⁵¹.

‘State aid providers’ - according to the provisions of the Ukrainian Law on State to Undertakings, State aid provider means State authorities, local self-government authorities, administration, management and control bodies and legal entities acting on their behalf, authorised to administer State resources or local resources and initiate and/or grant State aid¹⁵².

‘State resources’ include all resources of the public sector, including resources of intra-State entities (decentralised, federated, regional or other) and, under certain circumstances, the resources of private bodies. According to the Ukrainian Law on State Aid to Undertakings definitions of ‘State resources’ and ‘local resources’ are used. *State resources* mean ‘moveable and immovable property, national budget funds, other funds subject to the right of State ownership, land and other natural resources subject to the right of Ukrainian people’s ownership, budgets of mandatory State social insurance funds which are under governmental supervision or which are managed or administered by State authorities.’¹⁵³ *Local resources* mean ‘moveable and immovable property, local budget funds, other funds, natural resources owned by local communities in villages, townships, cities, and municipal districts as well as their jointly owned facilities which are managed by district and regional councils, property owned by the Autonomous Republic of Crimea and managed by the Council of Ministers of the Autonomous Republic of Crimea.’¹⁵⁴. According to the EU law both of these are considered to be State resources. (See also ‘local resources’).

¹⁵¹ Law of Ukraine on State Aid to Undertakings, Article 1, Part 1.14

¹⁵² Law of Ukraine on State Aid to Undertakings, Article 1, Part 1.5

¹⁵³ Law of Ukraine on State Aid to Undertakings, Article 1, Part 1.15

¹⁵⁴ Law of Ukraine on State Aid to Undertakings, Article 1, Part 1.16

T

'tangible assets' means assets consisting of land, buildings and plant, machinery and equipment¹⁵⁵. Typically, these are assets that have a physical form. Tangible assets include both fixed assets, such as machinery, buildings and land, and current assets, such as inventory. The opposite of a tangible asset is an intangible asset (or a non-physical asset), such as patents, trademarks, copyrights, goodwill and brand recognition. (See also *'intangible assets'*).

'temporary restructuring support' is liquidity assistance designed to support the restructuring of an undertaking by providing the conditions needed for the beneficiary to design and implement appropriate action to restore its long-term viability. Temporary restructuring support may only be granted to SMEs and smaller State-owned undertakings¹⁵⁶. Under EU rules, temporary restructuring support is designed to *"simplify the granting of State aid for restructuring SMEs"*. The maximum duration of such aid is 18 months (it is shorter than for the standard restructuring support) and can only be in the form of loans or loan guarantees. The recipient is also only required to provide a simplified version of the restructuring plan usually required in respect of restructuring support.

'Trade Related Investment Measures' is the name of one of the principal legal agreements of the WTO. The Agreement on Trade-Related Investment Measures (TRIMs), 1994 sets out rules that apply to the domestic regulations a country applies to foreign investors, often as part of an industrial policy. TRIMs are rules that restrict the imposition of preferences for domestic firms on foreign investors and thereby enable international firms to operate more easily within foreign markets. Policies such as local content requirements and trade balancing rules that have traditionally been used to both promote the interests of domestic industries and combat restrictive business practices are now banned.

'training aid' means aid granted by a Member State to a company for general or job specific training purposes. The training may be in any field. Training aid is exempt from the notification requirement, provided that the aid intensity does not exceed a certain percentage of the project's overall cost. The eligible costs of a training project are: trainers' remuneration; trainers' travel expenses; trainees' expenses; expenses on materials and supplies; depreciation of tools and equipment; costs of guidance and counselling services; trainees' remuneration¹⁵⁷.

¹⁵⁵ Commission Guidelines on regional State aid for 2014-2020. Official Journal C209, 23 July 2013, para.20(x).

¹⁵⁶ Commission Guidelines on State aid for rescuing and restructuring non-financial undertakings in difficulty, Official Journal C 249, 31 July 2014, para.28.

¹⁵⁷ Communication from the Commission - Criteria for the compatibility analysis of training state aid cases subject to individual notification, O J C 188 of 11 August 2009.

U

'undertaking' means any entity engaged in an economic activity, regardless of whether the body is established under public or private law, or the way in which it is financed. Based on Article 107(1) of the TFEU, the State aid rules generally only apply where the recipient of an aid is an "undertaking" which performs economic activity. An entity that carries out both economic and non-economic activities is to be regarded as an undertaking only with regard to the former. Application of the State aid rules as such does not depend on whether the entity is set up to generate profits, since non-profit entities can also offer goods and services on the market. The status of the entity under national law is not decisive. This means that its legal and organisational form is irrelevant. Thus, an entity that is classified as an association under national law may have to be regarded as an undertaking within the meaning of Article 107 (1). The same applies to an entity that is formally part of the public administration. (See also *'economic activity'*). According to the Ukrainian Law on State Aid to Undertakings the meaning of 'an undertaking' is as set down by the Law of Ukraine 'On the Protection of Economic Competition'¹⁵⁸. This provides in Article 1 that: 'an undertaking is a legal entity irrespective of its organisational legal form and form of ownership or a natural person providing activity in manufacturing, selling, purchasing commodities, other economic activity, including performing control over other legal or natural persons; groups of undertakings, if one or more of them perform control over the others. As undertakings shall also be deemed bodies of State power, bodies of local self-government, as well as bodies of administrative management and control in respect of their activity in manufacturing, selling, purchasing commodities or other economic activity'¹⁵⁹.

