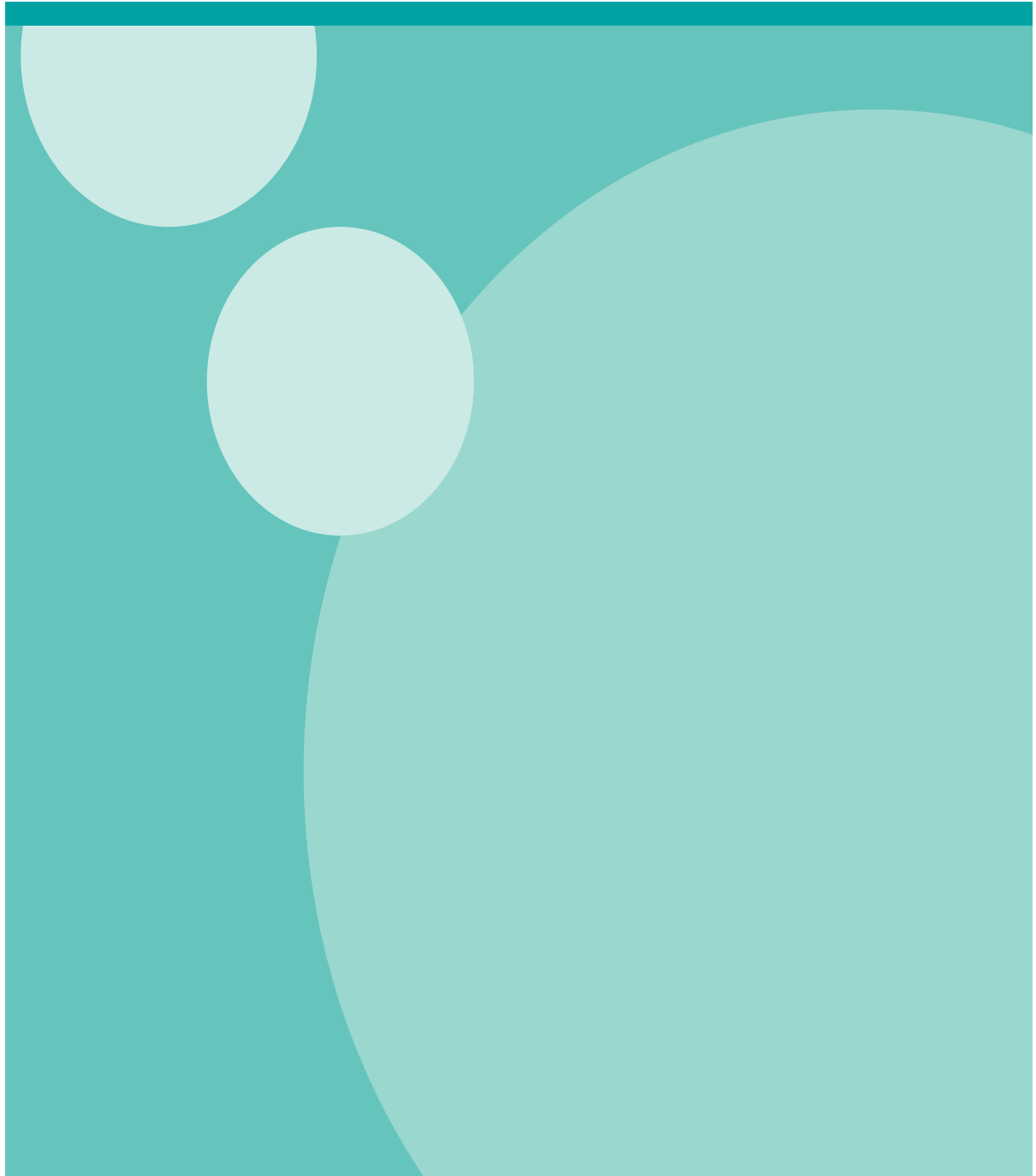




EUROPEAN UNION
Investing in Your Future
European Regional
Development Fund 2007-13



ERDF State Aid Law Requirements Guidance Note (ERDF-GN-1-003)



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CHAPTER ONE: WHAT IS STATE AID LAW?

- 1.1 State Aid law is the means by which the European Union regulates State funded measures to ensure they do not adversely affect trade between the Member States and thereby undermine the functioning of the European common market.
- 1.2 Not all public funding will constitute State Aid. Only a measure that satisfies each of the conditions set out in Article 107(1) of the Treaty of the Functioning of the European Union¹ (the TFEU)² will be a State Aid.
- 1.3 An award of State Aid is unlawful unless the measure:
 - 1.3.1 Is provided under the terms of an exemption which the European Commission has authorised as compatible with the European common market; or
 - 1.3.2 Has been individually assessed by the European Commission through the notification process and subsequently approved as compatible with the European common market.
- 1.4 The European Commission monitors compliance with State Aid law and may investigate projects up to ten years after the aid has been awarded.
- 1.5 Investigations may be speculative, based upon the findings of an audit or brought in response to a complaint to the European Commission³.
- 1.6 Where the European Commission finds unlawful State Aid they may order the immediate termination of the project and the clawback of the full value of the aid (with compound interest backdated to the point of the award⁴).
- 1.7 Under Article 14(1) of Regulation EC 659/1999, recovery of aid is undertaken by the Member State (at the direction of the European Commission) against the beneficiary. For this reason, the Department requires all ERDF applicants to provide an analysis of their project's structure which explains how it shall be compliant with State Aid law.
- 1.8 During the project, ERDF applicants must manage State Aid issues, for example by collecting appropriate information to demonstrate compliance with the terms of the relevant exemption.
- 1.9 Whilst this guidance may assist projects to comply with State Aid law, it does not provide a definitive account of the subject. The European

¹ The legal basis of State Aid law is set out at Schedule 1

² <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2010:083:0047:0200:en:PDF>

³ http://ec.europa.eu/eu_law/your_rights/your_rights_en.htm

⁴ At the European Commission's reference rate.

Commission's website, www.eur-lex.europa.eu, contains relevant legislation and guidance to help ERDF applicants meet their State Aid law obligations.

- 1.10 Where ERDF applicants have difficulty with State Aid law, they are recommended to engage a State Aid lawyer or other expert adviser.

CHAPTER TWO: CONDUCTING A STATE AID ANALYSIS

- 2.1 Article 107 (1) of the TFEU 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."
- 2.2 The test below is a logical step by step approach that can be followed to identify whether a measure meets the criteria set out in Article 107 (1) of the TFEU.
- 2.3 The European Commission takes a strict approach to applying the State Aid test. It is recommended that practitioners apply the same robust principles in undertaking their own analysis.

