

Guidelines for the analysis of the compatibility with the functioning of the EEA Agreement of state aid to promote the execution of important projects of common European interest¹

Contents

1.	INTRODUCTION.....	1
2.	SCOPE OF APPLICATION	2
3.	ELIGIBILITY CRITERIA.....	2
3.1	Definition of a project	3
3.2.	Common European interest.....	3
3.2.1.	General cumulative criteria	3
3.2.2.	General positive indicators.....	4
3.2.3.	Specific criteria	5
3.3.	Importance of the project	5
4.	COMPATIBILITY CRITERIA	5
4.1.	Necessity and proportionality of the aid	6
4.2.	Prevention of undue distortions of competition and balancing test	7
4.3.	Transparency	8
5.	FINAL PROVISIONS.....	9
5.1.	Notification obligation	9
5.2.	Ex post evaluation and reporting.....	9
5.3.	Entry into force, validity and revision.....	9
	ELIGIBLE COSTS	10

¹ These guidelines correspond to the European Commission’s communication on criteria for the analysis of the compatibility with the internal market of State aid to promote the execution of important projects of common European interest, published 20 June 2014 (OJ C 188, 20.6.2014, p. 4-12).

1. INTRODUCTION

1. This Chapter of the Guidelines gives guidance on the assessment under state aid rules of public financing of important projects of common European interest (IPCEIs).
2. IPCEIs may represent a very important contribution to economic growth, jobs and competitiveness for the European Economic Area (EEA) industry and economy in view of their positive spillover effects on the internal market and the society.
3. IPCEIs make it possible to bring together knowledge, expertise, financial resources and economic actors throughout the EEA, so as to overcome important market or systemic failures and societal challenges which could not otherwise be addressed. They are designed to bring together public and private sectors to undertake large-scale projects that provide significant benefits to the EEA and the citizens of the Contracting Parties.
4. IPCEIs can be relevant for all policies and actions that fulfil common European objectives, in particular as regards the Europe 2020² objectives, the European Union's flagship initiatives and key areas for economic growth such as the Key Enabling Technologies³ (KETs).
5. The State Aid Modernisation initiative (SAM)⁴ calls for state aid to be directed towards objectives of common European interests in line with the priorities of the Europe 2020 agenda, so as to address market failures or other important systemic failures that hinder the promotion of growth and jobs and the development of an integrated, dynamic and competitive internal market. The deployment of IPCEIs often requires a significant participation from public authorities since the market would not otherwise finance such projects. In case public financing of such projects constitutes state aid, this communication sets out the applicable rules so as to ensure that the level playing field in the internal market is preserved.
6. The SAM constitutes a good opportunity to update and consolidate the existing guidance in one single document so as to bring it into line with the Europe 2020 objectives and the SAM goals and to extend it to other fields where it could be of application. These Guidelines therefore replace any existing provisions on IPCEI. In this way, these Guidelines provide the Contracting Parties with dedicated and cross-disciplinary guidance aimed at encouraging the development of important collaborative projects that promote the common European interests.
7. Article 61(3)(b) of the EEA Agreement provides that aid to promote the execution of an important project of common European interest may be considered to be compatible with the functioning of the EEA Agreement. Accordingly, these Guidelines set out guidance as to the criteria the EFTA Surveillance Authority ("the Authority") will apply for the assessment of state aid to promote the execution of IPCEIs. They first define their scope and then provide a list of criteria which the Authority will use to assess the nature and the importance of such projects for the purposes of the application of Article

² Communication from the Commission, Europe 2020, A strategy for smart, sustainable and inclusive growth, COM(2010) 2020 final, 3.3.2010.

³ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions — 'A European strategy for Key Enabling Technologies — A bridge to growth and jobs', COM(2012) 341 final, 26.6.2012.

⁴ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions — EU State Aid Modernisation (SAM) - COM(2012) 209 final, 8.5.2012.

61(3)(b) of the EEA Agreement. They then explain how the Authority will assess the compatibility of public financing of IPCEIs under state aid rules.

