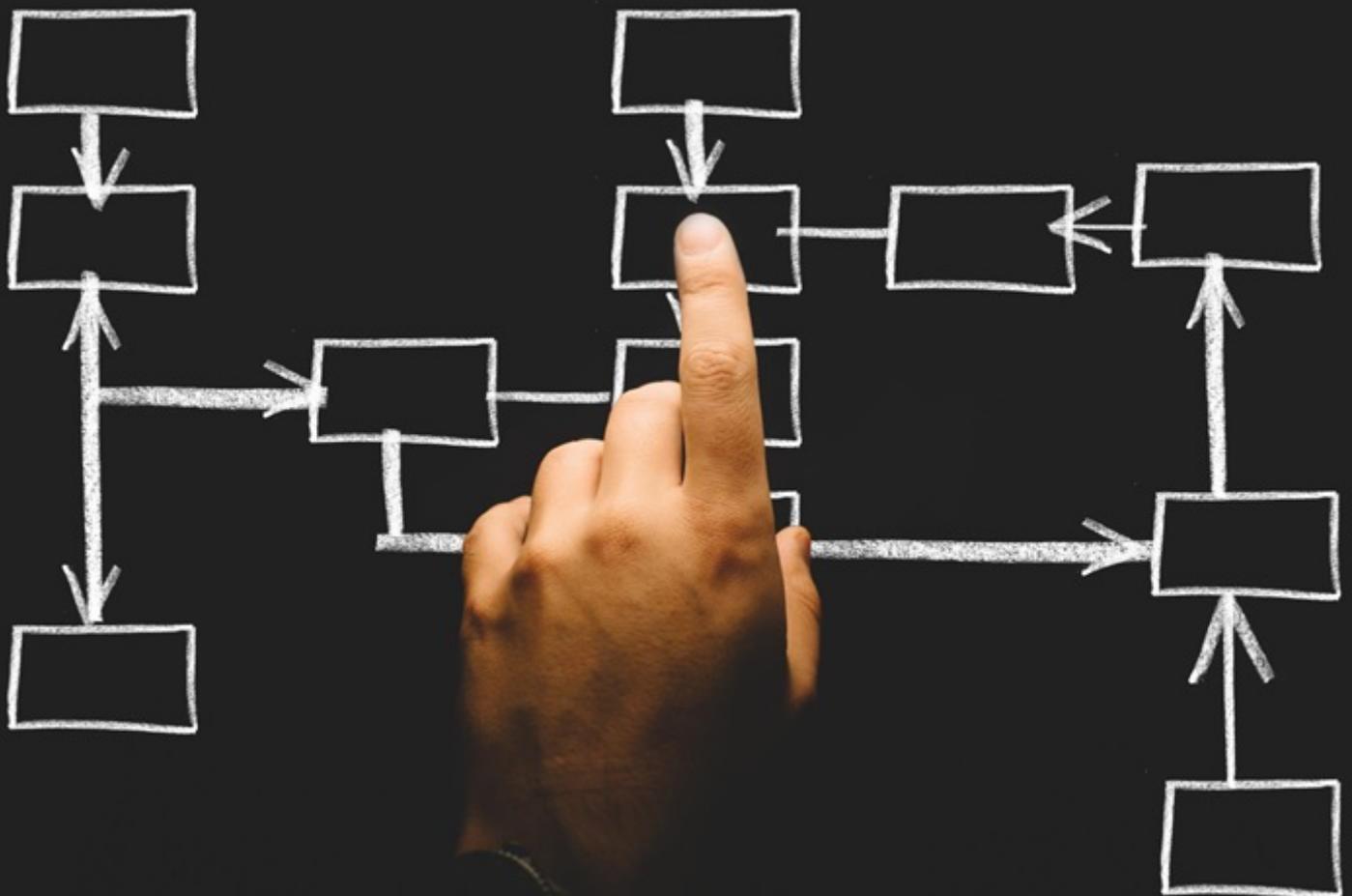


STATE AID RULES IN RESEARCH, DEVELOPMENT & INNOVATION

*Addressing Knowledge and
Awareness Gaps among
Research and Knowledge
Dissemination Organisations*

Decision Tree



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State Aid Rules in Research, Development & Innovation

Addressing Knowledge and Awareness Gaps among Research and Knowledge Dissemination Organisations

Decision Tree

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The JRC thanks the independent experts for their diligent work and contributions as well as their lively discussions over the course of multiple months. The JRC further thanks Pavol Jozef Šafárik University for having hosted a dedicated workshop, as well as all other stakeholders from European RDOs who shared with the CCTT the issues they regularly face on the subject-matter and their related questions.

Disclaimer

This publication is intended to be a simplified introduction on the subject-matter and nothing herein can in any way be considered as an authoritative interpretation of the applicable rules and regulations. Neither the author, the independent experts or the contributors, nor the JRC can be held liable for any decisions readers may take pursuant to the information and observations provided. This publication does not constitute an official position, decision or guidance of the European Commission or any other national state aid authority, and cannot under any circumstances be construed in a manner that may prejudice any such position, decision or guidance.

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FOREWORD

The global economy is becoming more and more innovation-driven. Therefore, Research and Knowledge Dissemination Organisations (RDOs) need to take an ever more active role in translating knowledge into innovation, to fuel economic growth, jobs and competitiveness. This not only necessitates that RDOs collaborate more closely with a broad range of partners, including industry, but also that they embrace new innovative models through science parks, shared research infrastructures, innovation clusters or similar catalysts.

Such activities often involve intensive interaction between publicly funded RDOs and industry – e.g. in the form of R&D-collaboration, the outsourcing of R&D-services to RDOs, knowledge transfer or the sharing of RDO-infrastructure. While these activities are desirable from an innovation and industrial-policy point of view, they may involve an element of public support. Such public support could constitute ‘State aid’ to one or more of the parties involved – the RDO and/or the undertakings, depending on the circumstances.

The present work is the result of over one year of discussions among experts and European Commission (EC) staff from the different relevant services in order to provide guidelines in the form of a decision tree for research organisations when dealing with the current EC rules and regulations on State Aid in Research and Innovation. The document is intended to provide technical clarification and should not be interpreted as a piece of legislation.

The EU Treaties establish a system of State aid control in the EU. Article 107 (1) of the Treaty on the Functioning of the EU (TFEU) defines the concept of ‘State Aid’. In essence, this concept comprises measures implemented by a governmental authority or using governmental resources in any form whatsoever, e.g. monetary transfers, tax relief, allocation of property and resources, or other contributions of financial worth, which give the recipient a selective advantage over other operators in the market, thereby affecting fair competition.

Pursuant to Article 107 (1) TFEU prohibits aid that threatens to distort competition in the internal market and affects trade between Member States. Nevertheless, the TFEU allows exemptions from this principle in certain situations, e.g. where State aid is necessary to facilitate the development of certain economic activities or of certain economic areas, pursuant to an exemption set out in Article 107 (3) lit. c TFEU.

Article 108 (3) TFEU requires Member States to notify their state aid measures to

the European Commission for prior authorisation before they implement them.

Based on Article 107 TFEU, the EU has developed a body of State aid rules to ensure that the general prohibition of State aid and the exemptions from that prohibition are applied uniformly across the European Union:

- The General Block Exemption Regulation sets out conditions and limits for aid measures that Member States can implement without prior formal Commission approval – including for R&D&I-aid;
- Other secondary legal texts set out assessment criteria for the aid measures that exceed the limits set out in the General Block Exemption Regulation and therefore require prior Commission approval. In the area of R&D&I, such assessment criteria are specified in the R&D&I-Framework.

Moreover, and very relevant for this publication, the European Commission has issued guidance as to whether a public measure involves State aid:

- A Commission Notice comprehensively explains the many facets of the notion of State aid;
- The R&D&I-Framework explains the presence of State aid in certain R&D&I-typical situations.

From this guidance, it emerges that an RDO can have three different scenarios under EU State aid rules:

1. *outside* the scope of EU State aid control – the publicly funded activity concerned is of a non-economic character;
2. *recipient* of State Aid – your organisation qualifies as an ‘undertaking’ in relation to the publicly funded activity concerned;
3. *grantor* of State Aid – your organisation provides an advantage to an undertaking.

The scenario must be defined in relation to your organisation’s activities. It depends on a number of legal and economic concepts under the general principles of EU State aid rules:

- **The concept of ‘Research and knowledge dissemination organisation’ (RDO)** as legally defined under EU State aid rules: In essence that broad legal definition encompasses entities pursuing predominantly non-commercial education and

knowledge dissemination objectives. In order to find out if the decision tree is useful for you, you first need to establish whether your organisation is an RDO (→ Section A1 of the Decision Tree).

- **The concept of ‘Economic activity’:** Public funding for an RDO can constitute State aid to the RDO if that funding is for an ‘economic activity’. This is the case if the RDO provides goods or services on the market, for example by carrying out research services on behalf of undertakings. If so, then your organisation qualifies as ‘undertaking’ in the context of the activity concerned, and public funding for that activity can fall under State aid rules. Understanding the concept of ‘economic activity’ and assessing the economic or non-economic character of your organisation’s various activities is therefore vital (→ Sections A2-A4 of the Decision Tree).
- **The presence of aid at the level of undertakings involved** in the activities of your organisation: RDOs could be in the position of a grantor of State aid if the conditions of the interaction concerned, e.g. a research service or a transfer of knowledge, constitute an advantage the undertaking could not have obtained on normal market conditions. If you aim to avoid the granting of such advantage, you need to determine whether the conditions of your interactions with industry are in line with the market condition presumptions under EU State aid rules, e.g. the notion of ‘adequate remuneration’ paid for your services (→ Section B of the Decision Tree). You have to be careful that such services remain below the relevant thresholds and are ancillary, otherwise your organisation risks becoming an undertaking itself.
- **Basic rules for the compatibility of State aid with the internal market:** If public funding involved in your activities indeed involves State aid at the level of your organisation or the undertakings involved in your activities, then knowing how to keep this aid within the legal limits of State aid rules is key (→ Section A.5 of the Decision Tree).

Practitioners in RDOs are encountering difficulties interpreting these concepts. It appears that these difficulties are due to certain knowledge and awareness gaps that result partly from a lack of detailed understanding of the applicable legal framework, and partly from various cultural and administrative differences across Member States.

As a research organisation with a broad European network, the Joint Research Centre (JRC) has mapped these knowledge and awareness gaps across a wide range of stakeholders. In order to understand better how such knowledge and awareness gaps can be addressed, the JRC’s Competence Centre on Technology Transfer (CCTT) in early 2019 convened a panel of independent experts, composed of esteemed

European legal professionals with hands-on experience in prominent RDOs. At the same time, the CCTT reached out bilaterally to numerous stakeholders and collected information on the challenges and problems they experience regarding State Aid. A dedicated workshop was held in Slovakia hosted by Pavol Jozef Šafárik University in May 2019, and a discussion session took place with the technology transfer offices of major European RDOs at the 12th plenary meeting of the European TTO Circle in Dublin in July 2019, hosted by Teagasc. In addition, in 2019-2020 JRC provided support and guidance to the 14 recently established Centres of Excellence and Centres of Competence in Bulgaria, from where it gathered further questions from stakeholder organisations. In this sense, this publication may be particularly useful for RDOs from the Member States that joined the EU with the 2004 enlargement and thereafter.

This publication is drawing from these sources. It aims to close the knowledge and awareness gaps RDOs are experiencing in the area EU State Aid rules. To help RDO navigate the assessment of the presence of State aid in their R&D-interactions, this publication contains a **Decision Tree that walks the reader through the different stages of the assessment**. Annex A provides the legal definitions under EU State aid rules, corresponding to the terminology used in this publication. Annex B provides several examples / illustrations that may be useful.

LEGISLATION

Non-exhaustive list of legislative and other relevant acts and documents

The up-to date acts can be found directly on the following page:

https://ec.europa.eu/competition/state_aid/legislation/legislation.html

- Articles 107 and 108 of the Treaty on the Functioning of the European Union (TFEU).
- Commission Notice on the notion of State aid as referred to in Article 107(1) of the Treaty on the Functioning of the European Union, 2016/C 262/01 (OJ C 262).
- Communication from the Commission — Framework for State aid for research and development and innovation, 2014/C 198/01 (OJ C 198).
- General Block Exemption Regulation: Commission Regulation (EU) No 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 (OJ L 187).
- Commission Regulation (EU) No 1407/2013 of 18 December 2013 on the application of Articles 107 and 108 of the Treaty on the Functioning of the European Union to de minimis aid (OJ L 352).
- Commission Directive 2006/111/EC of 16 November 2006 on the transparency of financial relations between Member States and public undertakings as well as on financial transparency within certain undertakings (OJ L 318/OJ L 348M).
- Communication from the Commission — Guidelines on State aid to promote risk finance investments, 2014/C 19/04 (OJ C 19).