STEP 1: IDENTIFY ALL THE POTENTIAL BENEFICIARIES

- 3.1 The State Aid rules apply to both the intended and unintended beneficiaries of a measure. Therefore before making the assessment, it is necessary to list all the organisations that may benefit from the proposed measure.
- 3.2 Each class of beneficiary should be considered as a separate potential level of State Aid. To apply the State Aid test correctly, it is necessary to apply steps 2 to 6 to each potential level of State Aid.
- 3.3 Only where each of the steps 2 to 6 is met in respect of a potential level of State Aid will there be a State Aid that needs to be managed in order to be lawful.
- 3.4 Some projects involve a number of different activities. In such situations care should be taken to ensure that the benefit derived from each activity is considered when applying the test. It may be that some activities do not meet all of steps 2 to 6 whereas other parts meet all the steps and therefore constitute State Aid.
- 3.5 Aid to the ERDF applicant should always be assessed as a potential level of State Aid.
- 3.6 A good ERDF application will work through all the levels of potential State Aid providing a rationale for determining whether aid is present or not. Where there is State Aid in a measure, the application should

explain the structure that the applicant will follow to achieve compliance and what practical steps the applicant will introduce to meet the terms of the chosen exemption.

STEP 2: IS THERE A TRANSFER OF STATE RESOURCES?

- 4.1 A State Resource is any form of funding or support which belongs to a Member State or which comes from funding which is controlled by a Member State⁵.
- 4.2 In most situations it will be clear that a transfer of State Resources has occurred. For example, all ERDF projects involve the transfer of State Resources.
- 4.3 Public sector bodies, including government departments and local authorities will be considered to represent the Member State. Their funds will be State Resources.
- 4.4 Organisations, whether they are public or private, that use public funding are considered capable of transferring State Resources. Therefore it is necessary to look at the control exercised by the Member State over such funds.
- 4.5 Control will be present where the Member State exercises discretion over the application of the funds or resources which have been paid for by the funds. For example, although ERDF is a European fund, because the Department for Communities and Local Government exercises discretion in allocating the monies, there is deemed to be sufficient control for it to be regarded as a State Resource.
- 4.6 Likewise there will be control where the Member State is able to instruct or otherwise direct the use of the funding. For example, a private company may administer the National Lottery fund but the government has designed and controls the framework in which it operates. Therefore the National Lottery falls within the scope of State Resources.
- 4.7 A transfer occurs where the State Resource is applied to another party. In establishing whether a transfer has taken place, the European Commission will look for a decrease in the budget of the Member State (including any funding controlled by the Member State) at the point the benefit is provided to the other party⁶. A wholly regulatory action (for example the passing of a law that requires all businesses to purchase insurance) would have no impact upon the budget of the State and therefore would not constitute a transfer of State Resources. The Commission does not assess whether the impact is proportionate and even a nominal impact will satisfy this part of the test.

⁵ Joined cases C-72 and 73/91 Sloman Neptun Schiffarts AG v Seeberiebsrat Bodo Ziesemer, 1993 ECR I-887

⁶ Preussen Elektra AG v Schleswag AG, 2001 ECR I-2009 at para 58

- 4.8 Article 107 (1) of the TFEU states that a transfer may occur in “any form whatsoever”. The most well known transfers are where a grant is awarded or an investment is made in the shares of a company.
- 4.9 There are many forms of transfer. For example:
- 4.9.1 a grant;
 - 4.9.2 a loan (with interest below the European Commission’s [reference rate](#));
 - 4.9.3 the purchase of shares in a company⁷
 - 4.9.4 training or consultancy provided from public funds;
 - 4.9.5 the State agreeing to act as a guarantor⁸;
 - 4.9.6 the writing off a debt; and
 - 4.9.7 the sale of a public owned asset at an undervalue.
- 4.10 When identifying whether a transfer has occurred the decisive feature is not the form that the measure takes but rather the effect⁹.

STEP 3: DOES THE MEASURE BENEFIT AN UNDERTAKING?

- 5.1 An undertaking is any entity¹⁰ which is engaged in an economic activity¹¹.
- 5.2 An economic activity is “any activity consisting of offering goods and services on a given market”¹².
- 5.3 When an organisation is carrying out an activity for which it is capable of being remunerated and competing against other organisations within a market, it will be an undertaking for the purposes of State Aid.
- 5.4 The Commission applies the undertaking test very narrowly. It does not take into account whether a fee is charged or whether the amount of profit is appropriate. Neither does it consider whether the organisation has charitable aims or other social objects. Public sector organisations that have engaged in an economic activity have been found to be undertakings¹³.

⁷ Unless it can be established that the purchase price represents the market rate.

⁸ A longer list of examples can be found on page 3 of the Department for Business Innovation and Skills’ “The State Aid Guide: Guidance for State Aid Practitioners” at <http://www.bis.gov.uk/assets/biscore/business-law/docs/s/11-1040-state-aid-guide.pdf>

⁹ Opinion of the AG on case 6/97 Italy v Commission at para 22.

¹⁰ This includes legal persons, such as a company, and individuals acting as sole traders.

¹¹ C-303/88 Italy v Commission 1991 ECR I-1433

¹² C35/96 – Commission v Italy 1998 ECR I-03851

¹³ Italy v Commission, 1991 ECR I-1433

- 5.5 An organisation that can demonstrate that it does not operate within a market will be outside the definition of an undertaking. This may occur where there is market failure – which occurs where an economic entity, for whatever reasons, has no commercial competitors¹⁴.
- 5.6 For some activities there cannot be a market because even though goods and services are offered, one organisation exercises exclusive competence (usually by virtue of a statutory remit), for example passport control.¹⁵
- 5.7 Some activities are not commercial in nature. Where an organisation only carries out non-commercial activities it will not be an undertaking. For example a Local Authority acting within its remit to invest in the improvement of an area in accordance with the Local Government Act.
- 5.8 Where an organisation carries out some commercial and some non-commercial activities, the organisation will be considered to be an undertaking unless it puts in place appropriate accounting measures to segregate the two elements and thereby avoid any benefit transferring across to its commercial activities.
- 5.9 An individual is capable of being an undertaking if they meet the criteria of carrying out an economic activity and offering goods to a market (for example they are a sole trader or where they are acting in their capacity as an employee). However in most cases individuals will not constitute undertakings.
- 5.10 In some State Aid exemptions the term undertaking is used interchangeably with enterprise. There is no material difference, both terms relate to the entire organisation carrying out the business (for example a group of companies). Further detail on this can be found at the [SME Definition User Guide and Model Declaration](#).