8. These Guidelines do not exclude the possibility that aid to promote the execution of IPCEIs may also be found compatible with the functioning of the EEA Agreement on the basis of other provisions, notably Article 61(3)(c) of the EEA Agreement and their implementing rules. The state aid framework has been modernised with a view to offering the Contracting Parties greater possibilities to subsidise important projects which remedy market failures and cohesion challenges in different areas in order to promote sustainable growth and jobs. However, those provisions may not fully address the relevance, specificities and features of IPCEIs, which may require dedicated eligibility, compatibility and procedural provisions, which are set out in these Guidelines.

2. SCOPE OF APPLICATION

9. These Guidelines apply to IPCEIs in all sectors of economic activity.
10. These Guidelines shall not apply to:
 - (a) measures involving aid to undertakings in difficulty, as defined by the rescue and restructuring guidelines⁵ or any successor guidelines, as amended or replaced;
 - (b) measures involving aid to undertakings which are subject to an outstanding recovery order following a previous Authority decision declaring an aid illegal and incompatible with the functioning of the EEA Agreement;
 - (c) aid measures which entail by themselves, by the conditions attached to them or by their financing method a non-severable violation of EEA law⁶, in particular:
 - aid measures where the granting of aid is subject to the obligation for the beneficiary to have its headquarters in the relevant Contracting Party or to be predominantly established in that Contracting Party,
 - aid measures where the granting of aid is subject to the obligation for the beneficiary to use nationally produced goods or national services,
 - aid measures restricting the possibility for the beneficiary to exploit the research, development and innovation results in other Contracting Parties.

3. ELIGIBILITY CRITERIA

11. In determining whether a project falls within Article 61(3)(b) of the EEA Agreement, the following criteria will apply:

⁵ Guidelines on state aid for rescuing and restructuring non-financial undertakings in difficulty, as adopted by Decision No 321/14/COL, published in OJ L 271, 16.10.2015, p. 35 and in the EEA Supplement thereto No 62 on 15.10.2015, p. 1. As explained in paragraph 23 of those guidelines, given that its very existence is in danger, a firm in difficulty cannot be considered an appropriate vehicle for promoting other public policy objectives until such time that its viability is assured.

⁶ See for instance Case C-156/98 *Germany v Commission* EU:C:2000:467, paragraph 78 and Case C-333/07 *Régie Networks v Rhône-Alpes Bourgogne* EU:C:2008:764, paragraphs 94–116.

3.1 Definition of a project

12. The aid proposal concerns a single project which is clearly defined in respect of its objectives as well as the terms of its implementation, including its participants and its funding.⁷
13. The Authority may also consider eligible an ‘integrated project’, that is to say, a group of single projects inserted in a common structure, roadmap or programme aiming at the same objective and based on a coherent systemic approach. The individual components of the integrated project may relate to separate levels of the supply chain but must be complementary and necessary for the achievement of the important European objective.⁸

3.2. Common European interest

3.2.1. *General cumulative criteria*

14. The project must contribute in a concrete, clear and identifiable manner to one or more common European objectives and must have a significant impact on competitiveness of the EEA, sustainable growth, addressing societal challenges or value creation across the EEA.
15. The project must represent an important contribution to the common European objectives, for instance by being of major importance for the Europe 2020 strategy, the European Research Area, the European strategy for KETs⁹, the Energy Strategy for Europe¹⁰, the 2030 framework for climate and energy policies¹¹, the European Energy Security Strategy¹², the Electronics Strategy for Europe, the Trans-European Transport and Energy networks, the Union’s flagship initiatives such as the Innovation Union¹³,

⁷ In the case of research and development, when two or more projects are not clearly separable from each other and, in particular when they do not have independent probabilities of technological success, they must be considered as a single project. Aid for a project that merely leads to a change in the location of the project within the EEA without changing the nature, size or scope of the project, will not be considered compatible.

⁸ Hereafter a single project and an integrated project are referred to as a ‘project’.

⁹ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions — ‘A European strategy for Key Enabling Technologies — A bridge to growth and jobs’, COM(2012) 341 final, 26.6.2012

¹⁰ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, ‘Energy 2020 — A strategy for competitive, sustainable and secure energy’, COM(2010) 639 final, 10.11.2010.

¹¹ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, ‘A policy framework for climate and energy in the period from 2020 to 2030’, COM(2014) 15 final, 22.1.2014.

¹² Communication from the Commission to the European Parliament and the Council, ‘European Energy Security Strategy’, COM(2014) 330 final, 28.5.2014.

