

DEPARTMENT FOR TRANSPORT GUIDELINES ON COMMUNITY TRANSPORT FUNDING AND THE E.U. STATE AID RULES

Introduction

The following should be noted:

1. These guidelines have been produced by the Department for Transport (DfT) following discussions with the European Commission¹. They are intended to assist local authorities and other public bodies² to ensure that, where they choose to provide funding in support of community transport organisations or projects, they do so having regard to the need to comply with all relevant legal requirements including, in particular, the EU State Aid rules.

2. These guidelines are provided to local authorities for general information and guidance only. They do not alter current rules or legislation, and they are not intended to constitute legal advice. Each local authority is responsible for ensuring that it complies with its legal duties, including when procuring services or providing grant funding.³ In the event that a local authority is in any doubt as to the lawfulness of a proposed grant, it should seek legal advice from its in-house legal department or, where appropriate, external legal advisers.

Background

What are 'community transport services'?

The term 'community transport services' (CTS) is not defined in law. It is a generic description capable of being applied to a very wide range of different services. However, the term is most usually applied to services involving the provision, both *by* and *for the benefit of* a particular local community, of some form of transportation facility or service. The service may benefit that local community as a whole, or a particular section of that local community (such as the disabled or infirm).

CTS are often, though not always:

- provided by a local charity or other non-profitmaking body;
- provided wholly or partly through the labour of unpaid volunteers;
- provided for the benefit of people in the community who would otherwise be disadvantaged in terms of their access to transport services (e.g. people living in a countryside village that is not served by regular public transport services, or people who suffer from physical or mental disabilities who, for that reason, find it difficult to use public transport).

¹ The views expressed in this document may not be regarded in any circumstances as stating an official position of the European Commission.

² All further references to 'local authorities' in these guidelines include not only local authorities but also any other body that distributes community transport funding.

³ Local authorities will generally be required to appoint a Monitoring Officer who has personal responsibility for ensuring that the authority's decisions and actions are compliant with the law (including EU law).

CTS can play a very valuable role in improving the quality of life of the groups of people for whose benefit those services are provided.

Local authorities decide for themselves whether or not they provide financial assistance for CTS and, if so, how to channel such assistance, which organisations and projects to assist, and how much funding to provide to each of them. As a result, there is a rich diversity in financially assisted CTS within the UK, with local authorities able to introduce or support innovations and to learn from each other's experiences.

In many local authority areas, the local mix of supported CTS consists principally in 'on demand' CTS schemes (such as 'dial-a-ride') that help disabled or infirm people with their travel needs by collecting them upon their request for specific individual journeys. Local mixes may also include some scheduled services, such as a minibus service that helps people in an otherwise relatively isolated rural community travel to the nearest town or shopping centre by making a round trip journey on a specific day each week. There are also minibus sharing schemes, whereby a minibus is purchased and maintained, and made available for use by a number of different community groups (e.g. to transport children in a local children's football team to away matches).

Many local authorities support CTS that are provided by voluntary organisations or community interest companies that are already providing a range of services for the target user groups, often with the assistance of volunteers. Partnerships with the voluntary sector can be very successful in ensuring that CTS are provided in ways that best meet the needs of users in an integrated and effective manner.

The role of Central Government

The purpose of this guidance is not to restrict local authorities' freedom to make decisions, but rather to highlight the existing State Aid rules. Compliance with the rules is a legal requirement. In addition, compliance may assist local authorities in ensuring that public money is being used efficiently and to meet genuine local needs.

The State Aid rules are complex, and the question of whether or not a particular grant to a particular organisation might constitute State Aid can be considered only on a case by case basis, i.e. based on the facts of that particular case. Relevant factors may include such matters as: (a) the amount of public financial support being provided; (b) the particular forms of CTS in respect of which that support has been given; and (c) the nature of any other activities being carried out by the organisation concerned and identification of the particular economic markets in which the organisation is active. It is not possible to analyse all of those matters within this guidance document: the factual circumstances will be different in relation to each grant.

If either a local authority or community transport organisation has any concerns about the compliance of a particular grant with the State Aid rules, it should seek appropriate legal advice as early as possible.

The structure of this guidance

The remainder of this document is intended to set out an Assessment Framework that DfT recommends that local authorities use when deciding whether or not to provide

grants in support of CTS schemes. This is intended as a framework to assist local authorities in identifying potential issues under the State Aid rules in particular. It is not intended to replace whatever financial or other assessments local authorities may also need to apply for other purposes. It is also not intended to remove or limit the obligation to notify State aid where the making of such a notification is required in the light of Article 108 of the Treaty on the Functioning of the European Union (TFEU).

Even in relation to relatively small grants, it is important that the local authority consider State Aid compliance and ensure that the use of public funds to provide the grant represents good value and takes account of any potential for distortion of competition. Following the Assessment Framework set out in this document will help local authorities do this.

The Assessment Framework

Section A: Is the grant capable of being State Aid?

In order for a grant to potentially constitute State Aid, it must be:

- provided to an *undertaking* (i.e. an entity that is involved in *economic activity*); and
- liable to distort competition and affect trade between EU Member States.