STEP 4: DOES THE MEASURE PROVIDE A SELECTIVE ADVANTAGE?

- 6.1 Article 107(1) of the TFEU refers to the measure “favouring certain undertakings or the production of certain goods”.
- 6.2 There are two elements to this part of the test, is the measure selective and does it provide an advantage?
- 6.3 A measure is selective where it is limited to a particular beneficiary or class of beneficiaries. The alternative is a general measure, which means it is applicable in the same manner to all undertakings, across all sectors in a Member State¹⁶. A good example of a general measure

¹⁴ There is a high burden of proof in respect of market failure in State Aid cases. This argument should not be carried without having been reviewed by a solicitor.

¹⁵ Case C-96/94 Centro Servizi Spediporto 1995, ECR I-2883.

¹⁶ Where an organisation’s power is limited to a smaller area, the test applies to the full extent of their remit.

is the building of public infrastructure, such as roads which are available for all to use on the same terms.

- 6.4 The onus is on the applicant to demonstrate that the measure is not selective. In reviewing whether a measure is selective, the European Commission will not only look at the intention of the measure but also investigate whether there are any elements that would provide a greater advantage to particular undertakings or certain sectors.
- 6.5 An advantage is established where the beneficiary is, or has the potential to be, in a better position as a result of the measure. In most situations, such as a grant of money, it will be clear that an advantage has been provided.
- 6.6 It can be difficult to establish whether an advantage is present where there is an element of exchange. For example where the State purchases a plot of land. In such situations it is necessary to evaluate whether the recipient undertaking has received a greater benefit than would have been obtained under normal market conditions. In the example, an independent valuation by an appropriate professional would benchmark the appropriate market rate.
- 6.7 Where a project provides a service at market rate over a period of time it is important that the rate is regularly reviewed to ensure it is up to date.
- 6.8 The Market Economy Investor Principle applies a similar benchmarking approach to establish the value of shares. If the State can show that it is operating in the same manner as a private investor, usually by adopting the same terms of investment as a commercially driven comparator, then it is considered that no advantage accrues.
- 6.9 A loan provided at the European Commission's reference rate will be considered to be at market conditions¹⁷.
- 6.10 In a narrow set of circumstances, the State providing appropriate compensation for abnormal costs incurred by the undertaking as a result of the exercise of the State's powers may be justified on the basis that it does not provide an advantage¹⁸. Such situations are comparatively unusual and therefore it is recommended that expert advice is taken.

STEP 5: DOES THE MEASURE HAVE THE POTENTIAL TO DISTORT COMPETITION?

¹⁷ http://ec.europa.eu/competition/state_aid/legislation/reference_rates.html

Please note that the reference rate will not negate State Aid where no commercial organisation would have provided a loan to that organisation.

¹⁸ T-157/01 Danske Busvognmaend v Commission 2004 ECR II-917

- 7.1 Article 107(1) of the TFEU applies a measure “which distorts or threatens to distort competition”.
- 7.2 The threshold for this criterion is very low. There is no requirement to demonstrate an actual distortion of competition. A measure which has the potential to cause distortion will meet the criterion.
- 7.3 In order to establish whether competition may be distorted, it is necessary to identify the market which the undertaking operates within. The market is the geographical zone in which undertakings compete to win business¹⁹.
- 7.4 Identifying a market is a complex process involving detailed consideration of the nature of the goods or services being provided as well as the location and influence of competitors and customers.
- 7.5 The European Commission takes a wide view on what constitutes a market and therefore it is sensible to adopt the same approach. A common mistake in making an analysis of the market is to base the assessment around arbitrary regional delineations. For example, whilst it may be correct to state that there is no market for the manufacture of Formula 1 cars in the North West of England, the nature of those who would purchase a Formula 1 car means the market is likely to be international.
- 7.6 Once the market has been identified, it is necessary to assess whether the beneficiary could be in a better position compared to their commercial rivals as a result of the measure. Given that there is no assessment at this stage of the value of the measure, even a modest amount of aid is likely to have the potential to distort the market.
- 7.7 There will be no distortion of competition where an open tender process is used to select the supplier of goods, works or services. This is because such a process allows the market to determine the supplier on merit. Note that this approach only negates State Aid at the level of the supplier and any party which benefits from the procured goods, works or services will need to be considered as a separate potential level of State Aid²⁰.

STEP 6: WILL THE MEASURE HAVE AN AFFECT ON TRADE BETWEEN MEMBER STATES?

- 8.1 In cases where the market that the undertaking operates in is international, there will be an affect on trade between Member States.
- 8.2 Again, even comparatively modest amounts of aid will affect trade between Member States.

¹⁹ T-229/94 Deutsche Bahn v Commission 1997 ECR II-1689

²⁰ Commission Decision N264/2002; caser T-116/01 and T-118/01 P&O European Ferries 2003 ECR II - 2957

- 8.3 Situations where a measure does not affect trade between Member States arise where the undertaking is involved in highly localised activity. For example, a grant of £5,000 to a mobile hairdresser operating in Western Scotland is unlikely to affect cross border trade. This is because the market for the service is very narrow and it is unlikely that customers would travel from another Member State to make use of the service.
- 8.4 Other examples where a measure has been found not to affect trade between the Member States include improvements to a swimming pool used only by the local population and investments in small museums²¹.

CONCLUSION

- 9.1 Where the measure meets each of Steps 2 to 6 then State Aid is present at that level. To lawfully provide the aid it will be necessary to either apply a State Aid exemption or to notify the project to the European Commission.
- 9.2 Where one or more of Steps 2 to 6 is answered in the negative then there will be no State Aid at that level.
- 9.3 ERDF applicants are recommended to apply the State Aid test at the outset of developing their projects. They should reapply the test shortly before submitting their application to ensure that the analysis is still accurate.
- 9.4 Most ERDF applicants keep a signed and dated record of their State Aid analysis which can be used in the event of a European Commission investigation. This record should cover all potential levels of State Aid.