¹³ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, ‘Europe 2020 Flagship Initiative — Innovation Union’, COM(2010) 546 final, 6.10.2010.

Digital Agenda for Europe¹⁴, the Resource Efficient Europe¹⁵, or the Integrated Industrial Policy for the Globalisation Era¹⁶.

16. The project must normally involve more than one Contracting Party¹⁷ and its benefits must not be confined to the financing Contracting Parties, but extend to a wide part of the EEA. The benefits of the project must be clearly defined in a concrete and identifiable manner.¹⁸
17. The benefits of the project must not be limited to the undertakings or to the sector concerned, but must be of wider relevance and application to the European economy or society through positive spillover effects (such as having systemic effects on multiple levels of the value chain, or up- or downstream markets, or having alternative uses in other sectors or modal shift) which are clearly defined in a concrete and identifiable manner.
18. The project must involve co-financing by the beneficiary.
19. The project must respect the principle of the phasing out of environmental harmful subsidies, as recalled by the Resource Efficiency Roadmap¹⁹.

3.2.2. *General positive indicators*

20. In addition to the cumulative criteria in Section 3.2.1, the Authority will take a more favourable approach where:
 - (a) the project has been designed so as to make it possible for all interested Contracting Parties to participate, having regard to the type of project, the objective pursued and its financing needs;
 - (b) the design of the project involves the European Commission or any legal body to which the European Commission has delegated its powers, such as the European Investment Bank;

¹⁴ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, 'A Digital Agenda for Europe', COM(2010) 245 final, 26.8.2010, as recognised in the resolution from the 37th Meeting of the EEA Joint Parliamentary Committee on 26 October 2011.

¹⁵ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, 'A resource-efficient Europe — Flagship initiative under the Europe 2020 Strategy', COM(2011) 21, 26.1.2011.

¹⁶ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, 'An Integrated Industrial Policy for the Globalisation Era — Putting Competitiveness and Sustainability as the Centre Stage', COM(2010) 614 final, 28.10.2010.

¹⁷ With the exception of interconnected research infrastructures and TEN-T projects that are of fundamentally transnational importance because they are part of a physically connected cross-border network or are essential to enhance cross-border traffic management or interoperability.

¹⁸ The mere fact that the project is carried out by undertakings in different countries, or that a research infrastructure is subsequently used by undertakings established in different EEA Member States, is not sufficient for a project to qualify as an IPCEI. The Court of Justice has stated that a project may be described as being of common European interest when it forms part of a transnational European programme supported jointly by a number of governments of the EEA Member States, or arises from concerted action by a number of EEA Member States to combat a common threat. Joined Cases C-62/87 and 72/87 *Exécutif régional wallon and SA Glaverbel v Commission* EU:C:1988:132, paragraphs 22-23.

¹⁹ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, 'Roadmap to a Resource Efficient Europe', COM(2011) 571 final, 20.9.2011.

- (c) the selection of the project involves the European Commission or any legal body to which the European Commission has delegated its power, provided that this body is acting in that purpose as an implementing structure;
- (d) the governance structure of the project involves the European Commission — or any legal body to which the European Commission has delegated its powers — and several Contracting Parties;
- (e) the project involves important collaborative interactions in terms of number of partners, involvement of organisations of different sectors, or the involvement of undertakings of different sizes;
- (f) the project involves co-financing by an EFTA or European Union fund.²⁰

3.2.3. *Specific criteria*

- 21. R&D&I projects must be of a major innovative nature or constitute an important added value in terms of R&D&I in light of the state of the art in the sector concerned.
- 22. Projects comprising of industrial deployment must allow for the development of a new product or service with high research and innovation content and/or the deployment of a fundamentally innovative production process. Regular upgrades without an innovative dimension of existing facilities and the development of newer versions of existing products do not qualify as IPCEI.
- 23. Environmental, energy or transport projects must either be of great importance for the environmental, energy, including security of energy supply, or transport strategy of the Union or contribute significantly to the internal market, including, but not limited to those specific sectors.

3.3. Importance of the project

- 24. In order to qualify as an IPCEI, a project must be important quantitatively or qualitatively. It should either be particularly large in size or scope and/or imply a very considerable level of technological or financial risk.