'undertaking in difficulty' means a firm which is unable, whether through its own resources or with the funds it is able to obtain from its owner/shareholders or creditors, to stem losses which, without outside intervention by the public authorities, will almost certainly condemn it to going out of business in the short or medium term. In particular, according to the point 10 of the European Commission's Guidelines on State aid for rescuing and restructuring, a firm is, in principle and irrespective of its size, regarded as being in difficulty in the following circumstances:

- (a) in the case of a limited liability company, where more than half of its registered capital has disappeared and more than one quarter of that capital has been lost over the preceding 12 months;
- (b) in the case of a company where at least some members have unlimited liability for the debt of the company, where more than half of its capital as shown in the company accounts has disappeared and more than one quarter of that capital has been lost over the preceding 12 months;
- (c) whatever the type of company concerned, where it fulfils the criteria under its domestic law for being the subject of collective insolvency proceedings.¹⁶⁰

Even when none of the abovementioned circumstances are present, a firm may still be considered to be in difficulties; in particular where the usual signs of a firm being in difficulty are present e.g. increasing losses, diminishing turnover, growing stock inventories, excess capacity, declining cash flow, mounting debt, rising interest charges and falling or nil net

¹⁵⁸ Law of Ukraine on State Aid to Undertakings, Article 1(2).

¹⁵⁹ The Law of Ukraine on Economic Competition Protection, Article 1.

¹⁶⁰ Commission Guidelines on State aid for rescuing and restructuring non-financial undertakings in difficulty, Official Journal C 249, 31 July 2014 Part 2.2.

asset value. In acute cases, the firm may already have become insolvent or may be the subject of collective insolvency proceedings brought under domestic law. In the latter case, these the EU rules apply to any aid granted in the context of such proceedings which leads to the firm's continuing in business. In any event, a firm in difficulty is eligible for rescue and restructuring aid only where, demonstrably, it cannot recover through its own resources or with the funds it obtains from its owners/shareholders or from market sources.

A newly created firm is not eligible for rescue or restructuring aid even if its initial financial position is insecure.

A firm belonging to or being taken over by a larger business group is not normally eligible for rescue or restructuring aid, except where it can be demonstrated that the firm's difficulties are intrinsic and are not the result of an arbitrary allocation of costs within the group, and that the difficulties are too serious to be dealt with by the group itself. Where a firm in difficulty creates a subsidiary, the subsidiary, together with the firm in difficulty controlling it, will be regarded as a group and may receive aid under the conditions laid down in the EU rules. (See also '*rescue aid*' and '*restructuring aid*').

'unlawful aid' means new aid put into effect in contravention of the provisions of Article 108 (3) of the TFEU¹⁶¹. First the definition covers situations when State aid is implemented without notification. Secondly, it will cover notified aid which is, notwithstanding the standstill obligation, implemented before the Commission has given its approval. Thirdly, unlawful or illegal aid also covers *mis-used aid*. The European Commission is responsible for ensuring that Member States do not implement illegal State aid. It may open a State aid investigation if it finds out that a measure that could be considered State aid has been adopted without the Commission's prior approval and may therefore be unlawful aid. If a company has benefitted from a tax regime that is found to be unlawful State aid, it may have to re-pay the tax saved as a result of the tax benefit, plus interest. State aid can be given legally only by using one of a set of approved EU mechanisms for State aid, by getting approval for the particular scheme from the EU Commission.

According to the Ukrainian Law on State Aid to Undertakings 'unlawful' or 'illegal State aid' is 'State aid granted without notification to the Authorised Body or during the post-notification period but before the Authorised Body takes a decision finding that such State aid is compatible with competition or granted in violation of the Authorised Body's decision finding such State aid incompatible with competition except for categories of State aid which providers are relieved from their obligation to notify of new State aid pursuant to the Law¹⁶².

¹⁶¹ Council Regulation (EC) 659/ 1999 OJ 1999 L 83/1, Article 1(f).

¹⁶² Law of Ukraine on State Aid to Undertakings, Article 1, Part 1.8.

V

'venture capital' means investment in unquoted companies by investment funds (venture capital funds) that, acting as principals, manage individual, institutional or in-house money and includes early-stage and expansion financing, but not replacement finance and buy-outs.