CHAPTER THREE: MANAGING STATE AID IN ERDF PROJECTS

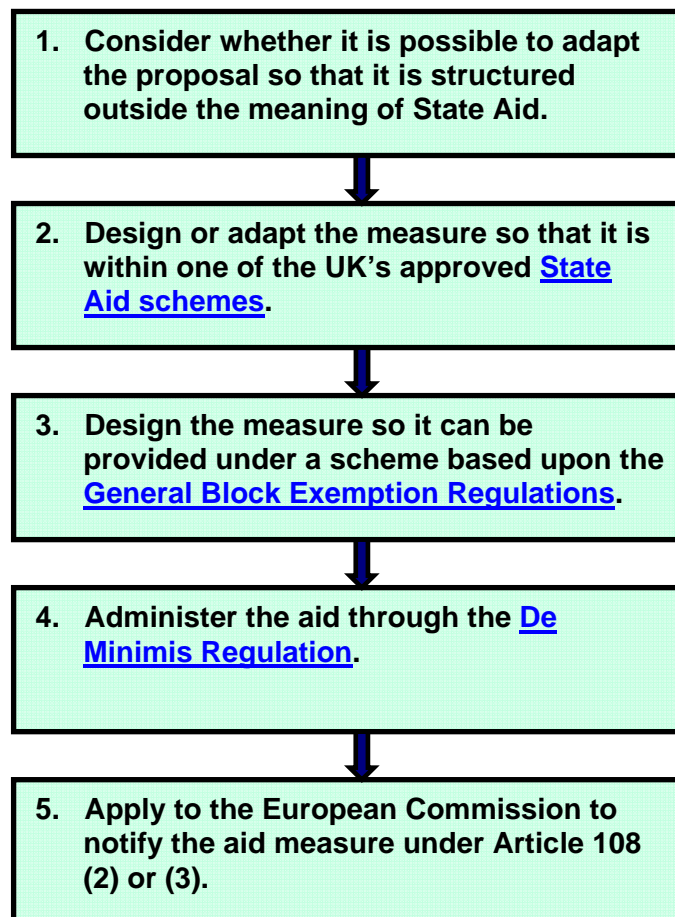
- 10.1 The process set out in Chapter 2 should enable an ERDF applicant to identify whether any of the beneficiaries of the project are in receipt of a State Aid.
- 10.2 An award of State Aid shall be unlawful unless:
- 10.2.1 The project is delivered in accordance with the terms of an exemption which the European Commission has authorised as compatible with the European common market; or
- 10.2.2 The project been individually approved by the European Commission through the notification process as compatible with the European common market and is delivered in accordance with the terms of the approval.

²¹ N630/2002 – Museum of Sardinia

- 10.3 This chapter explains a logical process which the ERDF applicant can use to select the appropriate State Aid cover to lawfully deliver their projects.
- 10.4 It is common that ERDF projects contain State Aid at one or more levels. Experience shows that those applicants who put in place processes to manage the aid from the outset are most successful at achieving compliance and avoiding clawback.
- 10.5 Some exemptions are very technical. Therefore it is strongly recommended that all staff involved in administering State Aid under the cover of an exemption read the terms and legal basis of the relevant exemption.

Options for Managing a State Aid

- 10.6 Where State Aid is present, work through the State Aid options listed below:



- 10.7 In working through the process to select the appropriate means of managing a State Aid, it is important to be mindful that there are some rules that apply to specific sectors (for example, to postal services, steel, agriculture, fisheries and transport).

- 10.8 Many of the exemptions set out thresholds in Euros. The European Commission publishes a [monthly conversion rate](#). Any funding organisation applying an exemption should notify the aid recipient of the name of the exemption when the aid is awarded.

Adapting the proposal so it outside the scope of Article 107 (1) of the TFEU.

- 10.9 Where possible, the ERDF applicant should consider whether the funding could be restructured so that it is outside one or more of the criteria in the test for State Aid (as set out in steps 2 to 6 of Chapter 2). It is easier to restructure a project early on in its development.
- 10.10 For example, if a public sector organisation wishes to provide a ‘meals on wheels’ service for the elderly living in its nursing homes, there is likely to be State Aid in arbitrarily deciding on the provider of the meals. However conducting a widely advertised open tender process in line with the Public Contracts Regulations would negate the State Aid issues in selecting the provider because there is open competition and therefore no distortion of the market²². Be aware that this approach would only negate the issues at the supplier level of the project. However in this example, the other beneficiaries would be individuals and therefore there would be no State Aid at this level.
- 10.11 Some of the no aid structures are comparatively complicated²³. In such circumstances ERDF applicants should refer to [State Aid decisions](#) on the Europa website or seek the specialist advice of a State Aid lawyer or expert.

Design the measure so that it is within an approved State Aid scheme.

- 10.12 The European Commission has already approved a number of schemes as compatible with the European Common market.
- 10.13 A list of the UK’s notified schemes can be found by visiting <http://ec.europa.eu/competition/elojade/isef/index.cfm> and selecting State Aid (at the policy heading) and the United Kingdom (at Member State of the State Aid advanced search option).
- 10.14 It is the responsibility of the ERDF applicant to ensure that their measure meets all the requirements of the scheme. If the scheme is only partially applicable it will not provide State Aid cover.
- 10.15 As most schemes include an obligation to report upon annual spend to the European Commission, it is important that the ERDF applicant has been permitted to use the scheme and can provide the appropriate data. Permission may be obtained by contacting the scheme administrator.

²² Indeed the market has been allowed to operate to select the provider.

²³ For example, the [German Incubator decision](#) or the [Market Economy Investor Principle](#).

10.16 Commonly used schemes include the [Support for Land Remediation](#)²⁴ and the [Historic Environment and Regeneration Scheme](#)²⁵.

Provide the measure under a State Aid scheme notified under the General Block Exemption Regulations (“GBER”).

10.17 The GBER provides the legal basis for a funding organisation to notify up to 26 measures to provide lawful State Aid.

10.18 These include:

- 10.18.1 Regional investment and employment aid (Article 13);
- 10.18.2 SME investment and employment aid (Article 15);
- 10.18.3 Aid for female entrepreneurship (Article 16);
- 10.18.4 Aid for environmental protection (Articles 17 – 25);
- 10.18.5 Aid for consultancy and participation in fairs (Articles 26 – 27);
- 10.18.6 Aid in the form of risk capital (Articles 28 – 29);
- 10.18.7 Aid for R&D and innovation (Articles 30 – 37);
- 10.18.8 Training Aid (Articles 38-39); and
- 10.18.9 Aid for disabled and disadvantaged workers (Articles 40 – 42).

10.19 A more detailed table of the 26 measures available under GBER can be found in Schedule 2 of this guidance.

10.20 The GBER may only be used where the funding organisation has published a GBER scheme upon its website and applied for European Commission approval through the [State Aid Notification Interactive programme](#).

10.21 The Department has published schemes for all the measures (other than Article 25 which relates to environmental taxes) for the use of ERDF projects. The list of these schemes (and the articles of GBER to which they relate) may be found at Schedule 2. A link to a checklist upon each scheme may be found at Schedule 3.

10.22 The administrator of aid (including where an ERDF applicant provides aid to another under a GBER scheme) must inform the recipient of the name of the scheme and that it has been notified under GBER.