DECISION TREE

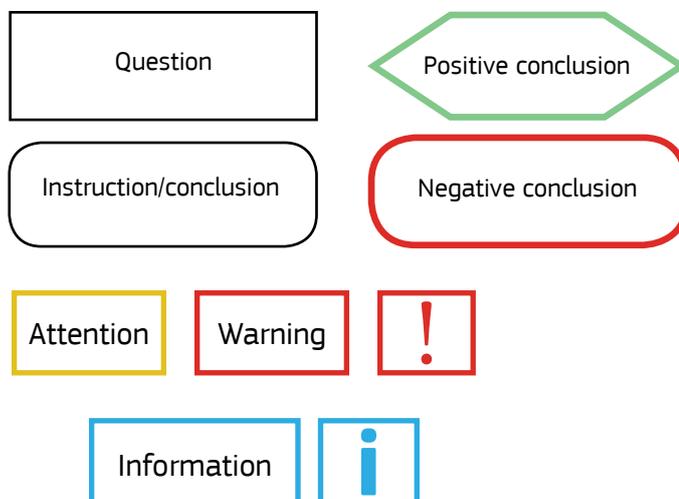
Before you begin

The aim of this Decision Tree is to help Research and Knowledge Dissemination Organisations better understand and comply with State Aid rules within the European Union. It should, however, be underlined that the information provided in this document is intended as a simplified introduction. State Aid measures are normally dealt with **on a case-by-case basis**, as the specific circumstances of each case may differ from one another. As such, the information provided in this document does not replace any formal advice, guidance or assessment your National State Aid Authority, the European Commission or relevant Courts may deliver. The Joint Research Centre, in response to requests to facilitate Research Organisations' basic understanding of certain rules, has strived to provide this very general outline and cannot be held liable for any decisions you may take pursuant to the information provided in this Decision Tree. In case of any doubts/questions you must always first contact the State Aid authorities of your Member State.

You will find that this document is divided into 6 Sections (Section A1 to A5, and Section B). You are advised to follow it in the given order since each Section leads on to one another to guide you through the relevant considerations accordingly. Please also refer to the Annexes for a list of definitions (Annex A) and for several described examples (Annex B).

It is recommended to print the present Decision Tree document in colour.

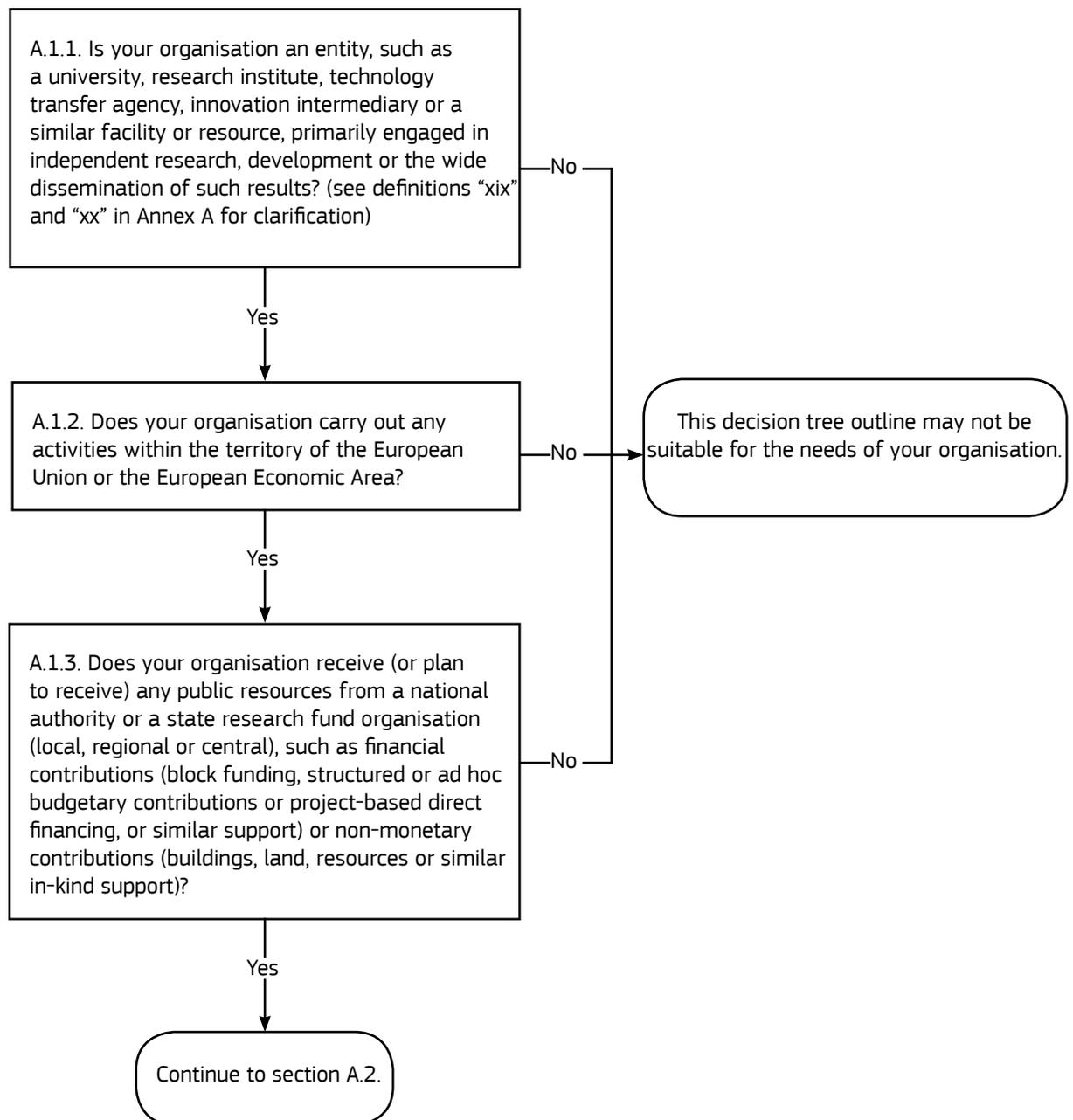
Legend



SECTION A1

Is this Decision Tree suitable for your organisation?

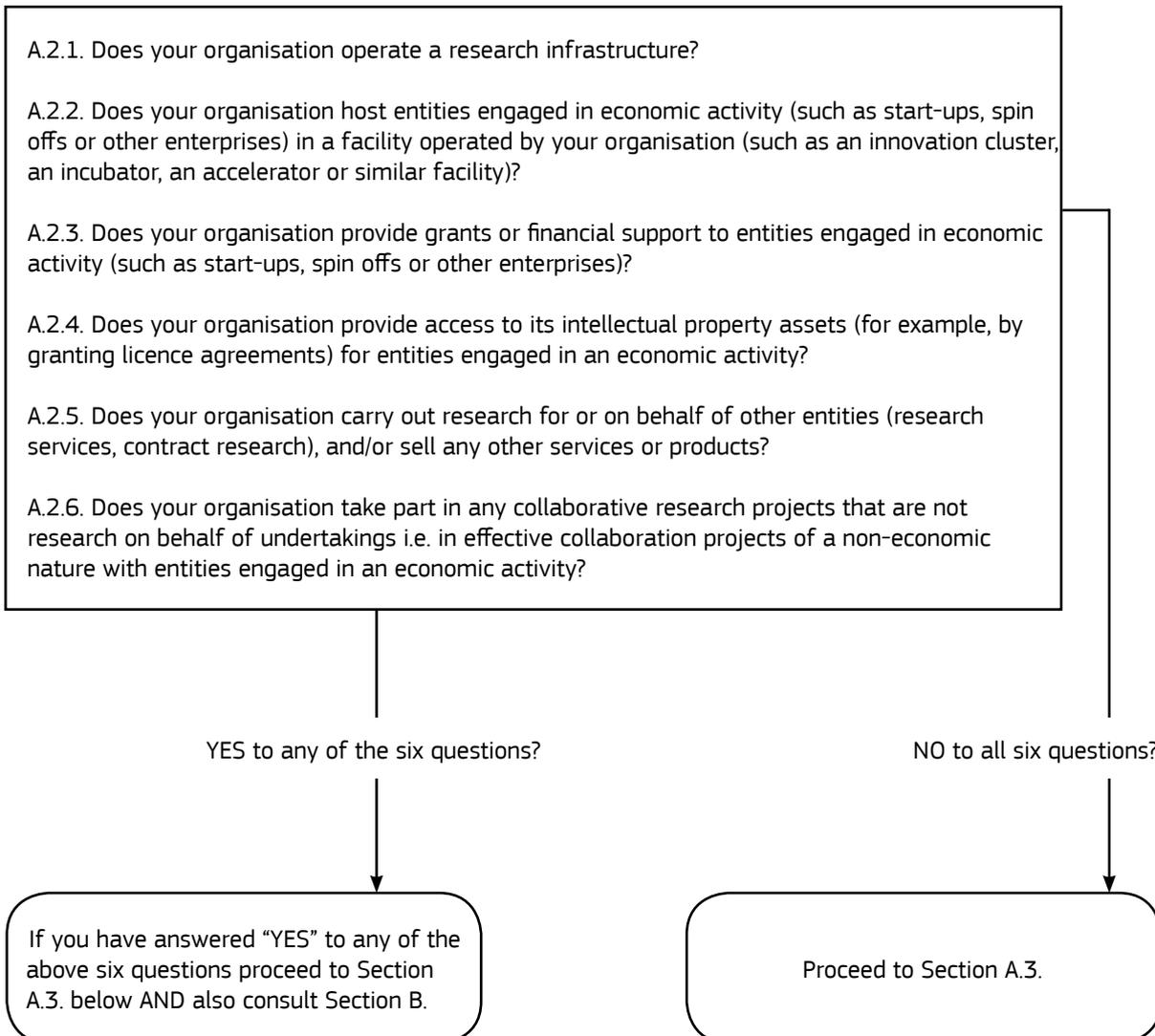
This Decision Tree has been prepared for the specific context of Research and Knowledge Dissemination Organisations. This Section will assist you in deciding whether this Decision Tree is suitable for the needs of your organisation, before you proceed with other considerations.