4. COMPATIBILITY CRITERIA

- 25. When assessing the compatibility with the functioning of the EEA Agreement of aid to promote the execution of an IPCEI on the basis of Article 61(3)(b) of the EEA Agreement, the Authority will take into account the following criteria²¹.
- 26. The Authority will carry out a balancing test to assess whether the expected positive effects outweigh the possible negative effects as set out below.
- 27. In view of the nature of the project, the Authority may consider that the presence of a market failure or other important systemic failures, as well as the contribution to a common European interest, is presumed where the project fulfils the eligibility criteria set out in Section 3 above.

²⁰ EFTA or European Union funding centrally managed by the institutions, agencies, joint undertakings or other bodies of the EEA or European Union that is not directly or indirectly under the control of the Contracting Parties does not constitute state aid.

²¹ According to case law, the Authority enjoys discretion as regards the assessment of the compatibility of IPCEIs. Joined Cases C-62/87 and 72/87, *Exécutif régional wallon and SA Glaverbel v Commission* [1988] ECR 1573, paragraph 21.

4.1. Necessity and proportionality of the aid

- 28. The aid must not subsidise the costs of a project that an undertaking would anyhow incur and must not compensate for the normal business risk of an economic activity. Without the aid the project’s realisation should be impossible, or it should be realised in a smaller size or scope or in a different manner that would significantly restrict its expected benefits.²² Aid will only be considered proportionate if the same result could not be achieved with less aid.
- 29. The Contracting Party must provide the Authority with adequate information concerning the aided project as well as a comprehensive description of the counterfactual scenario which corresponds to the situation where no aid is awarded by any Contracting Party. The counterfactual scenario may consist in the absence of an alternative project or in a clearly defined and sufficiently predictable alternative project considered by the beneficiary in its internal decision-making, and may relate to an alternative project that is wholly or partly carried out outside the EEA.
- 30. In the absence of an alternative project, the Authority will verify that the aid amount does not exceed the minimum necessary for the aided project to be sufficiently profitable, for example by making possible to achieve an IRR corresponding to the sector or firm specific benchmark or hurdle rate. Normal rates of return required by the beneficiary in other investment projects of a similar kind, its cost of capital as a whole or returns commonly observed in the industry concerned may also be used for this purpose. All relevant expected costs and benefits must be considered over the lifetime of the project.
- 31. The maximum aid level will be determined with regard to the identified funding gap in relation to the eligible costs. If justified by the funding gap analysis, the aid intensity could reach up to 100 % of the eligible costs. The funding gap refers to the difference between the positive and negative cash flows over the lifetime of the investment, discounted to their current value on the basis of an appropriate discount factor reflecting the rate of return necessary for the beneficiary to carry out the project, notably in view of the risks involved. The eligible costs are those laid down in the Annex.²³
- 32. Where it is shown, for example by means of internal company documents, that the aid beneficiary faces a clear choice between carrying out either an aided project or an alternative one without aid, the Authority will compare the expected net present values of the investment in the aided project and the counterfactual project, account being taken of the probabilities of the different business scenarios occurring.
- 33. In its analysis, the Authority will take into consideration the following elements:

(a)	<i>specification of intended change</i>	:	the change in behaviour which is expected to result from the state aid, that is to say whether a new project is triggered, or the size, scope or speed of a project is enhanced, has to be well specified by the Contracting Party. The change of behaviour has to be identified by comparing what would be the expected outcome and level of intended activity with and without aid.
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²² The aid application must precede the starts of the works, which is either the start of construction works on the investment or the first firm commitment to order equipment or other commitment that makes the investment irreversible, whichever is the first in time. Buying of land and preparatory works such as obtaining permits and conducting preliminary feasibility studies are not considered as start of works.

²³ In case of an integrated project, the eligible costs must be detailed at the level of each individual project.

			The difference between the two scenarios shows the impact of the aid measure and its incentive effect;
(b)	<i>level of profitability</i>	:	where a project would not in itself be sufficiently profitable for a private undertaking to undertake, but would generate important benefits for the society, it is more likely that the aid has an incentive effect.