²⁴ N221/2006

²⁵ NN95/2002

- 10.23 The exemptions provided under GBER are primarily focused towards assisting SMEs to grow and develop. The amount of funding available is usually set out as a percentage of the total funding (meaning that the remainder must come from private sources). There is usually a higher percentage available for small and medium sized enterprises²⁶.
- 10.24 GBER only applies to transparent aid (where it is possible to determine the amount of the aid at the point of the award).
- 10.25 All GBER funding must demonstrate an incentive effect²⁷. The incentive effect is a measure used by the European Commission to ensure that the State Aid is being used to leverage a change in behaviour by the beneficiary.
- 10.26 Therefore a project which has already been started or where the necessary funding is already in place prior to the application for support will not be able to demonstrate the required incentive effect²⁸.
- 10.27 For SMEs, an incentive effect will be assumed to be present when it can be shown that the support is necessary for the project to take place.
- 10.28 With large enterprises, the test is higher and the ERDF applicant must be able to verify that the project will be carried out on a greater scale or more quickly due to the aid. The ERDF applicant is obliged to provide information prior to starting the project to enable the Department to review the presence of the incentive effect.
- 10.29 The funding percentages listed in the GBER are the maximum allowable threshold. There is a requirement that the aid administrator should seek to provide the minimum aid necessary. It is important that ERDF applicants are capable of demonstrating the requisite additionality and need required to show the European Commission that the minimum amount of aid has been provided.
- 10.30 Whilst the GBER provides many opportunities to provide public funded support, it is important that all the administrative requirements of the relevant measure are met. Where the support is outside of any part of the GBER scheme, it will be considered as unlawful aid.
- 10.31 There is no prohibition upon using more than one GBER scheme or article in a project. However steps must be taken to ensure than no eligible cost is funded under more than one GBER scheme or article.

²⁶ The user guide for an organisation to establish the category of enterprise of their organisation can be found at http://ec.europa.eu/enterprise/policies/sme/files/sme_definition/sme_user_guide_en.pdf

²⁷ Under Article 8 of GBER

²⁸ Italy v Commission, C 8/2009

- 10.32 It is not possible to cumulate a GBER scheme with De Minimis to achieve a higher percentage for the same eligible costs. Aid under a GBER scheme should not be declared for the purposes of De Minimis.
- 10.33 Each year the European Commission requests that each Member State reports upon its total spend under each GBER scheme. The failure to declare GBER spend could mean that the projects provided under it are technically unlawful. Therefore it is important that all organisations using GBER collect data upon how much aid has been provided under the relevant GBER schemes.

Administer the aid through the De Minimis Regulation

- 10.34 The [De Minimis regulation](#) permits up to €200,000 of State Aid to be provided to an undertaking in a rolling three year period²⁹, subject to certain administrative steps being taken. The threshold is €100,000 for undertakings in the road transport sector. ,
- 10.35 To ensure that undertakings do not receive more than their €200,000 allocation in a three year period, the European Commission requires that the undertaking completes a declaration stating the amount of De Minimis previously received. This declaration must be signed by an authorised signatory on behalf of the undertaking before the aid is provided.
- 10.36 Care needs to be taken to establish the scope of the undertaking. This will normally encompass the business group rather than a single company within a group.
- 10.37 An example declaration is set out in Schedule 4 of this guidance. The undertaking is only required to declare aid received under the De Minimis regulation in the current fiscal year and the two previous fiscal years (please note that aid provided under other State Aid exemptions does not need to be declared for the purposes of the De Minimis declaration).
- 10.38 The administrator of the aid must check that the support it proposes to provide will not lead to the undertaking exceeding their De Minimis threshold (when added to the undertaking's previously received De Minimis aid) As the threshold is in [Euros](#), it is necessary to calculate the value of the support prior to the aid being provided³⁰.

²⁹ This being the financial year of the undertaking in which the aid is awarded and the two previous financial years.

³⁰ Where the aid is not a grant, the organisation must objectively establish the gross grant equivalent of the aid by reference to similar services. This will normally not be the same as the cost of providing the service, but rather the grant that would be necessary for the applicant to purchase the service on the open market. Records should be kept showing the calculation by reference to comparable services.

10.39 The Department strongly recommends that organisations administering De Minimis ensure that their staff have read the [De Minimis Regulation](#) before providing any aid. This is because although the concept of De Minimis aid is comparatively simple, the regulation contains a number of technical requirements.

10.40 For example, you cannot use the De Minimis regulation to provide aid:

10.40.1 to the fishery and aquaculture sectors, as covered by Council Regulation [\(EC\) No 104/2000](#);

10.40.2 that is linked to the primary production of agricultural products as listed in [Annex 1 to the EC Treaty](#), in the following cases;

10.40.3 where the amount is fixed on the basis of the price or quantity of such products purchased from primary producers or put on the market by the undertakings concerned;

10.40.4 which is conditional on being partly or entirely passed on to primary producers primary producers;

10.40.5 for export related activities³¹

10.40.6 which is contingent upon the use of domestic over imported goods;

10.40.7 to the coal sector, as defined in Regulation [\(EC\) No 1407/2002](#);

10.40.8 the acquisition of road freight transport vehicles granted to undertakings performing road freight transport for hire or reward; and

10.40.9 to undertakings “in difficulty”, as covered at 2.1 of the [Rescue and Restructuring Guidelines](#)

10.41 Copies of the declarations should be retained by the organisation that has administered the De Minimis for twenty years. Best practice is to write to the recipient of the aid to inform them of the total amount of State Aid received.

Notification

³¹ Export aid is defined in the [SME Block Exemption](#) as “aid directly linked to the quantities exported, to the establishment and operation of a distribution network or to other current expenditure linked to the export activity”.

- 11.1 Notification is a process set out in Article 108 of the TFEU through which a project or scheme can apply to the European Commission for express approval. For organisations in the United Kingdom the process of making a notification to the European Commission is led by the State Aid Branch at the Department for Business, Innovation and Skills. No applications to notify a measure should be made without the involvement of the Department of Business, Innovation and Skills.
- 11.2 The process of applying to the European Commission can be time consuming and expensive. As with any application, there is no guarantee that approval can be provided. No public funding can be provided until approval is given and the time taken to get approval varies between two months and twenty four months depending upon the nature of the application.
- 11.3 Notification should therefore only be used as a last resort. Given the work involved it is usually only appropriate to undertake notification on large strategic projects, where no alternative exemption could be used to achieve the same objectives³².
- 11.4 The process for notification can be found at Article 108 of the TFEU. The legal basis for the notification should be brought under one of the headings in Article 107 (2) or (3).
- 11.5 The notification timescale will be shorter when the approval sought is within European Commission guidelines or the application follows an existing precedent.
- 11.6 Such approvals will normally only be subject to a phase 1 review by the European Commission. Where a project or scheme seeks to go beyond the European Commission's guidelines or sets a new precedent, it is likely to be subject to a phase 2 investigation which is more rigorous and time consuming.
- 11.7 Given the complexity of the notification process, it is strongly recommended that ERDF applicants take expert advice and factor the process into their project planning.