SECTION A2

Understanding your organisation's activities

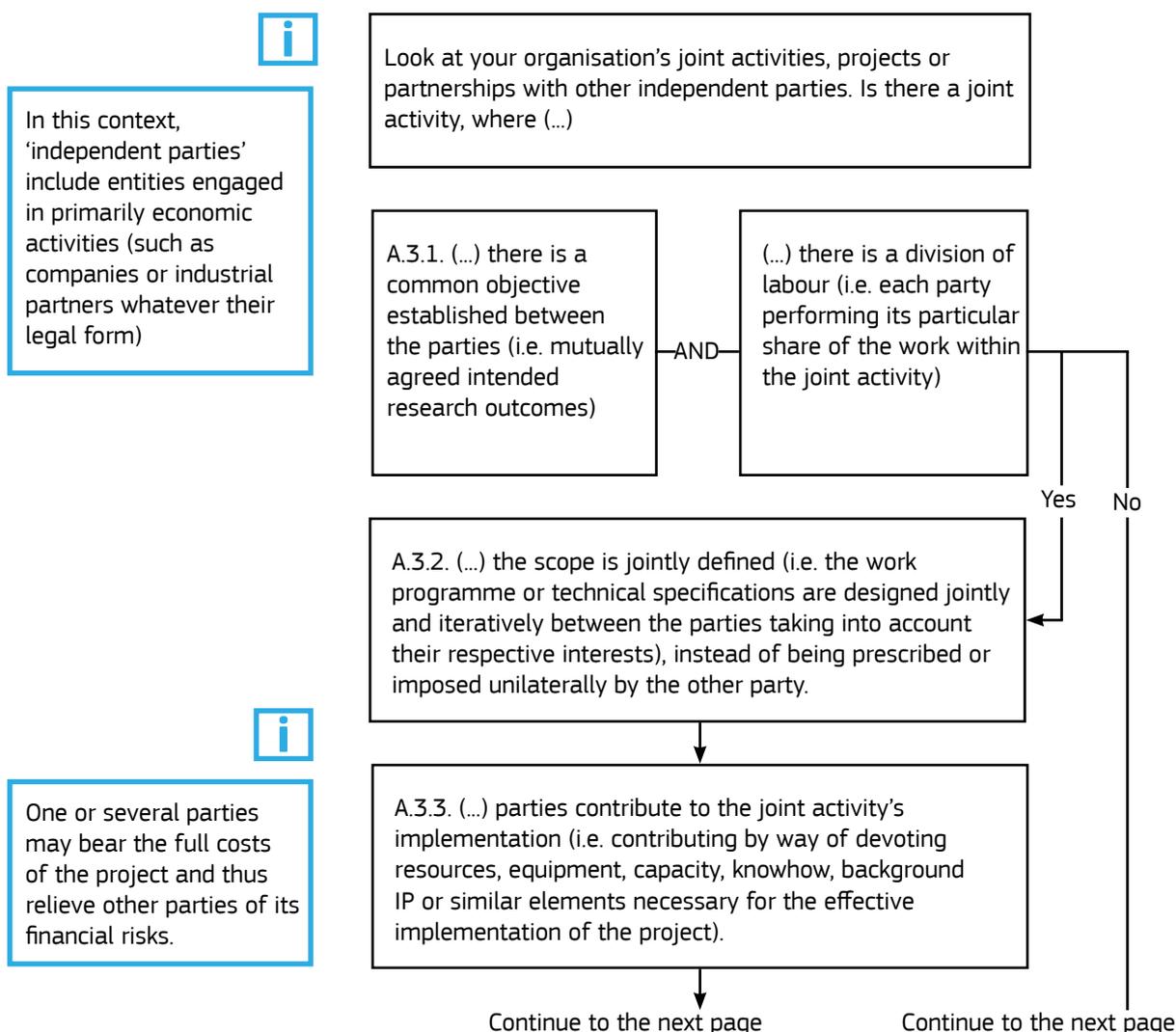
Under state aid rules, research and knowledge dissemination organisations may be considered both as a recipient of aid but also - under certain circumstances - a provider of indirect aid to other entities engaged in economic activity. This Section will help you understand which activities may relate to situations where your organisation is a recipient of aid, and which activities may result in passing on indirect aid to third-parties (which are then addressed in Section B of the decision tree).

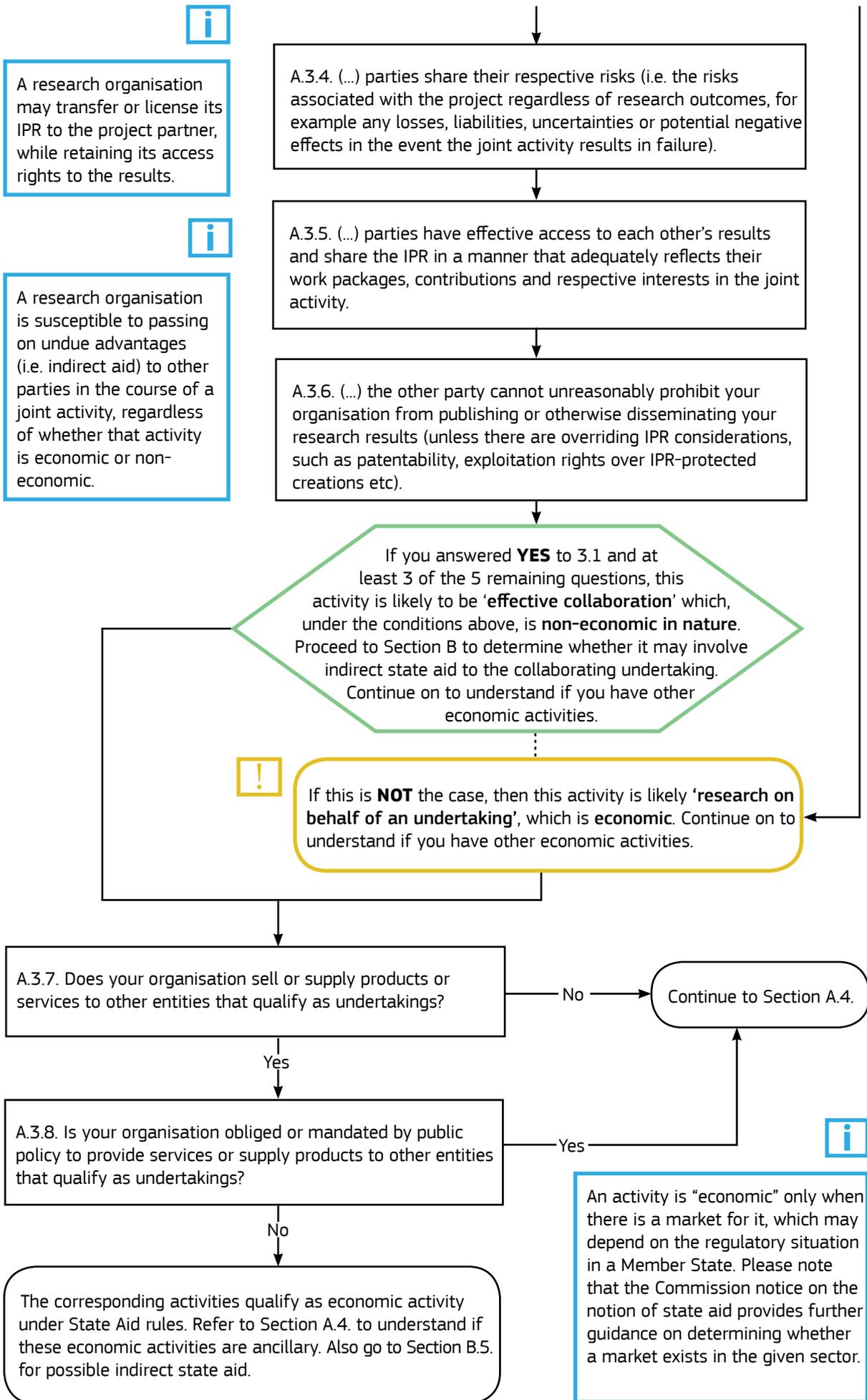


SECTION A3

Understanding which activities are economic or non-economic

Under State Aid rules, the distinction between economic and non-economic activities is crucial. Generally primary activities of research and knowledge dissemination organisations have a non-economic character. These activities are namely education, independent research (including “effective collaboration” between independent parties), wide dissemination of research results (where this is non-exclusive and non-discriminatory) for example through teaching or publications. These may also include knowledge transfer activities (such as, protection and licensing of intellectual property, mobility of researchers, knowledge management, contributing to standardisation, and similar activities). Other activities, such as contract research or selling of products and services, are considered as economic activities which may have state aid consequences. This Section will help you understand how to distinguish your economic activities from your non-economic activities.