34. In order to address actual or potential direct or indirect distortions of international trade, the Authority may take account of the fact that, directly or indirectly, competitors located outside the EEA have received (in the last three years) or are going to receive, aid of an equivalent intensity for similar projects. However, where distortions of international trade are likely to occur after more than three years, given the particular nature of the sector in question, the reference period may be extended accordingly. If at all possible, the Contracting Party concerned will provide the Authority with sufficient information to enable it to assess the situation, in particular the need to take account of the competitive advantage enjoyed by a third country competitor. If the Authority does not have evidence concerning the awarded or proposed aid, it may also base its decision on circumstantial evidence.
35. When gathering evidence, the Authority may use its investigative powers²⁴.
36. The choice of the aid instrument must be made with a view to the market failure or other important systemic failures which it seeks to address. For instance, where the underlying problem is lack of access to finance, Contracting Parties should normally resort to aid in the form of liquidity support, such as loans or guarantees.²⁵ Where it is also necessary to provide the undertaking with a certain degree of risk-sharing, a repayable advance should normally be the aid instrument of choice. Repayable aid instruments will generally be considered as a positive indicator.
37. The energy security and energy efficiency objectives must be taken into account in the analysis where relevant.
38. The Authority will consider more favourably projects that include a significant own contribution by the beneficiaries or by independent private investors. Contribution of tangible and intangible assets, as well as land, shall be accounted at market price.
39. The selection of beneficiaries through a competitive, transparent and non-discriminatory tender will be considered as a positive indicator.

4.2. Prevention of undue distortions of competition and balancing test

40. The Contracting Party should provide evidence that the proposed aid measure constitutes the appropriate policy instrument to address the objective of the project. An aid measure will not be considered appropriate if other less distortive policy instruments

²⁴ See Article 1(3) of Council Regulation (EU) No 734/2013 of 22 July 2013, amending Regulation (EC) No 659/1999 laying down detailed rules for the application of Article 93 of the EC Treaty (OJ L 204, 31.7.2013, p. 15). At the time of the adoption of these guidelines, Regulation (EU) No 734/2013 was under consideration for incorporation into the EEA Agreement. Regulation (EC) No 659/1999 was incorporated into the EEA Agreement by Joint Committee Decision No 164/2001 (OJ L 65, 7.3.2002, p. 46 and EEA Supplement No 13, 7.3.2002, p. 26).

²⁵ Aid in the form of guarantees must be limited in time, and aid in the form of loans must be subject to repayment periods.

or other less distortive types of aid instruments make it possible to achieve the same result.

41. For the aid to be compatible, the negative effects of the aid measure in terms of distortions of competition and impact on trade between Contracting Parties must be limited and outweighed by the positive effects in terms of contribution to the objective of the common European interest.
42. In assessing the negative effects of the aid measure, the Authority will focus its analysis on the foreseeable impact the aid may have on competition between undertakings in the product markets concerned, including up- or downstream markets, and on the risk of overcapacity.
43. The Authority will assess the risk of market foreclosure and dominance, in particular in case of absence or limited dissemination of the research results. Projects involving the construction of an infrastructure²⁶ must ensure open and non-discriminatory access to the infrastructure and non-discriminatory pricing.²⁷
44. The Authority will assess the potential negative effects on trade, including the risk of a subsidy race between Contracting Parties that may arise in particular with respect to the choice of a location.

4.3. Transparency

45. Contracting Parties shall ensure the publication of the following information on a comprehensive state aid website, at national or regional level:
 - (a) the text of the aid measure and its implementing provisions, or a link to it;
 - (b) the identity of the granting authority or authorities;
 - (c) the identity of the individual beneficiary, the form and amount of the aid to each beneficiary, the date of granting, the type of undertaking (SME/large undertaking); the region in which the beneficiary is located (at NUTS level II); and the principal economic sector in which the beneficiary undertaking has its activities (at NACE group level)²⁸.
46. Such requirement can be waived with respect to individual aid awards below EUR 500 000. Such information must be published after the decision to grant the aid has been taken, must be kept for at least 10 years and must be available to the general public without restriction.²⁹ Contracting Parties will not be required to provide the abovementioned information before 1 July 2016.

²⁶ For avoidance of doubt, pilot lines are not considered as infrastructures.

²⁷ Where the project involves an energy infrastructure, it shall be subject to the tariff and access regulation and to the unbundling requirements according to internal market legislation.

