



Ministry of Housing,
Communities &
Local Government



European Union
European Regional
Development Fund

State Aid Law

European Regional Development Fund Guidance Note for Grant Recipients

January 2016

This document contains guidance on handling State Aid issues in projects involving European Union grant funds. The information contained within this document does not constitute legal advice. The Ministry of Housing, Communities and Local Government does not accept any liability with regard to the use of the contents of this document. Links to Department of Business, Innovation and Skills Guidance (the Department with responsibility for State Aid policy within Whitehall) and to relevant European Union publications are provided at appropriate places in the text.

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Chapter 1 – What is State Aid Law?

1. State aid can occur whenever state resources (which include European funding in the hands of UK Government) are used to give *selective* assistance to an undertaking. The ‘aid’ gives that undertaking an advantage compared to others, and this can distort competition, which, as a threat to the functioning of the internal market within the Union, must be avoided.
2. A concise and helpful explanation of the basics of State Aid can be found at:
https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/261384/bis_13-1330_state_aid_the_basics.pdf
3. The basic principles stem from Articles 107 and 108 of the Treaty for the Functioning of the European Union, as the post-Lisbon version of the Treaty is now known.
4. Aid is **unlawful** unless it is ‘**compatible**’ with the ‘internal market’ (ie within Europe) under the terms of the Treaty for the Functioning of the European Union. Aid is automatically compatible under Article 107(2) (which will rarely if ever apply in relation to European Structural and Investment Funds); it can be ‘**considered to be compatible**’ under some circumstances spelt out in Article 107(3), (a)-(e).
5. Article 108 Treaty for the Functioning of the European Union sets out the Commission’s powers in relation to State Aid, which are considerable.
6. It is the grant recipient’s legal responsibility to ensure that they comply with State Aid law. During the project, European Regional Development Fund grant recipients must take responsibility for and manage State Aid issues connected with it, for example by collecting appropriate information to demonstrate compliance with the terms of the relevant exemption.
7. Non-compliant State Aid is the fastest growing area of recovery in European Structural and Investment Funds¹. Therefore applicants are recommended to consider State Aid issues early in the conception and development of their proposal.
8. Many applicants find it useful to seek specialist legal advice when designing their projects to meet the requirements of State Aid law. Grant recipients should not rely on their contacts within the Growth Delivery Team for an indication as to whether or not their proposals comply with the law, though clearly it will be helpful for all concerned if a useful dialogue about the options open to an applicant seeking a compliant approach can be held.
9. There are a number of hyperlinks to useful European Union and BIS set out at the end of this note.
10. The guidance may be updated from time to time as circumstances require. The ‘new General Block Exemption Regulation’ (see later sections) will take time to

¹ P.134, European Structural and Investment Funds Journal 2/2014
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translate into reality, and the Commission has established working groups to review issues (such as local infrastructure) and take Member States' views. Keep up to date through European Union and BIS websites.

Chapter Two: Conducting a State Aid Analysis

1. Article 107(1) of the Treaty of the Functioning of the European Union ([Treaty for the Functioning of the European Union](#)) 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. Not all public funding constitutes State Aid. Only a measure which satisfies all of the conditions set out in Regulation 107(1) of the Treaty for the Functioning of the European Union is regarded to be a State Aid.
3. This chapter sets out a simplified test which can be used to make a quick assessment of whether State Aid is present in a project².

Step 1: Identify all the Potential Beneficiaries

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 identify all the organisations that may benefit from the European Regional Development Fund project.
2. It may be necessary to apply steps 2 to 7 to each potential beneficiary of State Aid³, not just the organisation applying for funding. In some projects, funds ‘flow through’ to organisations from the grant recipient, possibly in the form of payments under contracts for works, goods or services. Frequently, those contracts are **procured** and, as a consequence, market value is paid for those works, goods or services. But, for example, where incubator firms are allowed to use office accommodation created through the project activities free of charge or at less than market value - this is likely to be aid. Note that the use of funding to procure the works which, in this example, build the workspace, does not ‘absolve’ that funding from being aid in the hands of a subsequent beneficiary, a person or organisation using the workspace rent-free or below market rent for any period of time (see, though, the section on ‘de minimis’ below).
3. Once each of the potential beneficiaries is identified, many people find it useful to draw up a grid to work through steps 2 to 7⁴.

² Users wanting to undertake a more robust analysis should refer to the Commission’s Notion of State Aid guidance and relevant European Commission and court decisions.

³ Where there is a class of beneficiaries, for example users of a State funded facility, these may be considered together.

⁴ The list of beneficiaries is illustrative only.