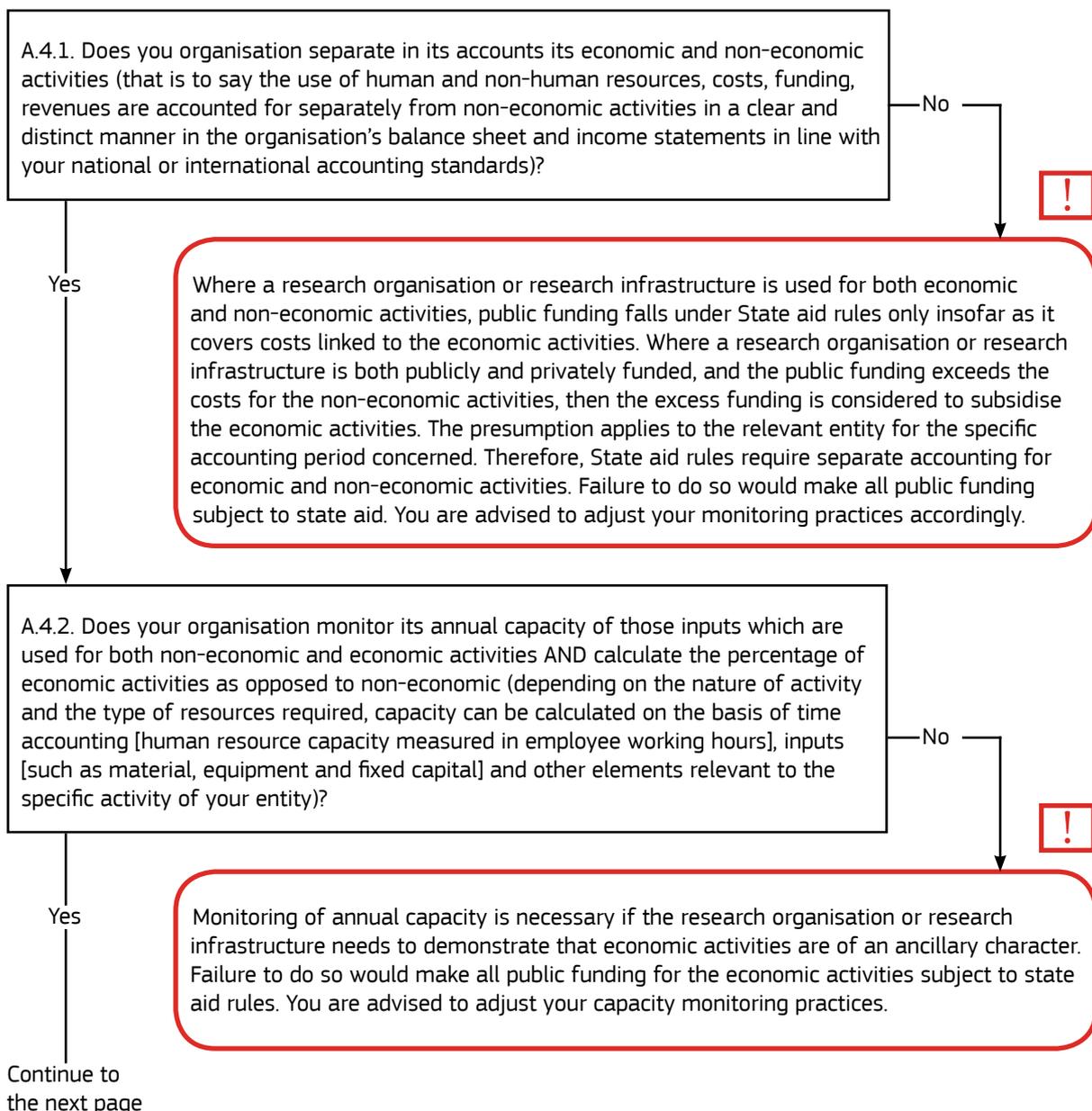


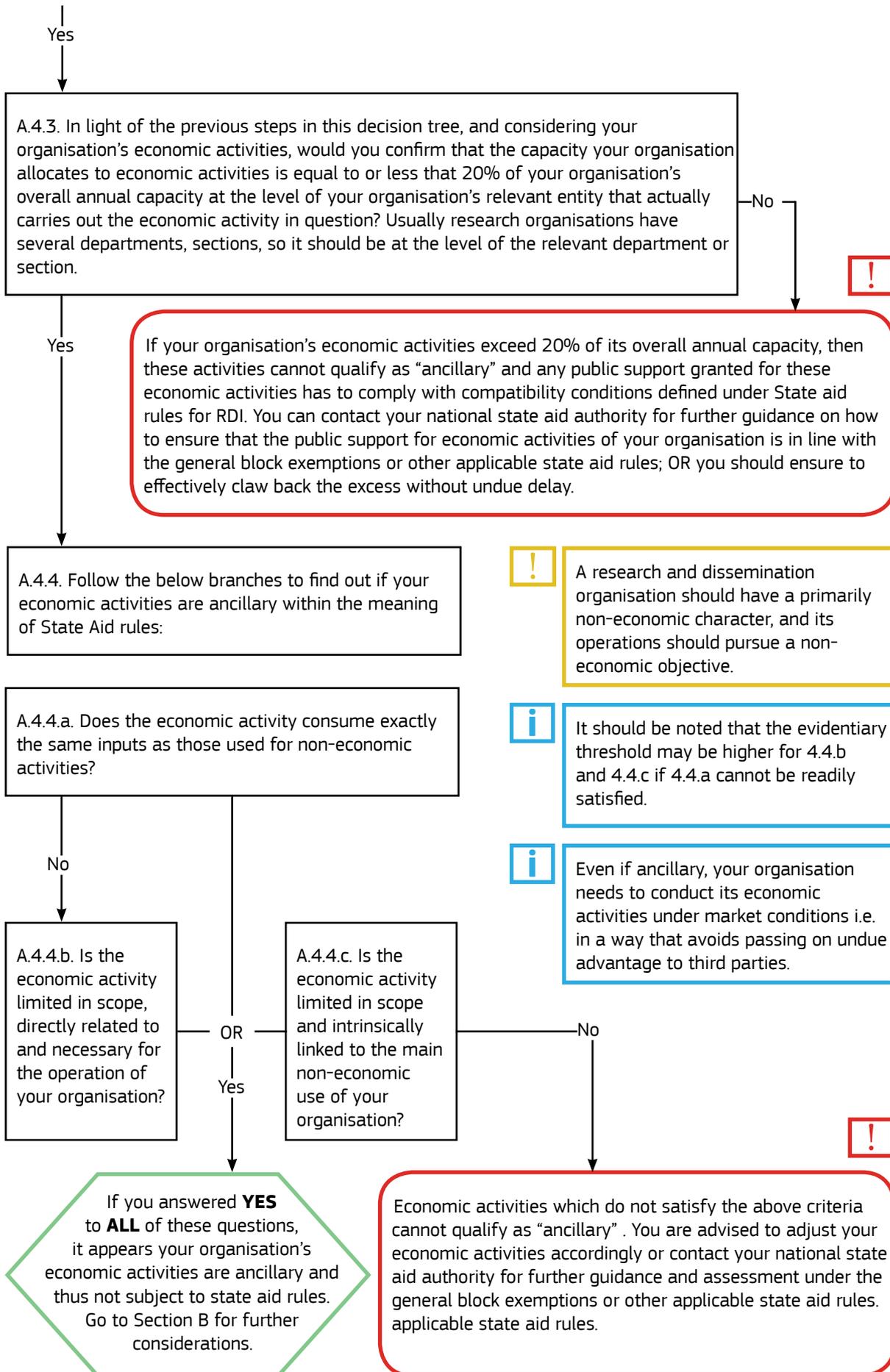


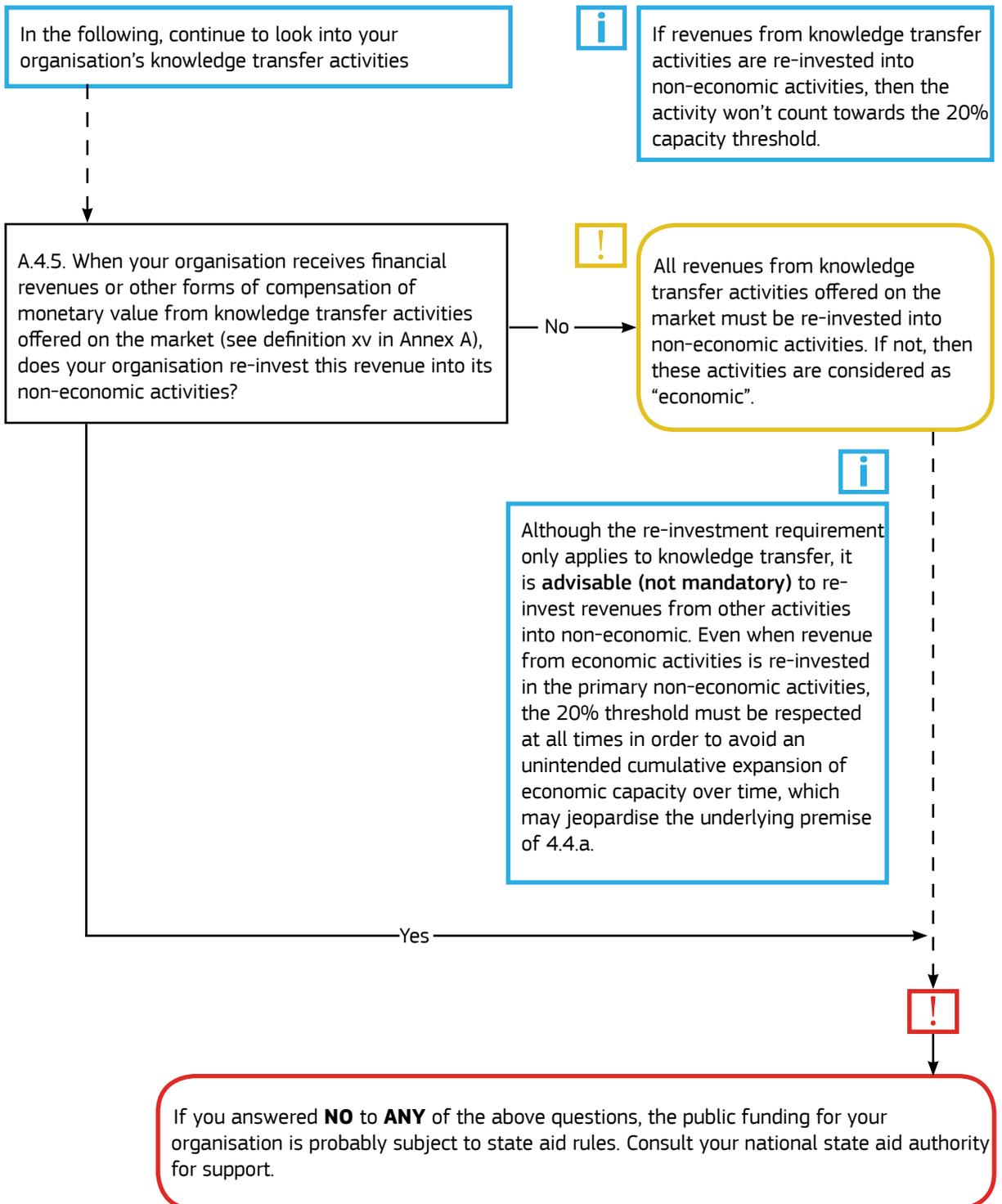
SECTION A4

Understanding which economic activities are subject to state rules

Once economic activities are properly identified, they are in principle subject to state aid rules. Nevertheless, economic activities which are purely “ancillary” to the non-economic activities of your organisation may fall out of the scope of state aid rules. For this, certain additional requirements (concerning, for examples, accounting practices, re-investment of revenues, and other modalities) must be fulfilled. Otherwise, state aid rules would apply to the public funding of these activities. In that case, a further evaluation may be necessary under applicable block exemptions. This Section will help you understand whether your organisation’s economic activities are ancillary and if other additional requirements are fulfilled.