Conclusion

- 12.1 There is a logical process to identify the appropriate way to manage State Aid in a project.
- 12.2 Before applying an exemption it is important to read through the scheme and the supporting legislation to ensure that it is possible to meet all the requirements.

³² Complex projects such as broadband will usually require notification.

- 12.3 Sophisticated ERDF applicants normally identify one or more staff that take responsibility for supervising compliance and handling queries from staff.

SCHEDULE 1 - STATE AID ARTICLES

The Consolidated Version Of The Treaty On The Functioning Of The European Union

AIDS GRANTED BY STATES

Article 107 (ex Article 87 TEC)

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

2. The following shall be compatible with the internal market:

(a) 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;

(b) aid to make good the damage caused by natural disasters or exceptional occurrences;

(c) 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 division. Five years after the entry into force of the Treaty of Lisbon, the Council, acting on a proposal from the Commission, may adopt a decision repealing this point.

3. The following may be considered to be compatible with the internal market:

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

(b) aid to promote the execution of an important project of common European interest or to remedy a serious disturbance in the economy of a Member State;

(c) aid to facilitate the development of certain economic activities or of certain economic areas, where such aid does not adversely affect trading conditions to an extent contrary to the common interest;

(d) aid to promote culture and heritage conservation where such aid does not affect trading conditions and competition in the Union to an extent that is contrary to the common interest;

(e) such other categories of aid as may be specified by decision of the Council on a proposal from the Commission.

Article 108
(ex Article 88 TEC)

1. The Commission shall, in cooperation with Member States, keep under constant review all systems of aid existing in those States. It shall propose to the latter any appropriate measures required by the progressive development or by the functioning of the internal market.

2. If, after giving notice to the parties concerned to submit their comments, the Commission finds that aid granted by a State or through State resources is not compatible with the internal market having regard to Article 107, or that such aid is being misused, it shall decide that the State concerned shall abolish or alter such aid within a period of time to be determined by the Commission.

If the State concerned does not comply with this decision within the prescribed time, the Commission or any other interested State may, in derogation from the provisions of Articles 258 and 259, refer the matter to the Court of Justice of the European Union direct.

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

If, as regards the aid in question, the Commission has already initiated the procedure provided for in the first subparagraph of this paragraph, the fact that the State concerned has made its application to the Council shall have the effect of suspending that procedure until the Council has made its attitude known. If, however, the Council has not made its attitude known within three months of the said application being made, the Commission shall give its decision on the case.

3. The Commission shall be informed, in sufficient time to enable it to submit its comments, of any plans to grant or alter aid. If it considers that any such plan is not compatible with the internal market having regard to Article 107, it shall without delay initiate the procedure provided for in paragraph 2. The Member State concerned shall not put its proposed measures into effect until this procedure has resulted in a final decision.

4. The Commission may adopt regulations relating to the categories of State aid that the Council has, pursuant to Article 109, determined may be exempted from the procedure provided for by paragraph 3 of this Article.

Article 109
(ex Article 89 TEC)

The Council, on a proposal from the Commission and after consulting the European Parliament, may make any appropriate regulations for the application of Articles 107 and 108 and may in particular determine the conditions in which Article 108(3) shall apply and the categories of aid exempted from this procedure.

SCHEDULE 2 - GBER SUMMARY TABLE

AID MEASURE	MAXIMUM % AID INTENSITY LEVELS FOR LARGE ENTERPRISES	MAXIMUM % AID INTENSITY LEVELS FOR SMALL (SE) AND MEDIUM SIZE (ME) ENTERPRISES	NOTIFICATION THRESHOLDS (€)
REGIONAL AID (ARTICLES 13 – 14)			
REGIONAL INVESTMENT AND EMPLOYMENT AID	<p>Available only in assisted areas</p> <p>Article 107(3)(c) areas 10-15%</p> <p>Article 107(3)(a) areas may receive up to a maximum of 35%</p> <p>Check the BIS postcode checker to determine the maximum assistance under the State Aid N673/2006 UK Corrigendum Regional Aid Map 2007-13).</p>	<p>+10% MEs</p> <p>+20% SEs</p>	<p>Sum greater than 75% of maximum allowable grant sum in respect of eligible costs of €100m in area in question</p> <p>(e.g. in area subject to 10% regional aid cap 7.5m)</p>
NEWLY CREATED SMALL ENTERPRISES IN ASSISTED REGIONS	Not applicable	<p>25% during first 3 years after creation of enterprise</p> <p>15% for next two years</p>	<p>€1m (subject to annual amount of aid per undertaking not exceeding 33% of total cap).</p> <p>(Not on a per project basis)</p>
AID FOR SME INVESTMENT AND EMPLOYMENT (ARTICLE 15)			
<p>SME INVESTMENT AND EMPLOYMENT</p> <p>For entities operating within Agricultural sector</p>	Not applicable	<p>10% ME</p> <p>20% SE</p> <p>40% for all SMEs</p>	€7.5m
AID FOR FEMALE ENTREPRENEURS (ARTICLE 16)			

SMALL ENTERPRISES NEWLY CREATED BY FEMALE ENTREPRENEURS	Not applicable	15%	€1m (subject to annual amount of aid per undertaking not exceeding 33% of €1m cap). (Not on a per project basis)
ENVIRONMENTAL AID MEASURES (ARTICLES 17 – 25)			
INVESTMENT TO GO BEYOND COMMUNITY STANDARDS FOR ENVIRONMENTAL PROTECTION	35%	45% ME 55% SE	€7.5m
ACQUISITION OF TRANSPORT VEHICLES THAT GO BEYOND COMMUNITY ENVIRONMENTAL PROTECTION STANDARDS	35%	45% ME 55% SE	€7.5m
EARLY ADAPTATION TO FUTURE ENVIRONMENTAL STANDARDS FOR SMES	Not applicable	10% ME 15% SE 10% (available for SEs only) where implementation of measures in question take place between one and 3 years prior to mandatory date for entry into force of relevant standards.	€7.5m
INVESTMENT IN ENERGY SAVING MEASURES	60% (if net of operating benefits) 20% (if not net of operating benefits)	70% ME 80% SE (if net of operating benefits) 30% ME 40% SE (if net of operating benefits)	€7.5m