Potential beneficiaries	Applicant	Construction company (procured – contract for works/services)	Operator of facility (procured – service contract)	Users of facility (free for 1 st 12 months, then capped below MR)
Transfer of State resources (grant/subsidised or no fee)	Yes	No	No	Yes
To an undertaking (operating a business)	Yes	yes	yes	Yes
Advantage	Yes	No (market value)	No (market value)	Yes, compared to other start-ups
Is the advantage selective	Yes	No – as above		Yes, as above
Potential to distort competition	Yes	No – as above		Yes
Affects trade between Member States	In principle			In principle

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.

Step 2: Is there a Transfer of State Resources?

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 State.
2. In most situations it will be clear that a transfer of State Resources has occurred. For example, all European Regional Development Fund projects involve the transfer of State Resources because grant has been awarded to grant recipients (albeit in the form of reimbursement of part of the recipient's expenditure).
3. Article 107(1) of the Treaty for the Functioning of the European Union states that a transfer may occur in "any form whatsoever".
4. There are, though, many forms of transfer. For example:
 - a. a grant;
 - b. a loan (with interest **below** the European Commission's [reference rate](#) – market rate loan is not aid);

- c. the purchase of shares in a company⁵
 - d. training or consultancy provided from public funds;
 - e. the State agreeing to act as a guarantor⁶;
 - f. the writing off a debt; and
 - g. the sale of a public owned asset at an undervalue.
5. When identifying whether a transfer has occurred the decisive feature is not the **form** that the measure takes but rather **the effect**. In the context of European Regional Development Fund, we are largely looking at grant funding; but downstream transactions including selling or letting at an undervalue or no value to an economic undertaking will constitute aid in the hands of the undertaking, so an awareness of these issues is necessary when devising or reviewing any scheme or project that includes state aid.

Step 3: Is the Transfer to an Undertaking?

1. An undertaking is any entity⁷ which is engaged in an **economic activity**⁸.
2. An economic activity is “any activity consisting of offering goods and services on a given market”⁹.
3. When an organisation is carrying out an activity for which it is capable of being remunerated (ie being paid/charging a fee) and competing against other organisations within a market (even if that market has failed and there are few if any actual competitors), it will be regarded as an undertaking for the purposes of State Aid. (Consider, for example, local authorities developing land and/or buildings that they own, for use – sale on or lease - in the property market or in some other economic activity).
4. The Commission applies the undertaking test very widely. 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 otherwise pursues wider social objects. Public sector organisations that have engaged in an economic activity have been found to be undertakings¹⁰.
5. Some activities are not economic in nature. Where an organisation only carries out non-economic activities it will not be an undertaking. For example, a state funded primary school.
6. Where an organisation carries out some commercial and some non-commercial activities, the organisation will be considered to be an undertaking unless it puts

⁵ Unless it can be established that the purchase price represents the market rate.

⁶ 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> which is currently in the process of being updated

⁷ This includes legal persons, such as a company, and individuals acting as sole traders.

⁸ C-303/88 Italy v Commission 1991 ECR I-1433

⁹ C35/96 – Commission v Italy 1998 ECR I-03851

¹⁰ Italy v Commission, 1991 ECR I-1433

in place appropriate accounting measures to segregate the two elements and thereby avoid any benefit transferring across to its commercial activities.

7. Be aware that 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 [Small and Medium Sized Enterprises Definition User Guide and Model Declaration](#).

Step 4: Does the Measure Provide an Advantage?

1. 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 to any individual organisation receiving the funding, as compared to other economic undertakings which have not received it.
2. The Market Economy Investor Principle is applied in order to establish whether or not a transaction between the State and the private sector involving an exchange of property (purchase of land/buildings or shares at a certain value). 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. Independent valuation of the property in question will normally settle the matter.
3. A loan provided at the European Commission's reference rate will be considered to be at market conditions¹¹.
4. An appropriately advertised open tender process (procurement) that is used to select the supplier of goods, works or services will allow suppliers to be outside the scope of State Aid on the basis that their benefit is obtained on normal market conditions. 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 beneficiary of State Aid¹².

Step 5: Is the Advantage Selective?

1. An advantage is selective where it is limited to a **particular beneficiary** or 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 State**¹³. For example, a tax rebate offered to all companies on the same terms.
2. 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

¹¹ http://ec.europa.eu/competition/state_aid/legislation/reference_rates.html

¹² Commission Decision N264/2002; cases T-116/01 and T-118/01 P&O European Ferries 2003 ECR II - 2957

¹³ Where an organisation's power is limited to a smaller area, the test applies to the full extent of their remit.

any elements that would provide a greater advantage to particular undertakings or certain sectors.

3. It is rare for a European Regional Development Fund grant to be general because although the opportunity to respond to the call is open to all interested parties, the award of the grant is provided to a single beneficiary.

Step 6: Is there the Potential to Distort Competition?