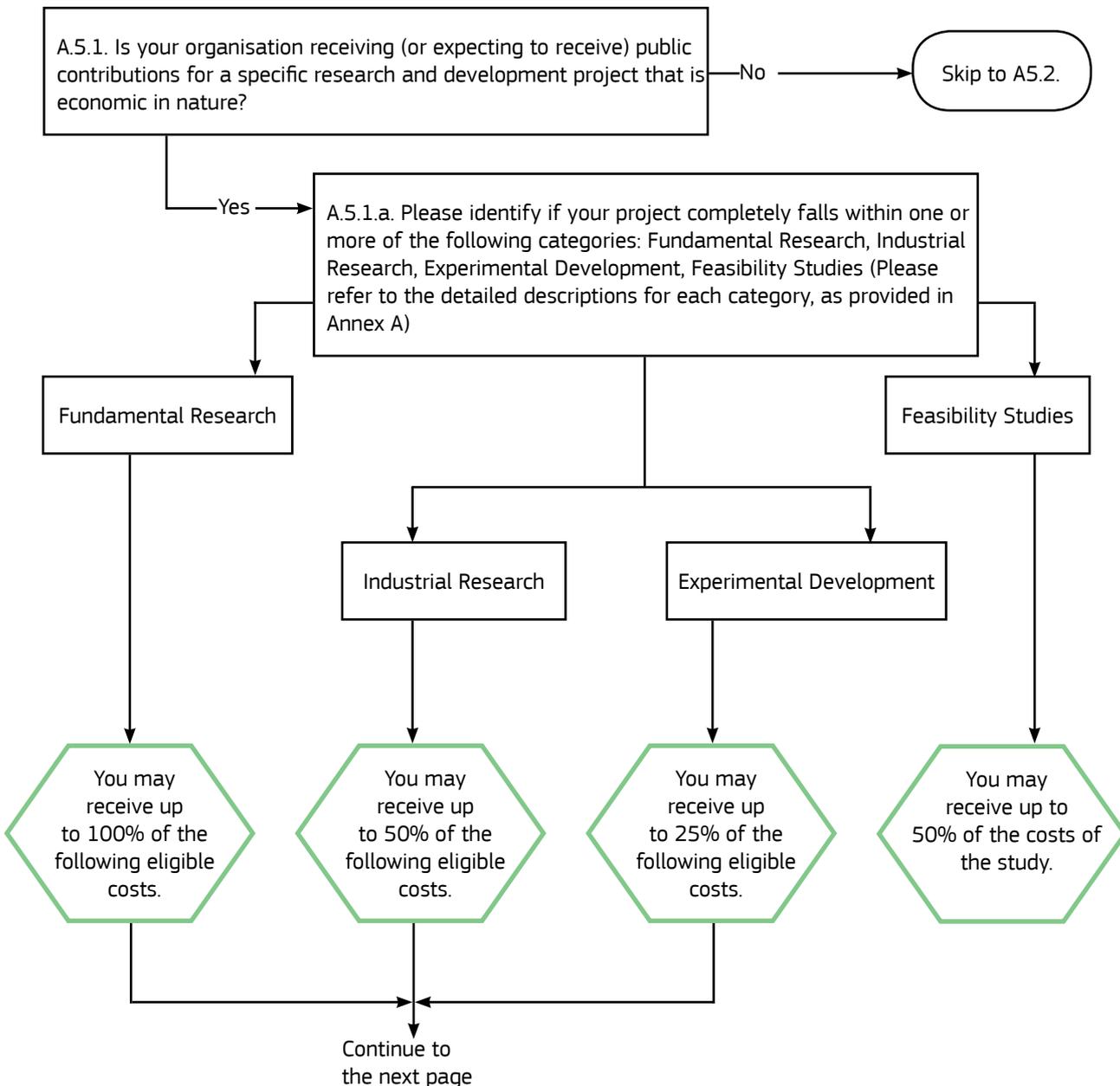


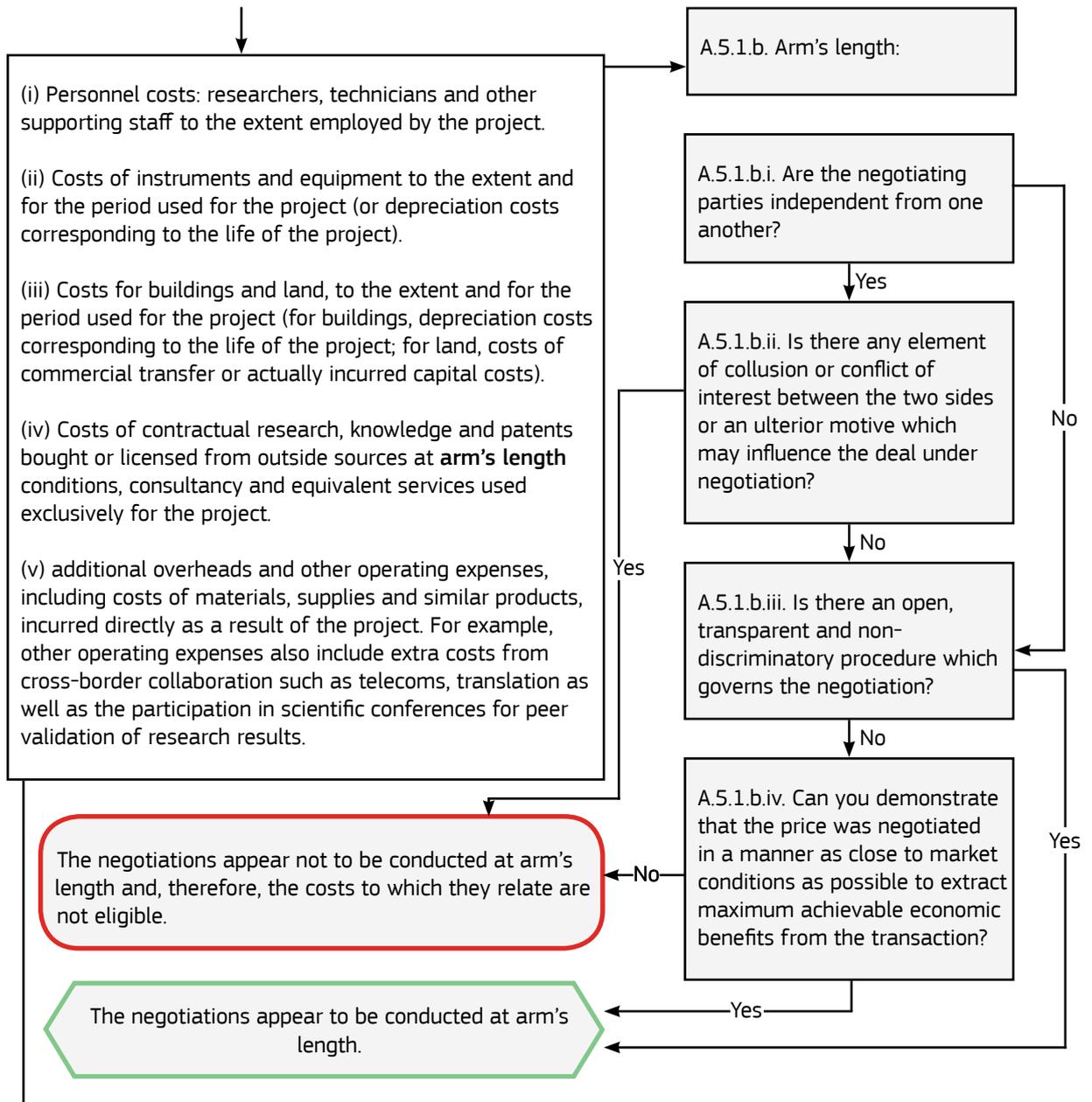


SECTION A5

Understanding block exemptions

State Aid rules allow national authorities (at local, regional or central levels of government) to grant aid for research organisations or research infrastructures under certain conditions. The General Block Exemption Regulation establishes conditions under which such aid can be provided without formally notifying the European Commission. If your organisation has received public funding for its economic activities, this Section will help you understand the different conditions which apply to such aid, and whether public funding received by your organisation could be in line with the applicable block exemptions.





i Although small and medium sized enterprises are accorded more favourable aid thresholds (additional 10% to 20%), it should be noted that a state-owned research and knowledge dissemination organisation, regardless of its size, cannot be considered as an SME for the purposes of benefiting from these privileges under the block exemptions.

A research and knowledge dissemination organisation (RDO, also abbreviated as RO) which carries out both economic and non-economic activities is regarded as an 'undertaking' under State Aid rules only with regard to its economic activities, provided it maintains account separation. The same rules apply to a RO conducting an economic activity, for which activity the RO receives public funding, as for 'regular' undertakings.

Does the project involve at least 1 SME or take place in at least 2 EU/EEA countries, and no single entity bears more than 70% of eligible costs?

OR

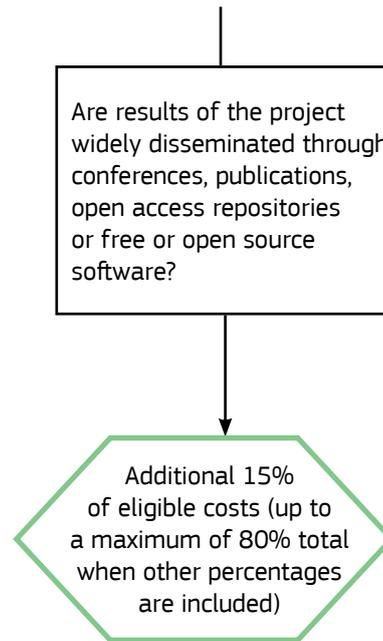
Is the project between undertakings and at least one research or knowledge dissemination organisation where the latter bears at least 10% of eligible costs and can publish own research results?

OR

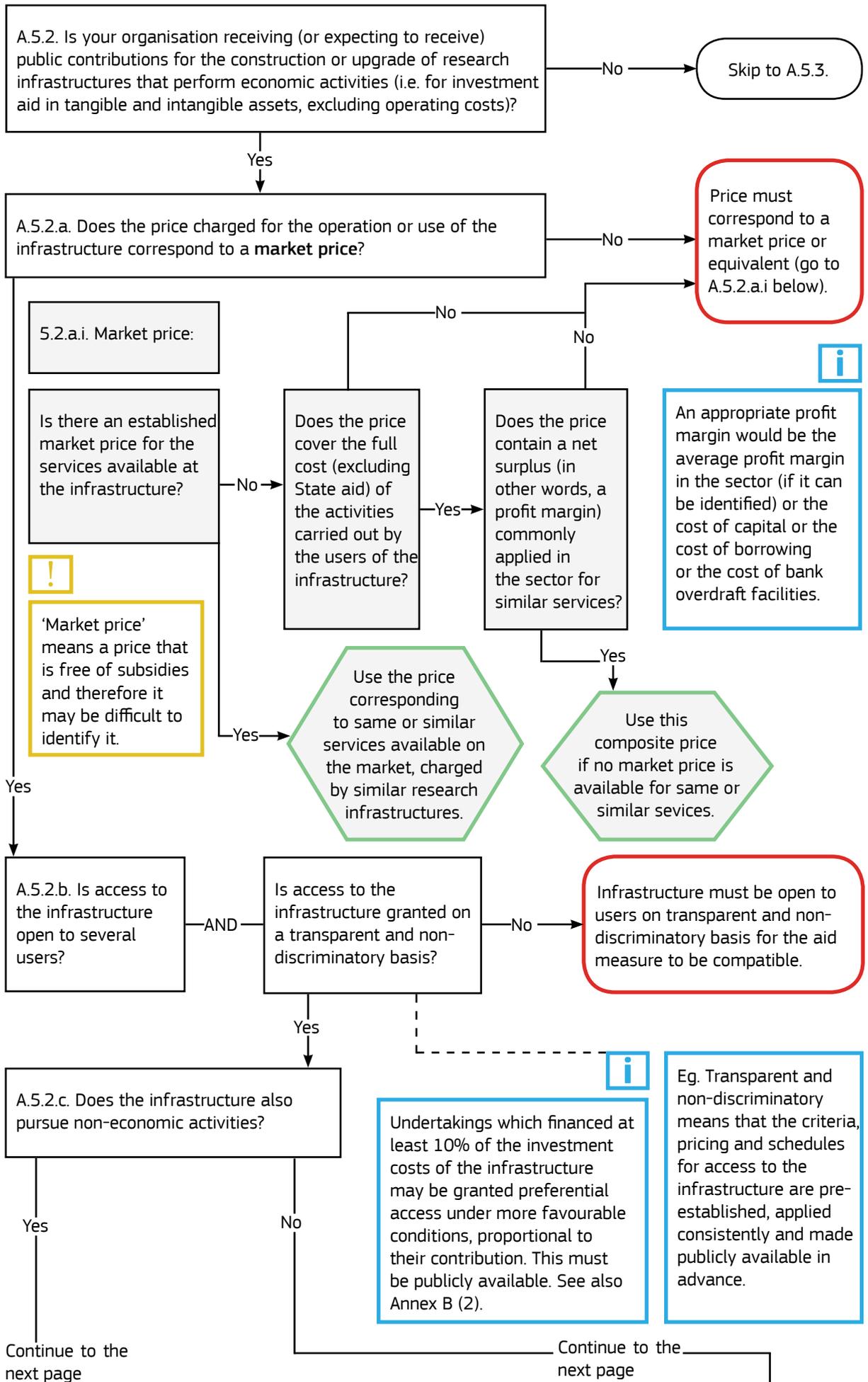
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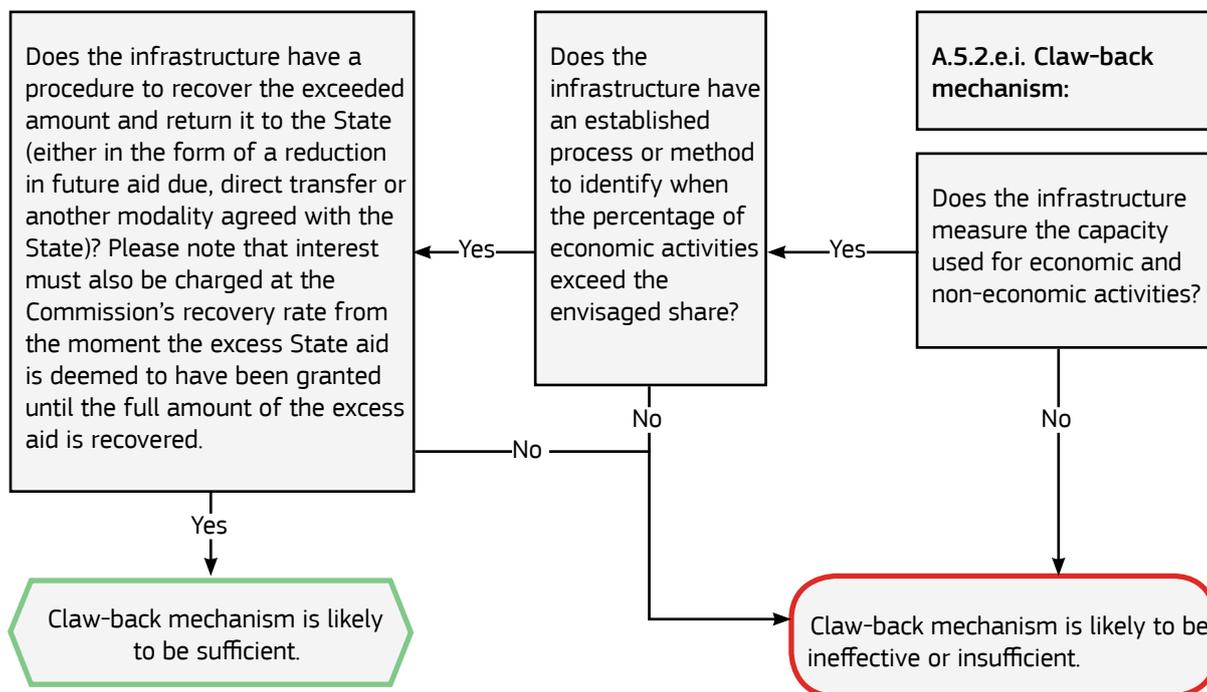
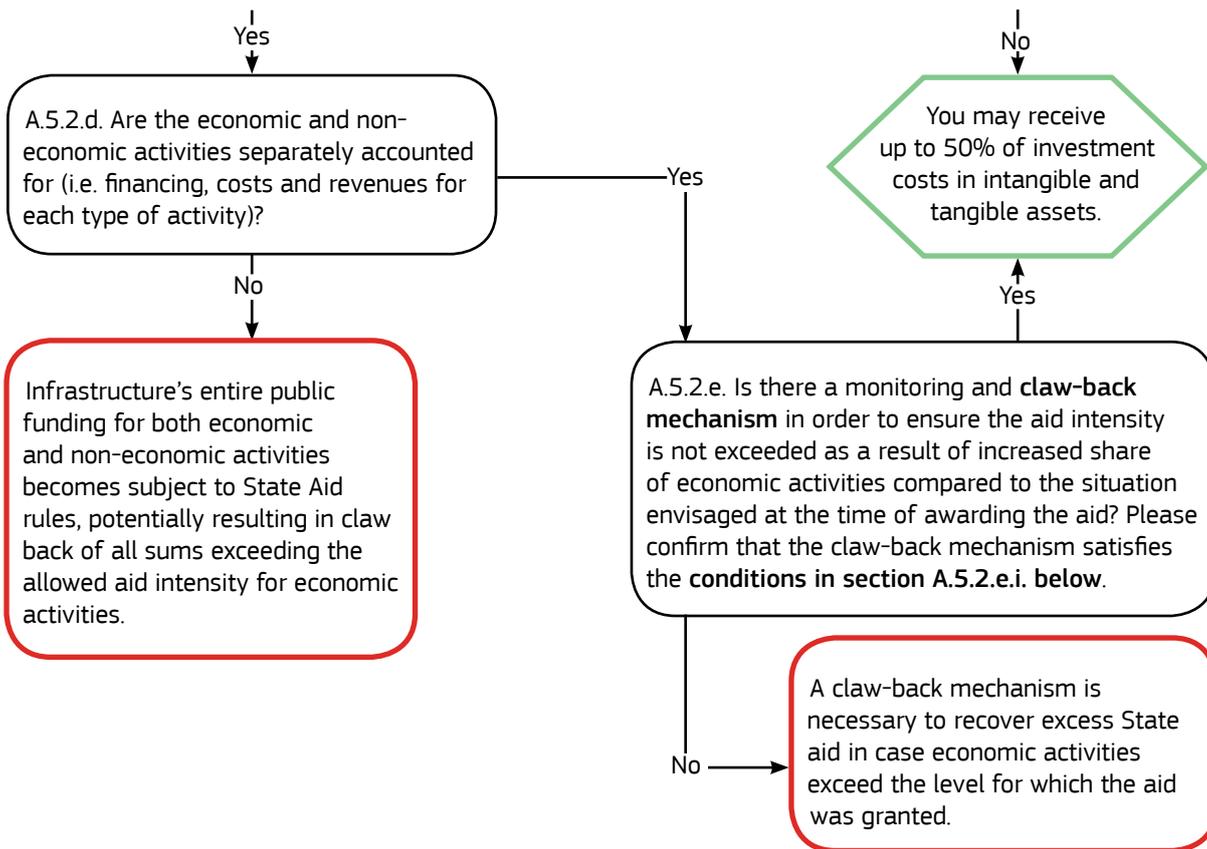