According to the Ukrainian Law on State Aid to Undertakings, venture capital means 'a contribution to the authorized capital of small to medium business entities through State resources or local resources in order to ensure that a certain type of activity is being undertaken for the period of feasibility studies, business planning, incorporation, set-up or expansion of production'¹⁶³.

'vertical aid' means State aid granted to support individual sectors of economy. (See also '*sectoral aid*').

¹⁶³ Law of Ukraine on State Aid to Undertakings, Article 1, Part 1.17.

W

'wage costs' mean the total amount actually payable by the beneficiary of State aid in respect of the employment concerned, comprising the gross wage before tax and compulsory contributions such as social security, child care and parent care costs over a defined period of time¹⁶⁴.

'worker with disabilities' according to Commission Regulation 800/2008 means any person who¹⁶⁵:

- (a) is recognised as a worker with disabilities under national law; or
- (b) has a long-term physical, mental, intellectual or sensory impairment which in interaction with various barriers may hinder their full and effective participation in a work environment on an equal basis with other workers.

The definition of 'worker with disabilities' is necessary for the assessment of State aid in the form of wage subsidies that needs to be notified and will make the Commission's decisions and their reasoning transparent and will also create predictability and legal certainty.

¹⁶⁴ Commission Guidelines on regional State aid for 2014-2020. Official Journal C209, 23 July 2013, para.20(z).

¹⁶⁵ Guidelines on Regional State aid for 2014-2020, (2013/C 209/01).

ANNEX

LEGAL INSTRUMENTS REFERRED TO IN THE GLOSSARY

EU Regulations, Directives, Recommendations, "soft law" instruments and decisions

Council Regulation (EEC) No. 4055/86 of 22 December 1986 applying the principle of freedom to provide services to maritime transport between Member States and between Member States and third countries, OJ L 117, 5 May 1988.

Council Regulation (EEC) No. 3577/92 applying the principle of freedom to provide services to maritime transport within Member States (maritime cabotage), OJ L 364, 12 December 1992.

Council Regulation (EC) No.659/1999 of 22 March 1999 laying down detailed rules for the application of Article 108 of the Treaty on the Functioning of the European Union of the EC Treaty, OJ L 83/1 of 27 March 1999.

Regulation (EC) No. 1059/2003 of the European Parliament and of the Council of 26 May 2003 on the establishment of a common classification of territorial units for statistics (NUTS) OJ L 154 of 21 June 2003.

Regulation (EC) No. 1370/2007 of the European Parliament and of the Council of 23 October 2007 on public passenger transport services by rail and by road and repealing Council Regulations (EEC) Nos 1191/69 and 1107/70, OJ L 315 of 3 December 2007.

Directive 2004/39/EC of the European Parliament and of the Council of 21 April 2004 on markets in financial instruments, OJ L 145 of 30 April 2004.

Commission Regulation (EC) No. 800/2008 of 6 August 2008 declaring certain categories of aid compatible with the common market in application of Articles 87 and 88 of the Treaty, OJ L 214 of 9 August 2008.

Commission Regulation (EC) 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, OJ L 352 of 24 December 2013.

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- Commission Guidelines on State aid to airports and airlines, OJ C 99 of 4 April 2014.
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- Commission Guidelines on State aid for rescuing and restructuring non-financial undertakings in difficulty, O J C 249 of 31 July 2014.
- Commission Framework for State aid for research and development and innovation 2014/C 198/01, OJ C 198 of 27 June 2014.
- European Commission: *Communication on the repercussions of the terrorist attacks in the United States on the air transport industry*, COM(2001) 574 Final.
- European Commission: *Communication from the Commission - Criteria for the compatibility analysis of training state aid cases subject to individual notification*, O J C 188 of 11 August 2009.
- European Commission: *Communication from the Commission on the application of the European Union State aid rules to compensation granted for the provision of services of general economic interest*, OJ C 8 of 11 January 2012.
- European Commission: *Communication from the Commission to the Member States on the application of Articles 107 and 108 of the Treaty on the Functioning of the European Union to short-term export-credit insurance* (2012/C 392/01), OJ C 392 of 19 December 2012.
- European Commission: *Communication from the Commission on State aid for films and other audiovisual works* 2013/C 332/01, OJ C 332 of 15 November 2013.
- Commission Decision 2000/625/EC *Sea Transport of Irish Livestock* (2000).
- Commission Decision 2001/259/EC *Greek fruit and vegetable growers* (2001).
- Commission Decision NN 46/2001 *Aid to stock farmers hit by the BSE crisis* (25 July 2001).
- Commission Decision N 43a/2006 *Flood reconstruction loans* (11 December 2006).
- Commission Decision N 643/2008 of 23 December 2008.
- Commission Decision N 147/2009 *Pigmeat processors* (8 April 2009).
- Commission Decision N 424/2009 *Aid for the damage caused by natural disasters* (7 October 2009).
- Commission Decision N 235a/2010 *Floods in Poland* (6 August 2010).

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