1. Article 107(1) of the Treaty for the Functioning of the European Union applies where a measure **has the potential** to distort competition. There is no requirement to quantify or otherwise demonstrate an actual distortion of competition.
2. In order to establish whether competition may be distorted, it is necessary to identify the market which the undertaking operates within. The market occurs in the geographical zone in which undertakings compete to win business¹⁴.
3. Identifying a market generally involves detailed consideration of the nature of the goods or services being provided as well as the location and influence of competitors and customers.
4. 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 South West of England, the nature of those who would purchase a Formula 1 car means the market is likely to be international.
5. 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. Even a modest amount of aid is likely to have the potential to distort the market. In giving effect to an European Structural and Investment Funds Operational Programme within a specified Priority Axis, where the Member State is obliged to contribute to productive investment across a wide range of economic areas (sustainable jobs, aid for investment in small and medium sized enterprises and larger enterprises, infrastructure, development of endogenous potential and so on), it is difficult to envisage circumstances where aid to an undertaking, which fits other parts of the test, would not have the potential to distort competition.

Step 7: Is Trade between Member States Affected?

1. In cases where the market that the undertaking operates in is international, for example it involves selling items on the internet, there will be an effect on trade between Member States.

¹⁴ T-229/94 Deutsche Bahn v Commission 1997 ECR II-1689
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2. Again, even comparatively modest amounts of aid will affect trade between Member States.
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. (Note also that the level of aid, in this example, is very low, so that *de minimis* would apply¹⁵. Where aid levels are higher, and likely to have a broader impact within a community, this step is less likely to have no impact across the Union. Services in the General Economic Interest may need to be considered in this context.¹⁶)
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 museums¹⁷.

Conclusion

1. Identify all the potential beneficiaries and then work through steps 2 to 7 for each.
2. Only when a measure meets each of Steps 2 to 7 is State Aid present.
3. European Regional Development Fund applicants are recommended to apply the State Aid test at the outset of developing their projects. Standard forms should include an easy way for the applicant to check these issues. They should reapply the test shortly before submitting their application to ensure that the analysis is still accurate.
4. They should design their projects so as to ensure that it complies with any relevant exemption in the General Block Exemption Regulation.
5. A good European Regional Development Fund application will work through all the potential beneficiaries of 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.
6. Most European Regional Development Fund applicants keep a signed and dated record of their State Aid analysis, including the analysis for potential beneficiaries who were identified as not receiving State Aid, which can be used in the event of a European Commission investigation.

¹⁵ See

¹⁶ See separate note

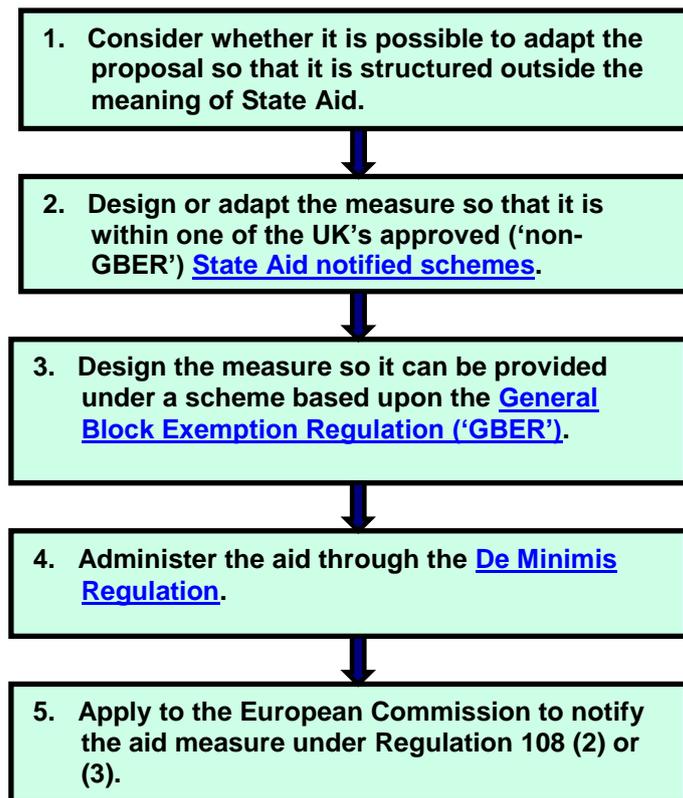
¹⁷ N630/2002 – Museum of Sardinia
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Chapter Three: Managing State Aid in European Regional Development Fund Projects