Please note that if the economic activities are kept below 20% of your organisation's annual capacity and otherwise fulfil the requirements for being ancillary (see Section A.4.4. above), your organisation does not lose its classification as a non-undertaking. To keep this status and avoid being qualified as a 'beneficiary' of State Aid while still carrying out economic activities, your organisation should continuously maintain separate accounting, abide to the abovementioned capacity usage threshold and make sure the economic activities remain ancillary.

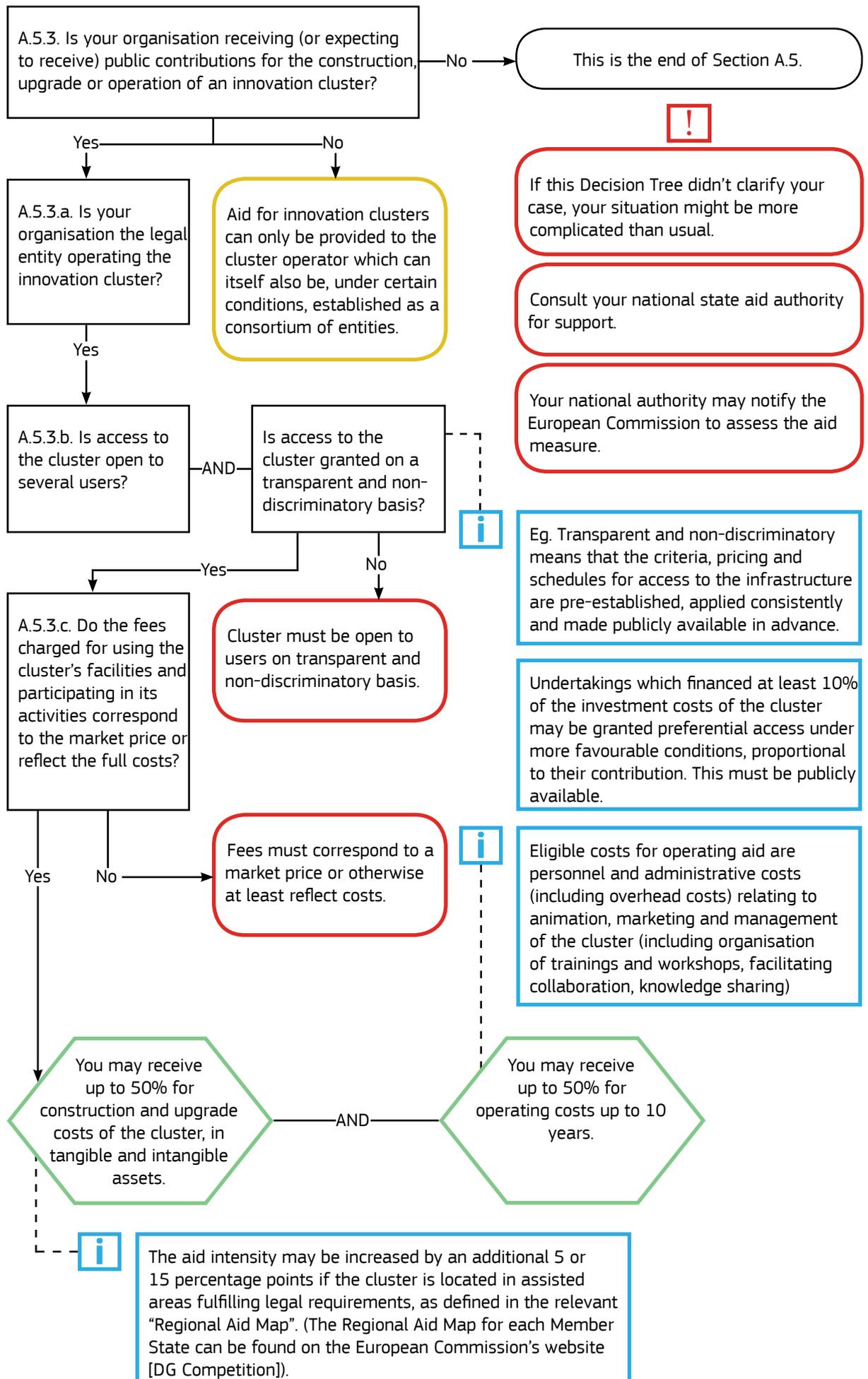


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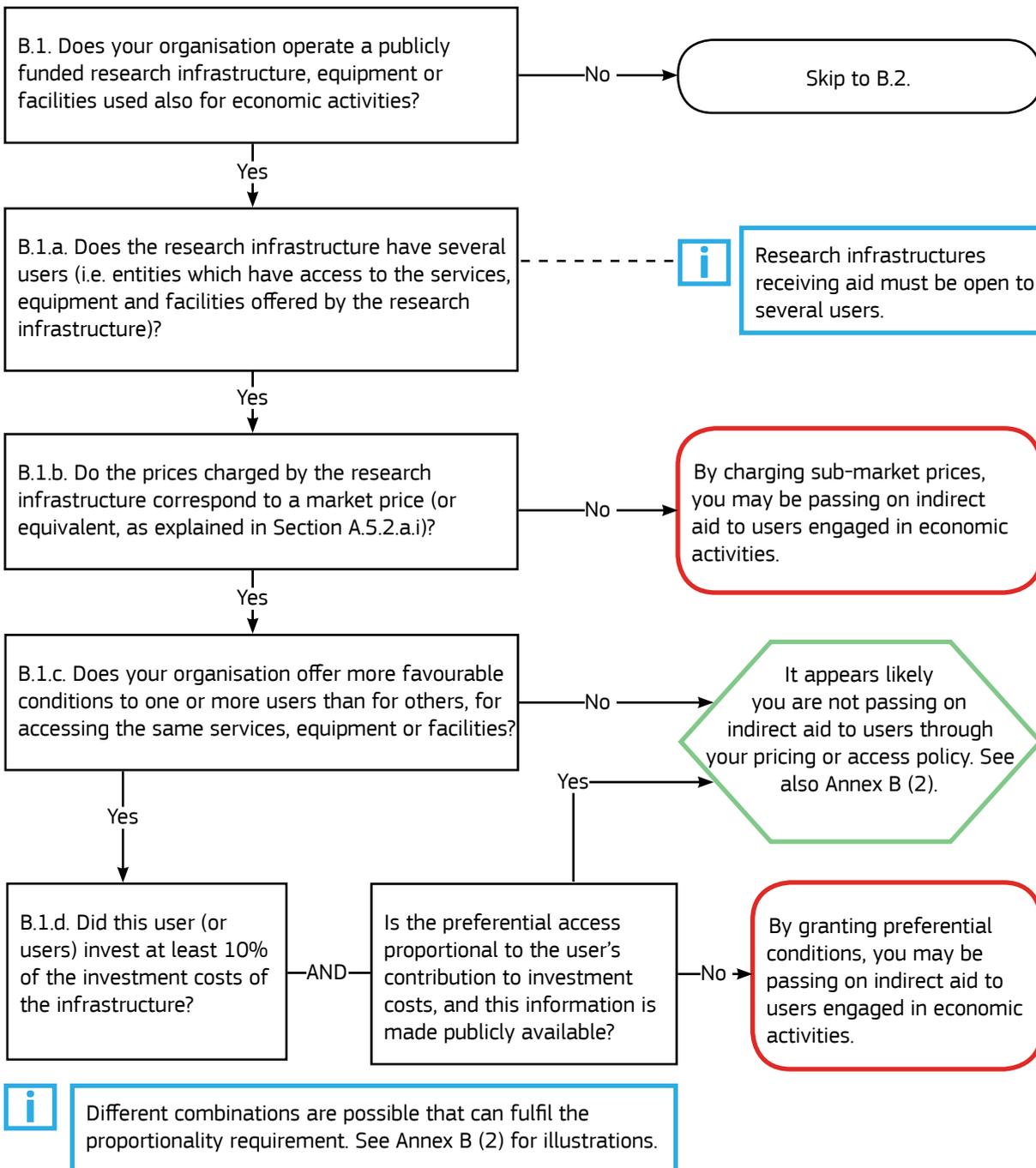
i If there is an effective separation of accounts between economic and non-economic activities, then the amount clawed back is proportional to the public funding received that corresponds to the overall percentage of the economic activities.
 For examples / illustrations on the application of the claw-back mechanism - see Annex B (1).
 If there is no effective separation of accounts, then the public funding received for both economic AND non-economic activities must be clawed back to the maximum amount of aid intensity under State Aid rules.