²⁸ With the exception of business secrets and other confidential information in duly justified cases and subject to the Authority's agreement (Chapter on professional secrecy in state aid decisions, Decision No 15/04/COL, published in OJ L 154, 8.6.2006, p. 27 and in the EEA Supplement thereto No 29 on the same date, p. 1).

²⁹ This information shall be published within 6 months from the date of granting. In case of unlawful aid, Contracting Parties will be required to ensure the publication of this information *ex post*, at least within 6 months from the date of the Authority's decision. The information shall be available in a format which allows data to be searched, extracted, and easily published on the internet, for instance in CSV or XML format.

5. FINAL PROVISIONS

5.1. Notification obligation

47. According to Article 1(3) in Part I of Protocol 3 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice, Contracting Parties must inform the Authority in advance of any plans to grant or alter state aid including aid for an IPCEI.
48. Contracting Parties involved in the same IPCEI are invited, whenever possible, to submit to the Authority a common notification.

5.2. Ex post evaluation and reporting

49. The execution of the project must be subject to regular reporting. Where appropriate, the Authority may ask for an *ex post* evaluation to be conducted.

5.3. Entry into force, validity and revision

50. These Guidelines will be applied from date of adoption until 31 December 2020.
51. The Authority will apply the principles set out in these Guidelines to all notified aid projects in respect of which it is called upon to take a decision after the Guidelines have been published on the Authority's website, even where the projects were notified prior to its publication.
52. In line with the Chapter on applicable rules for the assessment of unlawful state aid, in Part II of the State aid Guidelines³⁰, in the case of non-notified aid, the Authority will apply these Guidelines if the aid was granted after its entry into force, and the rules in force at the time when the aid was granted in all other cases.
53. The Authority may decide to amend these Guidelines at any time it is necessary for reasons associated with competition policy or to take account of other policies, international commitments, developments in the markets, or for any other justified reason.

³⁰ Decision No 154/07/COL, published in OJ L 73, 19.3.2009, p.23 and in the EEA Supplement thereto No 15 on the same date, p.1.

ANNEX

ELIGIBLE COSTS

- (a) Feasibility studies, including preparatory technical studies, and the costs of obtaining the permissions necessary for the realisation of the project.
- (b) Costs of instruments and equipment (including installations and transport vehicles) to the extent and for the period used for the project. If such instruments and equipment are not used for their full life for the project, only the depreciation costs corresponding to the life of the project, as calculated on the basis of good accounting practice, are considered as eligible.
- (c) Costs of the acquisition (or construction) of buildings, infrastructure and land, to the extent and for the period used for the project. Where these costs are determined with regard to the commercial transfer value or the actually incurred capital costs, as opposed to the depreciation costs, the residual value of the land, building or infrastructure should be deducted from the funding gap, either *ex ante* or *ex post*.
- (d) Costs of other materials, supplies and similar products necessary for the project.
- (e) Costs for obtaining, validating and defending patents and other intangible assets. Costs of contractual research, knowledge and patents bought or licensed from outside sources at arm's length conditions, as well as costs of consultancy and equivalent services used exclusively for the project.
- (f) Personnel and administrative costs (including overheads) directly incurred for the R&D&I activities, including those R&D&I activities related to first industrial deployment³¹, or in the case of an infrastructure project, incurred during the construction of the infrastructure.
- (g) In case of aid to a project of first industrial deployment, the capital and operating expenditures (CAPEX and OPEX), as long as the industrial deployment follows on from an R&D&I activity³² and itself contains a very important R&D&I component which constitutes an integral and necessary element for the successful implementation of the project. The operating expenditures must be related to such component of the project.
- (h) Other costs may be accepted if justified, and where they are inextricably linked to the realisation of the project, to the exclusion of operating costs not covered by point (g).

³¹ First industrial deployment refers to the upscaling of pilot facilities, or to the first-in-kind equipment and facilities which cover the steps subsequent to the pilot line including the testing phase, but neither mass production nor commercial activities.

³² The first industrial deployment does not need to be carried out by the same entity that carried out the R&D&I activity, as long as the former acquires the rights to use the results from the previous R&D&I activity, and the R&D&I activity and the first industrial deployment are both covered by the project and are notified together.