1. The process set out in Chapter 2 should enable an European Regional Development Fund grant recipient to identify whether any of the beneficiaries of the project (including those downstream from the initial grant recipient) are in receipt of a State Aid.
2. An award of State Aid will be unlawful unless:
 - a. 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 (*most aid should be covered by this, or projects should be adapted so that the exemption applies*); or
 - b. 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 (*an increasingly rare alternative*).
3. This chapter explains the process by which an European Regional Development Fund grant recipient can select the appropriate State Aid cover to lawfully deliver their projects.
4. It is common that European Regional Development Fund projects contain State Aid to one or more beneficiaries. 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.
5. If the terms of an exemption are not met, there is no State Aid cover. Therefore it is strongly recommended that grant applicants nominate a point of contact to oversee compliance and ensure all staff involved in administering State Aid have read the terms of the exemption. Compliance is an issue that will need to be addressed throughout the life of the project; amendments and adjustments to budgets and funding streams will be likely to affect the aid intensities and/or eligibility of costs. Co-ordinating correct approaches to expenditure claims so that the right categories of costs are attributed to relevant schemes/de minimis awards, are time-consuming and mistakes can have serious consequences for a project.

Options to manage State Aid

6. Where State Aid is present, work through the State Aid options listed below. Note that in most cases, unless a no aid solution is available, only options 3 and 4 are likely to be available:



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, coal, shipbuilding, synthetic fibres and transport). On the whole, these sectoral rules are not applicable in the context of European Regional Development Fund (because European Regional Development Fund is not available in those sectors).
8. Note that there are ceilings (or thresholds that must not be exceeded – see Art.4) to the aid that may be offered to individual undertakings under many exemptions in the General Block Exemption Regulation. (An explanation of the General Block Exemption Regulation is provided below). These thresholds are set out in the Schedule to this Guidance. There are also rules about the percentage of aid in relation to eligible costs, known as the 'aid intensity' that may be awarded, which vary depending on the size of the enterprise to whom aid is being awarded. These aid intensities are also noted in the Schedule to this guidance. Department of Business, Innovation and Skills guidance on the General Block Exemption Regulation is very helpful:
https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/325465/bis-14-943-state-aid-general-block-exemption-guidance.pdf
9. The thresholds are specified in Euros. The European Commission publishes a [monthly conversion rate](#). Any funding organisation (including MHCLG) applying an exemption will notify the aid recipient of the name of the exemption and European Commission reference number when the aid is awarded.

10. Record-keeping is very important. Individual awards of aid of over EUR 500,000 will be published on a dedicated website.
- 1) Adapting the proposal so it is outside the scope of Article 107 (1) of the Treaty for the Functioning of the European Union.**
11. Where possible, the European Regional Development Fund 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 7 of Chapter 2). It is easier to restructure a project early on in its development.
- 2) Designing the funding to meet an existing approved ('non-General Block Exemption Regulation') State Aid scheme.**
12. The European Commission has already approved a number of schemes as compatible with the European Common market. However, many have now expired, or become redundant thanks to the effect of the General Block Exemption Regulation. The English Property Development Scheme, (under the previous General Block Exemption Regulation¹⁸), which used the concept of 'bespoke' and 'speculative' developments, and built on two previous approved schemes, is not now in operation, and projects will need to consider whether their proposals fit within the terms of the relevant Regional Aid (initial) investment scheme.
13. Here is a way of checking which schemes still apply:
- <http://ec.europa.eu/competition/elojade/isef/index.cfm>
- Click on the 'State Aid' button in the 'Policy Area' field;
- In the Advanced Search screen that will open up, choose United Kingdom; 'Primary Objective' has several subject categories that will enable you to narrow down the search, e.g. Heritage Conservation (which expired on 30 June 2014).
14. It is the responsibility of the European Regional Development Fund applicant to ensure that their measure meets all the relevant requirements of any scheme. If the scheme is only partially applicable, the scheme cannot be used.
15. As most schemes include an obligation to report upon annual spend to the European Commission, it is important that the European Regional Development Fund applicant has been permitted to use the scheme and can provide the data to the scheme administrator.
- 3) Providing the measure under a State Aid scheme notified on the basis of the General Block Exemption Regulation 2014¹⁹.**
16. The General Block Exemption Regulation is a set of "off the peg" State Aid exemptions providing cover for awards of State Aid that fall, in most cases, beneath certain set ceilings (see summary in Schedule 2 to this guidance, as mentioned above). They are based on previous analysis, guidance, decisions