INVESTMENT IN HIGH EFFICIENCY COGENERATION	45%	55% ME 65% SE	€7.5m
INVESTMENT IN THE PROMOTION OF ENERGY FROM RENEWABLE ENERGY	45%	55% ME 65% SE	€7.5m
ENVIRONMENTAL STUDIES	50%	60% ME 70% SE	None specified
ENVIRONMENT AID, IN THE FORM OF TAX REDUCTIONS	Not applicable	Not applicable	10 year limit (Not on a per project basis)
AID FOR CONSULTANCY IN FAVOUR OF SMES AND SME PARTICIPATION IN FAIRS (ARTICLES 26- 27)			
CONSULTANCY IN FAVOUR OF SMES	Not applicable	Not applicable	€2m
SME PARTICIPATION IN FAIRS	Not applicable	50% (one time only per fair)	€2m
AID IN THE FORM OF RISK CAPITAL MEASURES (ARTICLES 28 – 29)			
AID IN THE FORM OF RISK CAPITAL	Not applicable	No less than 50% of total fund investment must come from private sector sources (reducing to 30% if the fund targets SMEs located exclusively within regional aid assisted areas)	Fund may not invest more than €1.5m per 12 month period per target SME. (Not on a per project basis)
AID FOR RESEARCH AND DEVELOPMENT AND INNOVATION (ARTICLES 30 – 37)			
INVESTMENT IN RESEARCH AND DEVELOPMENT PROJECTS	100% - Fundamental Research (FR) 50% - Industrial Research (IR)	100% FR 60-70% IR 35-45s ED	€20m FR €10m IR €7.5m ED

	25% - Experimental Development (ED) Bonus for collaborative Projects	Bonus for collaborative projects	
TECHNICAL FEASIBILITY STUDIES	65% IR 40% ED	75% IR 50% ED	€10m IR €7.5m ED
INDUSTRIAL PROPERTY RIGHTS COSTS FOR SMES	Not applicable	Linked to applicable type of research which led to IP right in question	€5m
RESEARCH AND DEVELOPMENT IN THE AGRICULTURAL AND FISHERIES SECTORS	100%	100%	€7.5m
YOUNG INNOVATIVE ENTERPRISES	Not applicable	Not applicable	€1m increasing to €1.35m if enterprise in an Article 107 (3) (c) regional aid assisted area and 1.5m if enterprise in an Article 107 (3) (a) regional aid assisted area. (Not on a per project basis)
INNOVATION ADVISORY SERVICES AND FOR INNOVATION SUPPORT SERVICES	Not applicable	Not applicable	€200k over 3 year cumulative (but reduced to 75% of that figure if service provider used for services does not have applicable national or European certification). (Not on a per project basis)
THE LOAN OF HIGHLY QUALIFIED PERSONNEL	Not applicable	50%	Costs incurred over maximum period of funding of 3 years per undertaking and per person

			borrowed. (Not on a per project basis)
TRAINING AID MEASURES (ARTICLES 38 – 39)			
TRAINING	25% Specific 60% General	35% ME, 45% SE 70% ME, 80% SE	€2m
AID FOR DISADVANTAGED WORKERS (ARTICLES 40 -42)			
RECRUITMENT OF DISADVANTAGED WORKERS IN THE FORM OF WAGE SUBSIDIES	50%	50%	€5m (Not on a per project basis)
EMPLOYMENT OF DISABLED WORKERS IN THE FORM OF WAGE SUBSIDIES	75%	75%	€10m (Not on a per project basis)
COMPENSATING THE ADDITIONAL COSTS OF EMPLOYING DISABLED WORKERS	100%	100%	€10m (Not on a per project basis)

SCHEDULE 3 – DETAILS OF DCLG STATE AID SCHEMES

The Department for Communities and Local Government's GBER schemes that have been notified for ERDF projects to use.

NAME OF SCHEME	ARTICLE NUMBER	DESCRIPTION
THE ENGLISH PROPERTY DEVELOPMENT STATE AID SCHEME SA.33355	13/15	13: Regional Investment and Employment 15: SME Investment and Employment
THE ENGLISH ENVIRONMENTAL STATE AID SCHEME SA.33338	18-24	18: Investment to go Beyond Community Standards for Environmental Protection 19: Acquisition of Transport Vehicles that go beyond Community Environmental Protection Standards 20: Early Adaptation to Future Environmental Standards for SMEs 21: Investment in Energy Saving Measures 22: Investment in High Efficiency Cogeneration 23: Investment in the Promotion of Energy from Renewable Energy 24: Environmental Studies
THE ENGLISH RISK CAPITAL INVESTMENT STATE AID SCHEME SA.33340	29	Aid in the form of Risk Capital
THE ENGLISH RESEARCH, DEVELOPMENT AND INNOVATION STATE AID SCHEME SA.33356	31-37	31: Aid for Research and Development Projects 32: Aid for Technical Feasibility Studies 33: Aid for Industrial Property Rights for SMEs 34: Aid for Research and Development in the Agricultural and Fisheries sectors 35: Aid to Young Innovative Enterprises

		<p>36: Aid for Innovation Advisory Services and for Innovation Support Services</p> <p>37: Aid for the Loan of Highly Qualified Personnel</p>
<p>THE ENGLISH BUSINESS SUPPORT STATE AID SCHEME</p> <p>SA.33379</p>	<p>14, 16, 26, 27, 39, 40, 41 & 42</p>	<p>14: Newly created Small Enterprises in Assisted Areas</p> <p>16: Aid for Small Enterprises newly created by Female Entrepreneurs</p> <p>26: Aid for consultancy in favour of SMEs</p> <p>27: Aid for SME participation in business fairs</p> <p>39: Training Aid</p> <p>40: Aid for Disadvantaged and Disabled Workers</p> <p>41: Aid for the Employment of Disabled Workers in the form of Wage Subsidies</p> <p>42: Aid for compensating the additional costs of employing disabled workers.</p>

Identifying an enterprise

Many of the State Aid schemes apply different aid levels based upon the size of the recipient enterprise. Enterprise is defined at Annex 1 of the GBER as “any entity engaged in an economic activity irrespective of its legal form”. This definition encapsulates all forms of business from self-employed persons to multinational companies.

Under State Aid law, enterprise - like undertaking - applies to the entire business. A company in a larger business group should be seen in context so that the enterprise is the business group. The table below contains the main information to determine the status of an enterprise.

Enterprise category	Headcount	Turnover	or	Balance sheet total
medium-sized	< 250	≤ € 50 million		≤ € 43 million
small	< 50	≤ € 10 million		≤ € 10 million
micro	< 10	≤ € 2 million		≤ € 2 million

Where a practitioner has any questions about an enterprise they should refer to the [European Commission user guide](#). This guide contains a pro-forma assessment form which can be used

when establishing the category of enterprise. If they have further questions they should speak to their legal department or compliance unit.