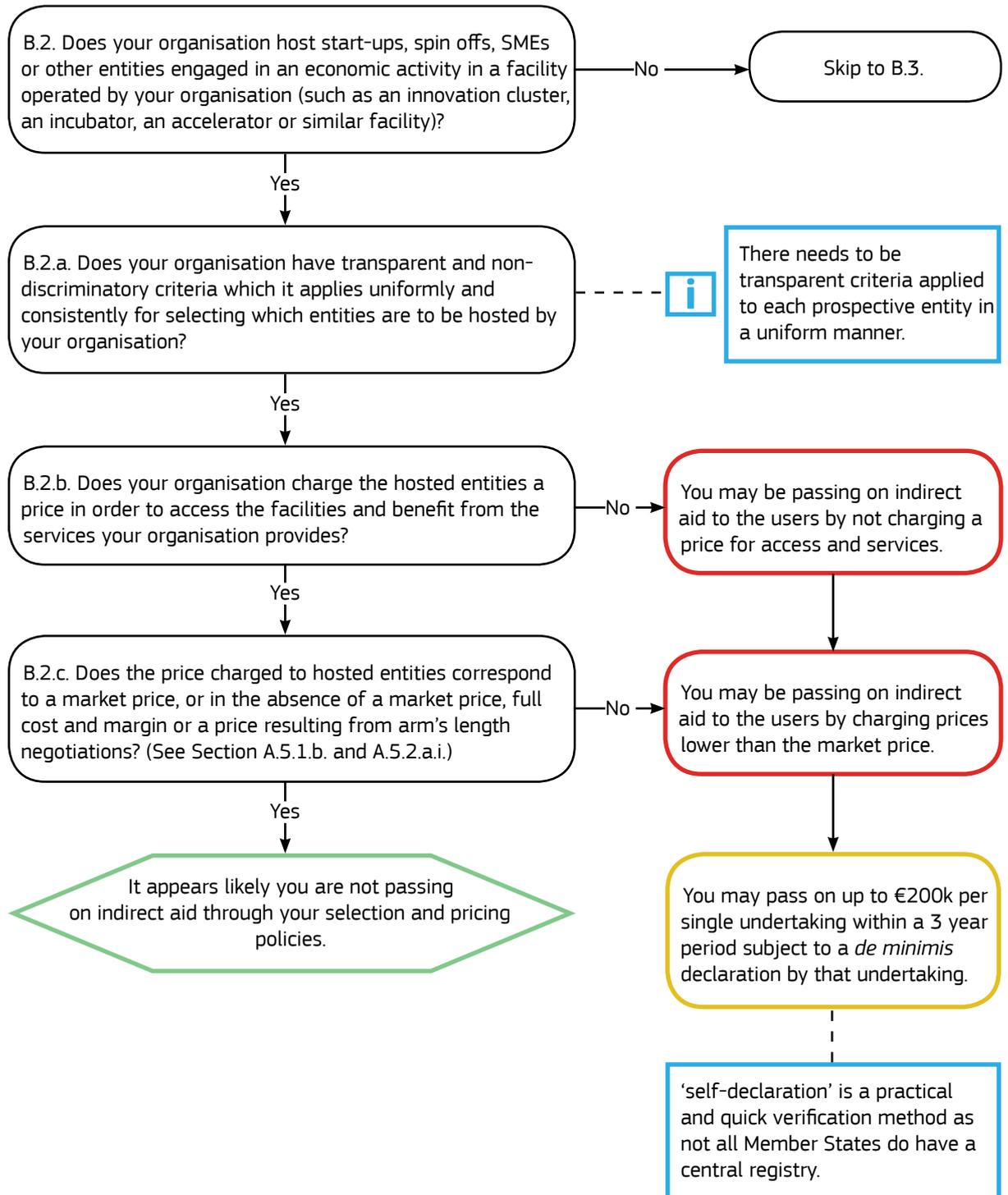


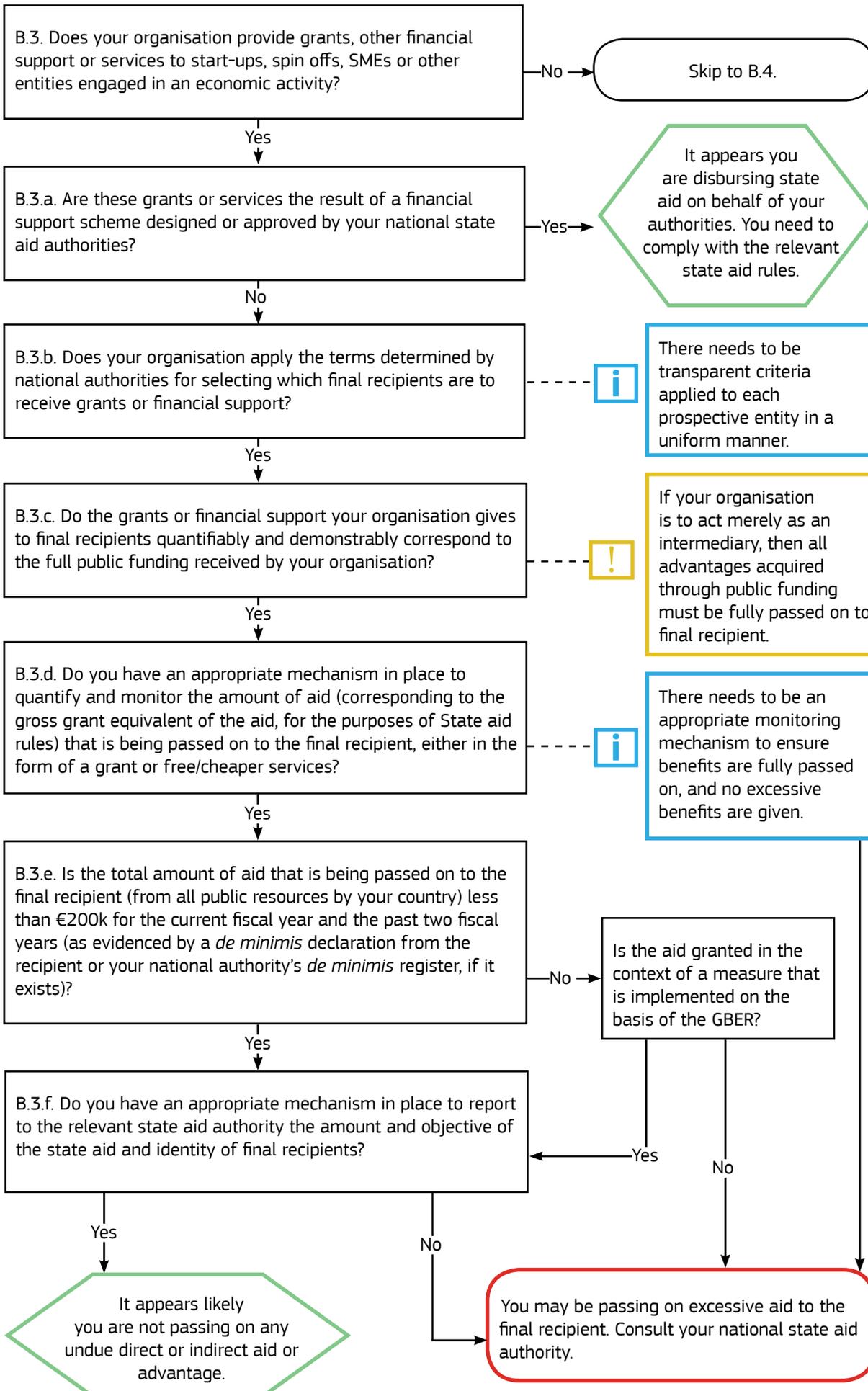
SECTION B

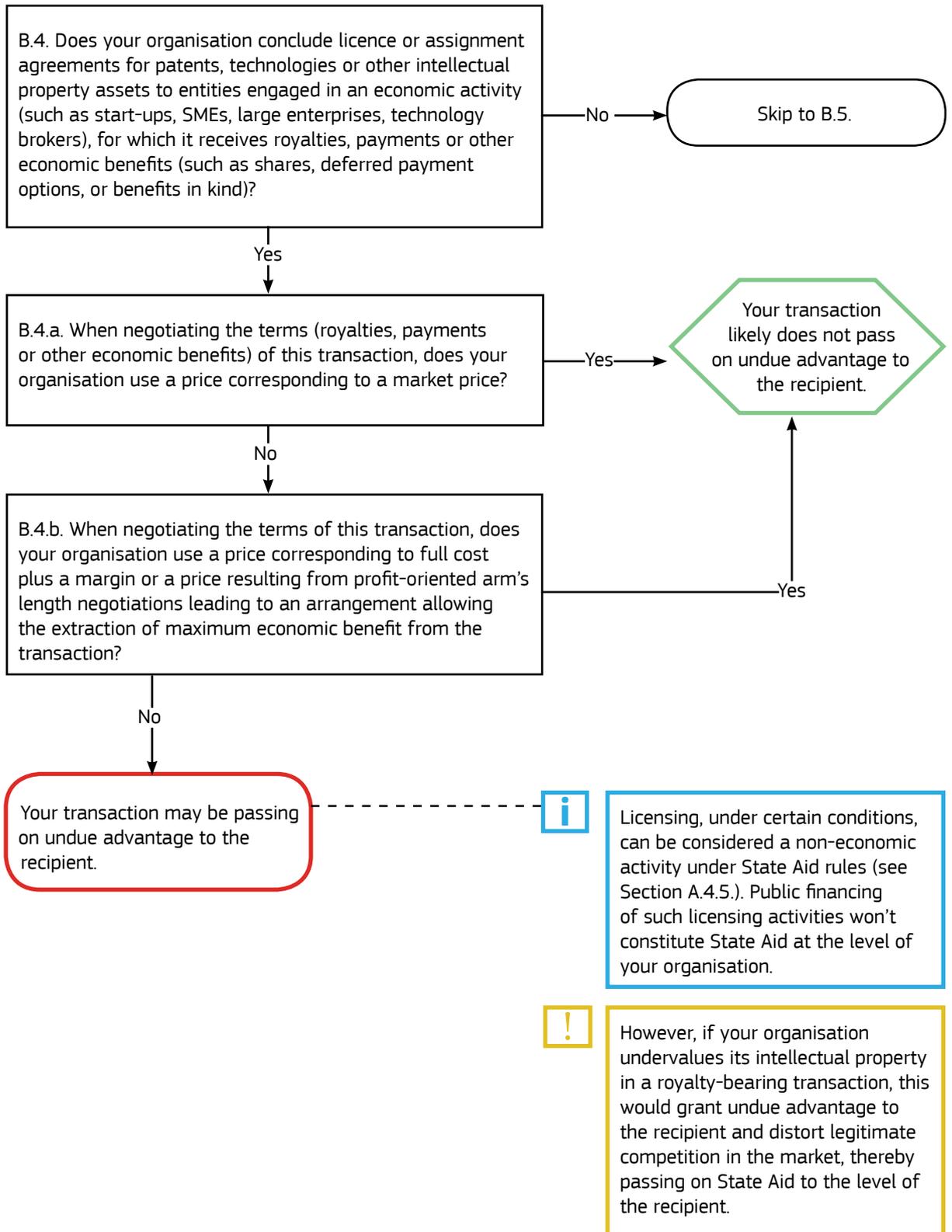
Understanding indirect State Aid

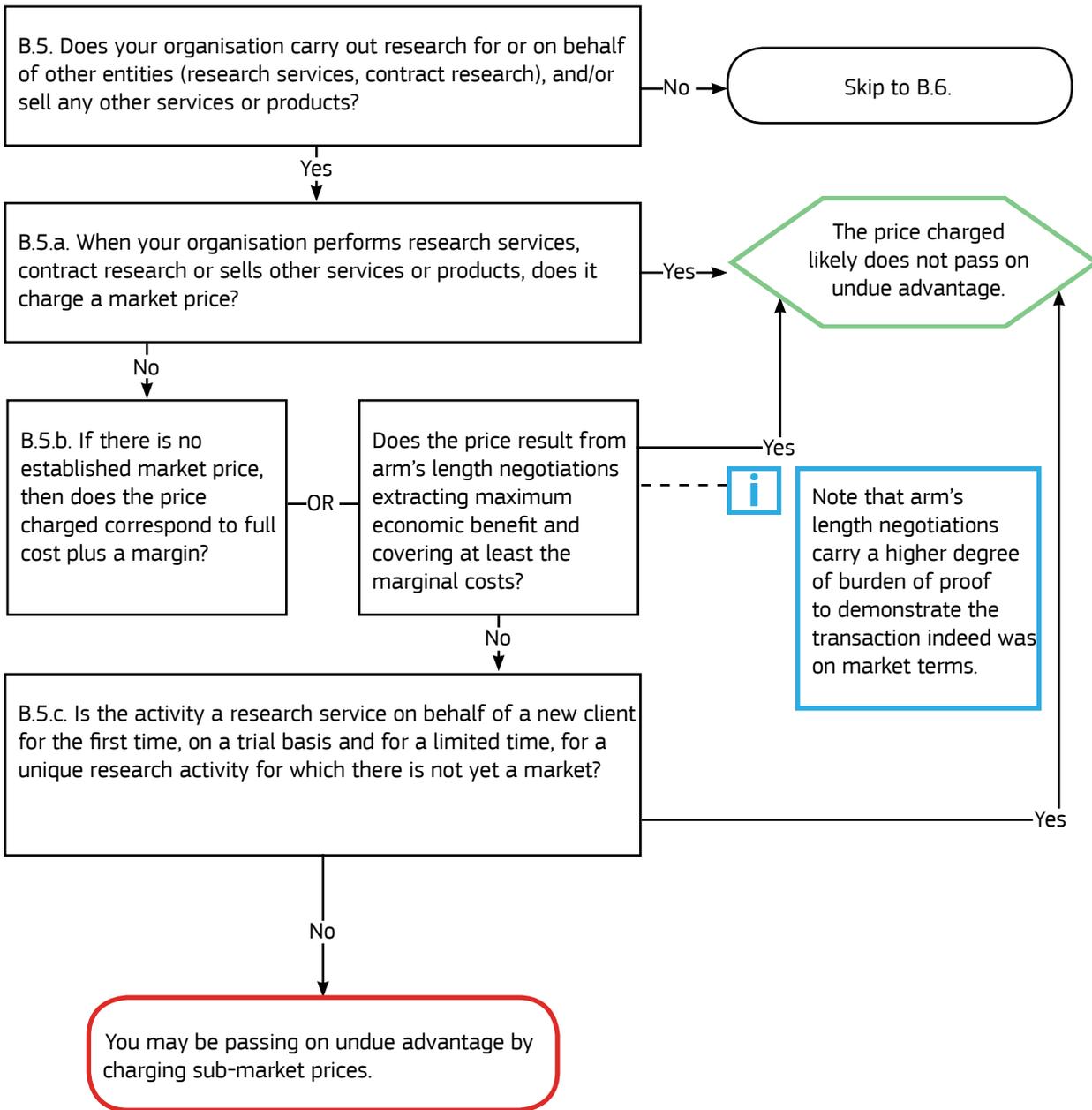
If the Decision Tree advised you at any point to also consult Section B, then please proceed with this Section. As mentioned in Section A.2., research and knowledge dissemination organisations may be considered both as a recipient of aid but also - under certain specific circumstances - a provider of aid to other entities engaged in economic activity. This Section will help you understand whether your organisation may be providing or pass on such indirect aid to third parties.