¹⁸ Commission Regulation (EU) No. 800/2008

¹⁹ EU Regulation 651/2014

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- and recommendations of the Commission and are part of the policy initiative of simplifying and modernising State Aid.
17. As a European Regulation, it has direct effect within the UK and grant recipients must comply with its terms.
 18. The new General Block Exemption Regulation came into force on 1 July 2014²⁰ and features 43 types of compatible aid relating to a variety of sectors. Please note that, despite their 'ready-made' status, national authorities have a legal obligation to publicise (or 'notify' – a confusingly similar term to the sort of non-General Block Exemption Regulation scheme notification described above) funding initiatives using the exemptions.
 19. The General Block Exemption Regulation may only be used where the funding organisation (i.e. the authority by or through whom the state is providing the aid) has published a General Block Exemption Regulation scheme on its website and applied for European Commission approval through the [State Aid Notification Interactive programme](#)..
 20. To date (March 2015), nine schemes based on the General Block Exemption Regulation have been notified by the Managing Authority and these are:
 - a. Regional aid (Articles 13 to 16);
 - b. Aid to small and medium sized enterprises (Articles 17 to 20);
 - c. Aid to access to finance for small and medium sized enterprises (Articles 21 to 24);
 - d. Aid for research and development and innovation (Articles 25 to 30);
 - e. Training Aid (Article 31);
 - f. Aid for disadvantaged workers and workers with disabilities (Articles 32 to 35);
 - g. Aid for environmental protection (Articles 36 to 49);
 - h. Aid for culture and heritage conservation (Articles 53 and 54);
 - i. Aid for local infrastructures (Articles 56).

The schemes may currently be found via this link:
<https://www.gov.uk/government/publications/european-regional-development-fund-2014-to-2020-state-aid-schemes>
 21. A table providing a very broad description of the 43 measures available under the General Block Exemption Regulation can be found in Schedule 2 of this guidance. To apply an exemption it is necessary to read the terms of the scheme and the relevant parts of the General Block Exemption Regulation.
 22. The Department (MHCLG) is aware that there are some issues in the new General Block Exemption Regulation that require further interpretation and clarification, and grant recipients should be aware that the Department with the lead on State Aid, Department of Business, Innovation and Skills, is co-ordinating continuing work on a number of issues, at Working Party level within the Commission. Issues like the application of Article 45 (land remediation) to projects involving brownfield sites; and the question of whether or not a developer's fee may be an eligible expense, or the interpretation of the meaning of 'operating profit' in the context of the Article 56 local infrastructure scheme are under active consideration and further guidance on these points will be issued as the position becomes clearer.

²⁰ The relevant thresholds are listed at Regulation 4 of the GBER
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23. As mentioned above, please also refer to Department of Business, Innovation and Skills' very helpful guidance at: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/325465/bis-14-943-state-aid-general-block-exemption-guidance.pdf. This gives more information about each exemption and draws attention to important details/caveats.
24. There is no substitute for reading through the exemptions themselves, if you are looking at a scheme and want to check the detail: <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32014R0651&from=EN>
25. As mentioned above, the Department has already published schemes under General Block Exemption Regulation which can be used by European Regional Development Fund projects, provided the relevant terms are met²¹. A list of these schemes can be found at Schedule 3. Any additional schemes or amendments to existing schemes will be published on the relevant websites
26. General Block Exemption Regulation only applies to transparent aid (where it is possible to determine the amount of the aid at the point of the award). (This will always be the case when giving grant funding of a specific amount).
27. All General Block Exemption Regulation funding must demonstrate an incentive effect²². The incentive effect tests that the State Aid is being used to leverage a change in behaviour by the beneficiary. A project which has already been started or where all the necessary funding is already in place prior to the application will not be able to demonstrate the required incentive effect²³. This legal principle has been transposed into the Regulation as an assumption that aid is "considered to have the incentive effect if the beneficiary has submitted a written application for the aid to the Member State... before work on the project or activity starts." More onerous requirements are placed on large enterprises, which must demonstrate in their documentation that the project shows a material increase in several indicators as a result of the aid. (That requirement is slightly less onerous in the case of regional investment aid – see Art.6(3)(a)).
28. Note that there are exceptions, concerning the incentive effect, in relation to several categories of aid, where the incentive effect is not required, or is deemed. They are relevant to aid schemes under Arts. 15, 21, 22, 32, 33, 34, 44, 50, 51 and 53.
29. The funding percentages (or 'aid intensities') listed in the General Block Exemption Regulation are the maximum allowable. Note that any de minimis 'cumulated' (or added in with) the total aid package would only be permissible if it related to different expenditure than that claimed under the relevant scheme.
30. There is no prohibition against using more than one General Block Exemption Regulation scheme or Regulation in a project. However, cumulation rules mean it is not permitted to "double count" one set of eligible costs under more than one State Aid exemption. Therefore if more than one scheme, or any scheme

²¹ The Department has not notified schemes under Articles 44,50,51 and 55.

²² Under Regulation 6 of GBER

²³ Italy v Commission, C 8/2009

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plus de minimis, is used, it is necessary to provide schedules of the eligible costs for each type of aid.