SCHEDULE 4 - ELIGIBILITY TO RECEIVE AID UNDER THE DE MINIMIS EXEMPTION

This form can be used to determine the value of any relevant aid previously received by a potential beneficiary, in order to ascertain whether there is scope to provide further aid under the De Minimis exemption.

Dear []

[SCHEME TITLE (IF APPLICABLE)] - STATE AID: DE MINIMIS AID

In order to avoid public funding distorting competition within the European Common Market the European Commission regulate the levels of assistance which the public sector can provide to businesses ("the State Aid rules"). You should note carefully the requirements needed to comply with the European State Aid rules and if need be, refer to the relevant legislation.

It is proposed that the assistance provided will comply with the State Aid rules by applying the De Minimis exemption (in accordance with EC Regulation 1998/2006 as published in the Official Journal of the European Union on 28 December 2006). Under the De Minimis exemption undertaking can receive up to €200,000 of De Minimis aid in the current financial year and the two previous financial years, subject to how much assistance it has received during that period under the De Minimis exemption.

Please complete the Statement of Previous Aid received under the De Minimis exemption and arrange for a director of your business to sign the declaration. Using this information we will assess your eligibility to receive assistance.

The value of the aid under this service is £[] which at the current European conversion rate is €[]. You may need to declare this amount to any body who requests information from you on how much De Minimis aid your business has received. Therefore we strongly recommend that you maintain a record of this De Minimis assistance for future reference. For the purposes of the relevant legislation, you must retain this letter for 3 years from the date on this letter and be able to produce it on request by the UK public authorities or the European Commission. You may need to keep this letter longer than 3 years for other purposes.

If you are in any doubt as to whether previous assistance received would constitute De Minimis assistance please raise your concerns as soon as possible. Having read the above we would be grateful if you could arrange for the attached statement confirming your business's eligibility for support to be completed, signed and returned as soon as possible.

Yours faithfully

[]

STATEMENT OF PREVIOUS AID RECEIVED UNDER THE DE MINIMIS EXEMPTION

I confirm that [NAME OF UNDERTAKING] has received the following De Minimis aid during the previous 3 fiscal years (this being the current fiscal year and the previous two fiscal years):

Organisation providing the assistance/aid	Value of assistance	Date of assistance	Nature of assistance

I acknowledge that I am authorised to sign on behalf of [NAME OF UNDERTAKING] and understand the requirements of De Minimis (EC Regulations 1998/2006). I acknowledge that if [NAME OF UNDERTAKING] fails to meet the eligibility requirements, [NAME OF UNDERTAKING] may become liable to repay the full price that would otherwise be payable in respect of the services received.

[NAME OF UNDERTAKING] is not a business “in difficulty” as defined at 2.1 of the Community Guidelines and State Aid for Rescuing and Restructuring Firms in Difficulty (2004/C22/02) at the date of this declaration.

The information set out above is accurate for the purposes of the De Minimis exemption.

SIGNATURE:

NAME:

BUSINESS:

POSITION:

DATE:

FOLLOW UP LETTER

Dear []

[SCHEME TITLE (IF APPLICABLE)]

STATE AID: DE MINIMIS AID

Further to our letter of [Date] we are pleased to confirm that [Name of Undertaking] received assistance to the value of £[] which at the European conversion rate on the date of the award was €[] under [Scheme Title]. This was provided as De Minimis Aid under EC Regulation 1998/2006.

A copy of the declaration which is dated [Date] is attached. You will need to keep this information as your business may need to provide it in the event that your business applies for any funding which uses the De Minimis exemption to comply with the State Aid rules.

Yours faithfully

[]

SCHEDULE 5 - USEFUL STATE AID LINKS

European Commission Competition Pages

http://ec.europa.eu/competition/state_aid/overview/index_en.html

State Aid Cases

http://ec.europa.eu/competition/state_aid/register/

State Aid News

http://ec.europa.eu/competition/index_en.html

State Aid Cases Search Engine

<http://ec.europa.eu/competition/elojade/isef/index.cfm>

State Aid: What is possible under the EU Rules?

EUROPA - Press Releases - State aid: what is possible under EU rules – an overview

State Aid: Frequently Asked Questions concerning the EU rules

<http://europa.eu/rapid/pressReleasesAction.do?reference=MEMO/08/660&format=HTML&aged=0&language=EN&guiLanguage=en>

European Commission Conversion Rate

http://ec.europa.eu/budget/inforeuro/index.cfm?fuseaction=currency_historique&cy=72&SearchField=&Period=2009-1&Language=en&Delim=_

European Commission Loan Reference and Discount Rate

http://ec.europa.eu/competition/state_aid/legislation/reference_rates.html

Department of Business, Innovation and Skills, State Aid branch

<http://www.bis.gov.uk/policies/europe/state-aid>

DEFRA, State Aid branch

<http://www.defra.gov.uk/foodfarm/policy/farm/state-aid/index.htm>

The General Block Exemption Regulations

<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2008:214:0003:0047:EN:PDF>

The De Minimis Regulations

http://eur-lex.europa.eu/LexUriServ/site/en/oj/2006/l_379/l_37920061228en00050010.pdf

Community framework for State Aid for Research and Development and Innovation

<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2006:323:0001:0026:EN:PDF>

Community Guidelines on State Aid for Environmental Protection

<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2008:082:0001:0033:EN:PDF>

Services of General Economic Interest

http://ec.europa.eu/competition/state_aid/legislation/sgei.html

Regional Aid

http://ec.europa.eu/competition/state_aid/regional_aid/regional_aid.html

Broadband Guidelines

http://ec.europa.eu/competition/consultations/2009_broadband_guidelines/guidelines_en.pdf

Sector Specific Rules

http://ec.europa.eu/competition/state_aid/legislation/specific_rules.html

The English Business Support State Aid Scheme

<https://internetstg.communities.gov.uk/documents/regeneration/pdf/1998037.pdf>

The English Research, Development and Innovation State Aid Scheme

<https://internetstg.communities.gov.uk/documents/regeneration/pdf/1998196.pdf>

The English Property Development State Aid Scheme

<https://internetstg.communities.gov.uk/documents/regeneration/pdf/1998201.pdf>

The English Environmental State Aid Scheme

<https://internetstg.communities.gov.uk/documents/regeneration/pdf/1998182.pdf>

The English Risk Capital Investment State Aid Scheme

<https://internetstg.communities.gov.uk/documents/regeneration/pdf/1998199.pdf>