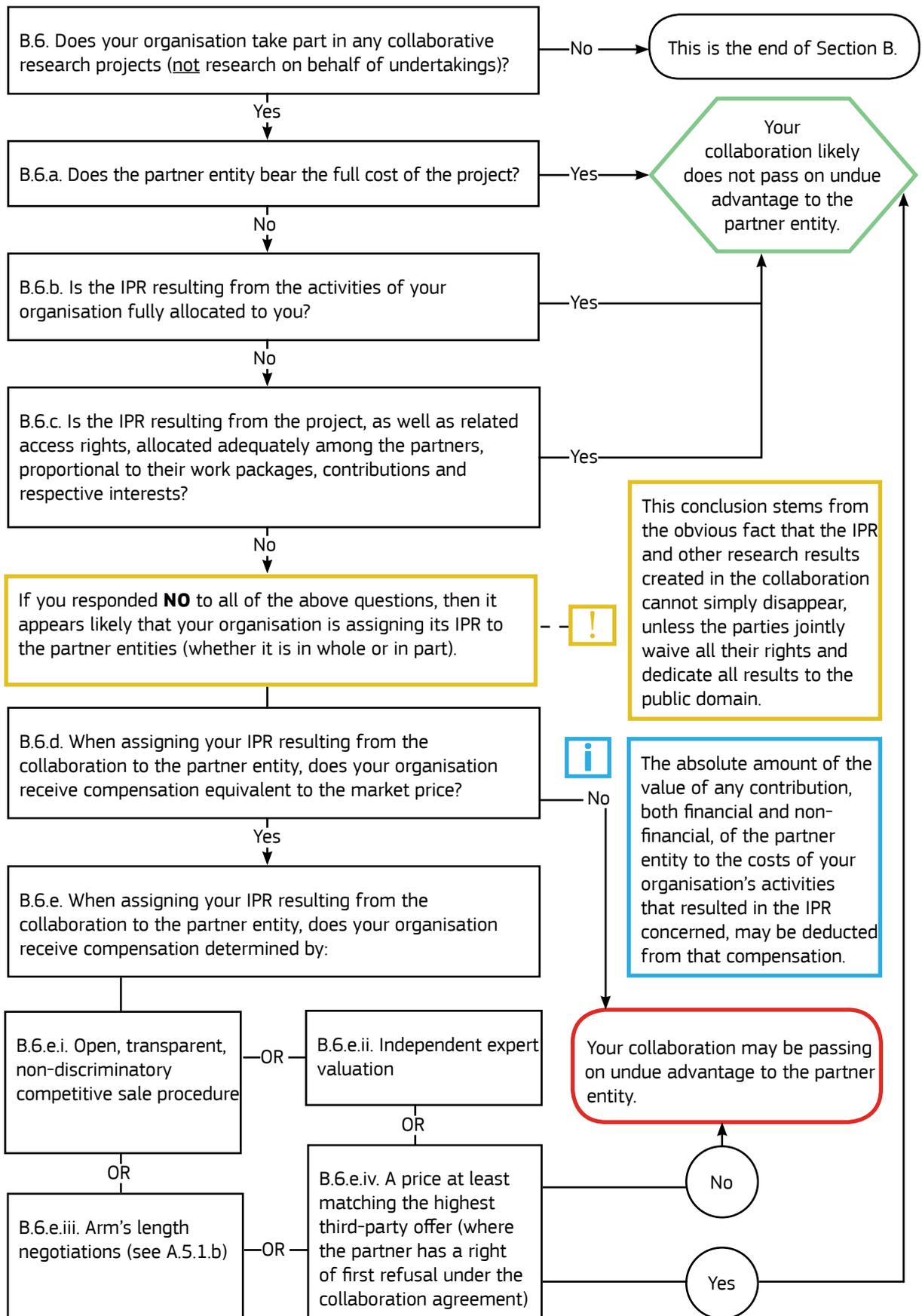






i Even if your organisation's economic activities are ancillary and below 20% of overall annual capacity, it needs to still conduct its activities in a way that avoids passing on undue advantage to third parties.

! Sales contracts for services or products should not undervalue the price of the respective service or product to the benefit of the buyer and the detriment of your organisation. Such practices would distort legitimate competition in the market.



This is the end of the Decision Tree.

Please be reminded that this document is intended for general information purposes only, and nothing here may substitute or prejudice any formal decision or authoritative advice competent State Aid authorities may issue.

ANNEX A

DEFINITIONS*

- i. **‘aid’** means any measure fulfilling the criteria laid down in Article 107(1) of the Treaty;
- ii. **‘aid intensity’** means the gross aid amount expressed as a percentage of the eligible costs, before any deduction of tax or other charge. Where aid is awarded in a form other than a grant, the aid amount is the grant equivalent of the aid. Aid payable in several instalments is discounted to its value at the date of award. The interest rate to be used for this purpose is the discount rate applicable at the date of award. The aid intensity is calculated per beneficiary;
- iii. **‘aid scheme’** means any act on the basis of which, without further implementing measures being required, individual aid may be awarded to undertakings defined therein in a general and abstract manner and any act on the basis of which aid which is not linked to a specific project may be awarded to one or several undertakings;
- iv. **‘applied research’** means industrial research, experimental development, or any combination of both;
- v. **‘arm’s length’** means that the conditions of the transaction between the contracting parties do not differ from those which would be stipulated between independent enterprises and contain no element of collusion. Any transaction that results from an open, transparent and non-discriminatory procedure is considered as meeting the arm’s length principle;
- vi. **‘effective collaboration’** means collaboration between at least two independent parties 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 the collaborative project, contribute to its implementation and share its risks, as well as its results. One or several parties may bear the full costs of the project and thus relieve other parties of its financial risks. Contract research and provision of research services are not considered forms of collaboration.

**This Annex reproduces the standard definitions provided under R&D&I State Aid rules regarding certain concepts and terminologies. These definitions correspond to [Section 1.3 of the EU R&D&I State Aid Framework](#). For the sake of expediency, only the definitions for those concepts and terminologies used in the Decision Tree have been reproduced here. For the complete set of definitions, please refer to the R&D&I Framework.*

vii. **‘experimental development’** 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 on 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 those changes may represent improvements;

viii. **‘feasibility study’** 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 success;

ix. **‘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 view;

x. **‘industrial research’** means the 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 components 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 pilot lines, when necessary for the industrial research and notably for generic technology validation;

xi. **‘innovation advisory services’** means consultancy, assistance and training in the fields of knowledge transfer, acquisition, protection and exploitation of intangible assets, use of standards and regulations embedding them;

xii. **‘innovation clusters’** means structures or organised groups of independent parties (such as innovative start-ups, small, medium and large enterprises, 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 cluster;

xiii. **‘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 services;

xiv. **‘intangible assets’** means assets that do not have a physical or financial embodiment such as patents, licences, know-how or other intellectual property;

xv. **‘knowledge transfer’** means any process which has the aim of acquiring, collecting and sharing explicit and tacit knowledge, including skills and competence in both economic and non-economic activities such as research collaborations, consultancy, licensing, spin-off creation, publication and mobility of researchers and other personnel involved in those activities. Besides scientific and technological knowledge, it includes other kinds of knowledge such as knowledge on the use of standards and regulations embedding them and on conditions of real life operating environments and methods for organisational innovation, as well as management of knowledge related to identifying, acquiring, protecting, defending and exploiting intangible assets;

xvi. **‘large enterprises’** means undertakings which do not fall within the definition of small and medium-sized enterprises;

xvii. **‘personnel costs’** means the cost of researchers, technicians and other supporting staff to the extent employed on the relevant project or activity;

xviii. **‘R&D project’** means an operation that includes activities spanning over one or several categories of research and development defined in this framework, 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 project.

xix. **‘research and knowledge dissemination organisation’** or **‘research 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 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 a decisive influence upon such an entity, for example in the quality of shareholders or members, may not enjoy a preferential access to the results generated by it.

xx. **‘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 set 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);

xxi. **‘small and medium-sized enterprises’** or **‘SMEs’**, **‘small enterprises’** and **‘medium-sized enterprises’** means undertakings fulfilling the criteria laid down in the Commission recommendation on the definition of micro, small and medium-sized enterprises;

xxii. **‘start of works’** or **‘start of the project’** means either the start of R&D&I activities, or the first agreement between the beneficiary and the contractors to conduct the project, whichever comes first. Preparatory works such as obtaining permits and conducting feasibility studies are not considered as start of works;

xxiii. **‘tangible assets’** means assets consisting of land, buildings and plants, machinery and equipment.

ANNEX B

EXAMPLES / ILLUSTRATIONS

1. Claw-back mechanism (see Section A.5.2.e. of the Decision Tree)

Example 1. A research infrastructure costs EUR 10 million to build and is expected to have ancillary economic activities not exceeding 20% of its overall annual capacity. In this case, the entire public funding of EUR 10 million is not considered state aid. However, if the infrastructure turns out to have 30% of economic activities, and assuming that this equals to 30% of the costs (i.e. EUR 3 million), this will need to be considered as funding of economic activities. Since block exemptions only allow an aid intensity of 50% for research infrastructures, EUR 1.5 million is excessive support for economic activities and has to be clawed-back (notwithstanding any other applicable national rules which may be more restrictive).

If there is no effective separation of accounts, then the public funding received for both economic AND non-economic activities must be clawed back to the maximum amount of aid intensity under State Aid rules (i.e. EUR 5 million, in the above example).

Example 2. A research infrastructure (RI) that is, from the beginning, intended to be used for commercial purposes.

Assume that 40% of a RI is to be used commercially, that the investment cost of the RI is 100 and that the investment is depreciated within one year. State aid may cover 20 of the 40 of the investment costs. The remaining 60 of the investment costs are 100% covered by public money as 60% of the RI is to be used for non-economic purposes.

Now, assume the economic use actually rises to 50% of the capacity of the RI. This means that 10 additional investment costs have been fully funded by the state, as they fall in the 60 that received 100% public funding.

However, only 5 have to be clawed-back because the additional costs of 10 could have benefited from 50% State aid.

Another issue that needs clarification is that the claw-back mechanism has to remain in place during the lifetime of the infrastructure until the investment is fully depreciated.

- Operators of RIs should take into account that some RIs may have an expected life of 20-25 years.
- Operators of RIs should also take into account situations where the State aid covers investment in both buildings with long life and equipment with a (much) shorter life. The claw-back mechanism may be discontinued only after full depreciation of the investment in assets.

2. Proportionality of investment costs to the more favourable conditions (see Sections A.5.2.b., B.1.c. and B.1.d. of the Decision Tree)

The terms of preferential access to a research infrastructure (RI) under more favourable conditions may vary according to the nature of the RI, the user's activities and - most importantly - the share of RI-investment costs (at least 10%) the user had financed. When fixing these terms, the RI-operator must ensure proportionality and transparency (i.e. terms publicly available), and must prevent overcompensation.

For example, such preferential access terms may specify a certain percentage of capacity use or user time, or a combination of both. These percentages should be based on the RI's available total capacity and be proportional to the share of investment costs financing borne by the user. Where a combination of factors applies, e.g. of capacity and time, one factor (e.g. percentage of capacity use) may even exceed the percentage of the investment financing borne by the user, provided that other factors (e.g. user time) are reduced accordingly.

Preferential access should not be granted in the form of reduced prices (below market rates) but rather e.g. in the form of favourable conditions concerning access to the capacity (preferential capacity allocation).

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