31. Whilst the General Block Exemption Regulation 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 General Block Exemption Regulation scheme, it will be considered as unlawful aid and be liable to be repaid entirely.
 32. Each year the European Commission requests that each Member State reports upon its total spend under each scheme. The failure to declare spend could mean that the projects provided under it are technically unlawful. Therefore it is important that all organisations using General Block Exemption Regulation collect data upon how much aid has been provided under the relevant General Block Exemption Regulation schemes. A requirement to publish data online about awards made under the General Block Exemption Regulation comes into force in 2016.
- 4) Provide the aid under the De Minimis Regulation**
33. The [De Minimis regulation](#) permits up to €200,000 (gross) of State Aid to be provided to an undertaking in a rolling three year period²⁴, subject to certain administrative steps being taken.
 34. Grant recipients should be under no illusions that the rolling period is linked to the structural funds programme periods (as has been suggested in some areas) – De Minimis aid is deemed granted at the moment the undertaking has a legal right to receive it, and the period of three years starts from the first time that occurs.
 35. It is also important to note that the restriction applies to aid granted by the Member State as a whole. Note that undertakings may have received aid (as de minimis) under different programmes, possibly from local authorities or through the HCA, as well as central government, and the de minimis aid ceiling applies to **all** such aid.
 36. To ensure that undertakings do not receive more than their €200,000 allocation, Member States must inform recipients that a De Minimis award of aid will be made to them (expressly referring to the gross amount of aid and to Commission Regulation (European Union) No 1407/2013, OJ L352/1); before granting the aid, the Member State (ie, in this case, the Department) must obtain a declaration from the undertaking about any other De Minimis aid previously received during the previous two and the current fiscal years.²⁵
 37. An example declaration is set out in Schedule 4 of this guidance. Care should be taken to ensure that the person making the declaration is authorised to sign on behalf of the undertaking and also that it is understood that undertaking is not

²⁴ The current fiscal year and the two previous fiscal years, ie the fiscal years used by the undertaking in the UK (in this case).

²⁵ Review Article 6 of the Regulation for the detailed rules, if de minimis is being provided under a scheme, as there is a derogation from that process which allows a standard letter to be sent out to all scheme participants, notifying them that a standard amount of money will be given to each undertaking in the scheme.

limited to the single company in receipt of aid, but **may apply to the business group**. The declaration must be provided prior to the award of aid and the sum must be set out in [Euros](#)²⁶.

38. Please read through the [De Minimis Regulation](#) before providing any aid. It is a short regulation; although the concept of De Minimis aid is comparatively simple, the regulation contains a number of technical requirements; note especially the provisions on 'cumulation' (with other forms of aid). Broadly, costs claimed as de minimis aid must relate to categories other than those claimed as eligible under any other scheme.

5) Notification (not related to exemptions in the General Block Exemption Regulation)

39. Notification is a process set out in Article 108 of the Treaty for the Functioning of the European Union through which a project or scheme operated by a public authority (such as this Department) can apply to the European Commission for express approval. For organisations in England, 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 applying to England may be made without the involvement of the Department of Business, Innovation and Skills.
40. The Commission has made it clear that it expects the vast majority of State Aid to be administered through the General Block Exemption Regulation, and that applications for scheme notifications outside the General Block Exemption Regulation will be rare. 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 four months and twenty four months depending upon the nature of the application. In the context of the spending deadlines set by the European Structural and Investment Funds programme, it is easy to see that notification is unlikely to be a practical approach to a state aid issue.
41. 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/major projects, where no alternative exemption could be used to achieve the same objectives²⁷.
42. The process for notification can be found at Regulation 108 of the Treaty for the Functioning of the European Union. The legal basis for the notification should be brought under one of the headings in Regulation 107 (2) or (3).
43. The notification timescale will be shorter when the approval sought is within European Commission guidelines or the application follows an existing precedent.

²⁶ Where the aid is not in the form of 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.

²⁷ Complex projects such as broadband will usually require notification.

44. 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.
45. Given the complexity of the notification process, it is strongly recommended that European Regional Development Fund applicants take expert advice and factor the process into their project planning.

Schedule 1 - State Aid Regulations

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 Regulation 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 Regulation 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.
3. 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 Regulations 258 and 259, refer the matter to the Court of Justice of the European Union direct.
4. 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 Regulation 107 or from the regulations provided for in Regulation 109, if such a decision is justified by exceptional circumstances.
5. 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.
6. 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 Regulation 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.

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

Regulation 109 (ex Regulation 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 Regulations 107 and 108 and may in particular determine the conditions in which Regulation 108(3) shall apply and the categories of aid exempted from this procedure.

Schedule 2 - General Block Exemption Regulation 2014-2020 Summary Table

Precis of General Block Exemption Regulation 2014-2020 exemptions (see paragraph 20 for schemes applicable in England.)

(check against BIS Guidance

https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/325465/bis-14-943-state-aid-general-block-exemption-guidance.pdf)

Aid Measure	Maximum Aid Intensity for <u>Large Enterprise</u> (%)	Maximum Aid Intensity for <u>Medium and Small enterprises</u>	Notification Threshold (ie exemption inapplicable for aid over this amount) (€)
Regional Investment Aid Art 14	Only for new economic activity unless Art 107(3)(a) area Article 107(3)(a) areas (Cornwall & IoS) - maximum of 25% Article 107(3)(c) pre-defined ²⁸ areas - maximum of 15% Article 107(3)(c) not pre-defined – maximum of 10%	Medium – Art 107(3)(a):35% Art 107(3)(b) pre-defined:25% Art 107(3)(b) not pre-defined:20% Small – Art 107(3)(a): 45% Art 107(3)(b) pre-defined: 35% Art 107(3)(b) not pre-defined: 30%	€100m Beware of cumulation over a 3 year period
Regional Operating Aid	100%	100%	N/A

²⁸ Those which were 'a' regions in 2011-2013 or are sparsely populated, as defined in para 158 of Regional Aid Guidelines 2014-2020
ERDF State Aid Law Guidance
ESIF-GN-1-006, Version 2
Date published 7 January 2016

Regional Urban Development Fund	N/A	70% at fund level	€20m
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Investment Aid to small and medium sized enterprises	N/A	10% ME 20% SE	€7.5m per undertaking per investment project
Aid for consultancy in favour of small and medium sized enterprises	N/A	50%	€2m per undertaking per project
Aid for small and medium sized enterprises to participate in fairs	N/A	50%	€2m per undertaking per year
Aid for cooperation costs incurred by small and medium sized enterprises participating in European Territorial Cooperation Projects	N/A	50%	€2m per undertaking per project
Risk Finance Aid	N/A	40 – 90% (subject to form of investment)	€15m
Aid for Start Ups	N/A	Aid not provided on an aid intensity basis	As laid out in Article 22(3), (4) and (5)
Aid for alternative trading platforms specialised in	N/A	Aid not provided on an aid intensity basis	N/A

small and medium sized enterprises			
Aid for scouting costs	N/A	50%	N/A

Aid for research and development projects	<p>100% for fundamental research</p> <p>50% for industrial research (max 80% with additional %s)</p> <p>25% for experimental development</p> <p>50% for feasibility studies</p>	<p>+10% ME</p> <p>+20% SE</p> <p>+ Conditional bonus 15%</p>	<p>€40m for fundamental research per undertaking, per project</p> <p>€20m for industrial research per undertaking, per project</p> <p>€15m if experimental development per undertaking, per project</p> <p>€7.5m feasibility studies per study</p>
Investment aid for research infrastructures	50%	50%	€20m per infrastructure
Aid for innovation clusters	<p>50%</p> <p>+ Assisted area uplift</p>	<p>50%</p> <p>+ Assisted area uplift</p>	€7.5m per cluster
Innovation aid for small and medium sized enterprises	N/A	50%	€5m per undertaking, per project
Aid for process and organisational innovation	15%	50%	€7.5m per undertaking, per project
Aid for research and development in the fishery and aquaculture	100%	100%	N/A

sector			
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Training Aid	50% + 10% Disabilities/Disadvantaged Workers	+10% ME +20% SE + 10% Disabilities/Disadvantaged Workers	€2m per training project
Aid for the recruitment of disadvantaged workers in the form of wage subsidies	50%	50%	€5m per undertaking, per year
Aid for the employment of workers with disabilities in the form of wage subsidies	75%	75%	€10m per undertaking, per year
Aid for compensating the additional costs of employing workers with disabilities	100%	100%	€10m per undertaking, per year
Aid for compensating the costs of assistance provided to disadvantaged workers	50%	50%	€5m per undertaking, per year

Investment aid enabling undertakings to go beyond Union standards for environmental protection or to increase the level of environmental protection in the absence of Union standards	40% + Assisted area uplift	+10% ME +20% SE + Assisted area uplift	€15m per undertaking, per investment project
Investment aid for adaptation to future Union standards	5-10% + Assisted area uplift	10-15% ME 15-20% SE + Assisted area uplift	€15m per undertaking, per investment project
Investment aid for energy efficiency measures	30% + Assisted area uplift	+10% ME +20% SE + Assisted area uplift	€10m
Investment aid for energy efficiency projects in buildings	70% at fund level	70% at fund level	€10m
Investment aid for high-efficiency cogeneration	45% + Assisted area uplift	+10% ME +20% SE + Assisted area uplift	€15m per undertaking, per investment project
Investment aid for the promotion of energy from renewable sources	30 – 45% + Assisted area uplift	+10% ME +20% SE + Assisted area uplift	€15m per undertaking, per investment project
Operating aid for the promotion of	Aid not provided on an aid intensity basis	Aid not provided on an aid intensity basis	€15m per undertaking,

electricity from renewable sources			per project
Operating aid for the promotion of energy from renewable sources in small scale installations	Aid not provided on an aid intensity basis	Aid not provided on an aid intensity basis	€15m per undertaking, per project
Aid in the form of reductions in environmental taxes	Aid not provided on an aid intensity basis	Aid not provided on an aid intensity basis	N/A
Investment aid for the remediation of contaminated sites	100%	100%	€20m per undertaking, per investment project
Investment aid for energy efficient district heating and cooling	45% + Assisted area uplift	+10% ME +20% SE + Assisted area uplift	€20m per undertaking, per investment project
Investment in waste recycling and re-utilisation	35% + Assisted area uplift	+10% ME +20% SE + Assisted area uplift	€15m per undertaking, per investment project
Investment aid for energy infrastructure	Aid not provided on an aid intensity basis	Aid not provided on an aid intensity basis	€50m per undertaking, per investment project
Aid for environmental studies	50%	+10% ME +20% SE	N/A
Aid schemes to make good the damage caused by certain	100%	100%	N/A

natural disasters			
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Social aid for transport for residents of remote regions	100%	100%	N/A
Aid for broadband infrastructures	Aid not provided on an aid intensity basis	Aid not provided on an aid intensity basis	€70m total costs per project
Aid for culture and heritage conservation	Aid not provided on an aid intensity basis	Aid not provided on an aid intensity basis	Investment aid €100m per project Operating aid €50m per undertaking, per year
Aid schemes for audio-visual works	60% cross border 100% difficult audio visual works	60% cross border 100% difficult audio visual works	€50m per scheme, per year
Aid for sport and multifunctional recreational infrastructures	For aid under €1m the aid intensity is 80%.	For aid under €1m the aid intensity is 80%.	Investment aid €15m or total costs exceeding €50m per project Operating aid €2m per infrastructure per year
Investment aid for local infrastructures	Aid not provided on an aid intensity basis	Aid not provided on an aid intensity basis	€10m or total costs exceeding €20m for the same infrastructure

This table summarises some of the main points of the General Block Exemption Regulation 2014-2020, but does not provide all the relevant detail. Any organisation seeking to award or receive aid under the General Block Exemption Regulation 2014-2020 should read the relevant regulations.

Identifying the nature of 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 General Block Exemption Regulation** 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. Particular care should be taken by each applicant to provide accurate data establishing its status, and the effect of consolidation of accounts if the enterprise is part of a group. 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 3 - 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 regulates 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 since it will be provided in line with the De Minimis exemption (in accordance with Commission Regulation (EU) No 1407/2013, OJ L 352/1). Under this exemption a single undertaking may receive up to the limit of €200,000 of De Minimis aid from the Member State within which it does business and which provides the aid over any period of three fiscal years.

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

The value of the aid under this initiative is £[] which at the current European conversion rate is €[]. You may need to declare this amount to any other UK public body intending to provide aid, in addition to any audit or other investigation, and 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 acknowledge receipt of notification from the Ministry of Housing, Communities and Local Government that it intends to grant De Minimis aid to [NAME OF UNDERTAKING].

I confirm that the financial year of [NAME OF UNDERTAKING] runs from to.....

I further confirm that [NAME OF UNDERTAKING] has received the following De Minimis aid during this financial year [INSERT RELEVANT DATES] and the previous two fiscal years (ie [INSERT RELEVANT DATES]):

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

I warrant that I am authorised to sign on behalf of [NAME OF UNDERTAKING] and I confirm that I understand the requirements of De Minimis (Commission Regulation (EU) No. 1407/2013). I acknowledge that if [NAME OF UNDERTAKING] fails to meet the eligibility requirements, [NAME OF UNDERTAKING] may become liable to repay the full value of the assistance provided.

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, being satisfied that the amount of aid we intended to give to [Name of Undertaking] would not, taking into account any aid provided during the relevant period of three fiscal years, exceed the limit of EUR 200,000 specified in Article 3 of the De Minimis Regulation (Commission Regulation (EU) No 1407/2013), [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 1407/2013

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 4 - Useful State Aid Links

Department of Business, Innovation and Skills, State Aid branch

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

(beware that not all the guidance is fully up to date – click on the list of updates to be sure of accessing the right materials)

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 European Union Rules?

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

State Aid: Frequently Asked Questions concerning the European Union 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&acy=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

DEFRA, State Aid branch

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

The General Block Exemption Regulation and related legislation

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

The De Minimis Regulations

http://ec.europa.eu/competition/state_aid/legislation/de_minimis_regulation_en.pdf