In relation to the concept of 'economic activity' it is important to emphasise that the fact that an organisation is a charity or other kind of non-profitmaking body does not necessarily mean that it is not involved in economic activity.

In relation to 'distortion of competition' and 'effect on trade between EU Member States', the following points should be borne in mind:

- In general, prudence will make it appropriate for a local authority to assume that a grant could be capable of distorting competition and affecting trade between Member States⁴ unless the grant can be provided under the European Commission's general *De Minimis* Regulation⁵ ("the General DMR"). Under the General DMR, grants are assumed not to be capable of affecting trade between EU Member States where the total amount of State support provided to the undertaking in question (including both the proposed grant and any other State support that the undertaking has received, or will receive, within a period of 3 years) does not exceed €200,000.
- The General DMR can be relied upon as the legal basis for providing the grant if the following conditions are satisfied:
 - The amount of the proposed grant is less than €200,000.
 - The undertaking receiving the grant will not receive more than €200,000 of *de minimis* aid from State sources over any period of three fiscal years.

⁴ That is so even if the grant recipient is not itself involved in supplying anyone outside of the United Kingdom. That is because, provided that the grant recipient competes in any market in which other market participants are involved in cross-border trade, it may be impossible to rule out some effect (even if a very small one) on such trade.

⁵ Commission Regulation (EU) No 1407/2013 of 18 December 2013 on the application of Articles 107 and 108 of the Treaty on the Functioning of the European Union to *de minimis* aid, EU Official Journal [2013] L352/1.

- The undertaking must be made aware that it is not permitted to receive aids during that 3 year period that would lead to the €200,000 de minimis threshold being exceeded.
- The procedural requirements set out in the General DMR are complied with when granting the aid.
- There have been State Aid cases in which the European Commission has decided that there is no potential effect on cross-border trade because all the activities of the body receiving the grant are of 'purely local interest' (i.e. provided for, and of interest only to, people within a small geographical area, and unlikely to be of interest to anyone outside of that area). The Commission's reasoning and practice in this area is, however, not without complexity, and local authorities should take a cautious approach to relying on the 'purely local interest' line of decisions. Accordingly, local authorities should not rely on a 'purely local interest' argument as their basis for providing CTS funding, without first seeking specialist legal advice regarding State Aid compliance.

Unless the local authority is satisfied that the proposed grant will not involve State Aid, the authority should proceed to the next section of this Assessment Framework.

Section B: Is the proposed grant capable of coming within the European Commission's higher de minimis threshold that applies to aid given to support an undertaking in carrying out a public service the performance of which has been entrusted to it?

Where the total amount of State support provided to the undertaking exceeds the General DMR's threshold of €200,000 in any period of 3 fiscal years, but does not exceed €500,000 in any period of 3 fiscal years, then it can be provided under the European Commission's Public Service De Minimis Regulation⁶ ("the PSDMR") provided that the conditions specified in the PSDMR are complied with.

Local authorities should refer to the full text of the PSDMR to ensure that the conditions are complied with. By way of summary, however, the conditions require that:

- The local authority identifies in a grant letter or other formal document the specific CTS the provision of which is entrusted to the organisation over the period in respect of which the grant is given.
- The CTS must qualify as a 'service of general economic interest' (or 'SGEI') for the purposes of the State Aid rules. The CTS in question must therefore not only reflect the local authority's reasonable judgement that those services are required to serve the interests of the community, but they must also be services in relation to which there is 'market failure'. In other words, public funds should not be used to support the provision of services that market competition would make available on satisfactory conditions (e.g. with regard to service frequency and the fares charges to service users) even without State funding.
- The total amount of support from public funds received by the organisation has not exceeded, and will not exceed, €500,000 in any three year period. The local authority must request express confirmation of this from the recipient organisation.

⁶ Commission Regulation (EU) No 360/2012 of 25 April 2012 on the application of Articles 107 and 108 of the Treaty on the Functioning of the European Union to de minimis aid granted to undertakings providing services of general economic interest, EU Official Journal [2012] L114/8.

- The grant letter or other formal document setting out the terms of the grant must state –
 - the amount of the grant in Euros (converted at the conversion rate published by the European Commission at the relevant time); and
 - that the grant is given pursuant to “Commission Regulation No 360/2012 on the application of Articles 107 and 108 of the Treaty on the Functioning of the European Union to *de minimis* aid granted to undertakings providing services of general economic interest, EU Official Journal 26.4.2012 L114/8”.

Where these conditions cannot be satisfied, the PSDMR cannot be relied on as the basis for providing the grant, and the local authority should therefore go on to consider Section C below.

Section C: Other cases

A local authority should proceed with caution when considering the provision of a grant to a CTS that cannot be provided under the PSDMR (because, for example, the amount of funding provided to that CTS would exceed €500,000 within a 3 year period). It is essential that the local authority take specialist State Aid legal advice before providing any such grant. The following guidance is provided for information only, and is not a substitute for taking specialist advice.

It is important to note that the European Commission’s Public Service Compensation Decision (“the PSC Decision”, also often referred to as the “Article 106(2) Decision”)⁷ cannot be applied to State funding provided for the purpose referred to in Article 93 TFEU, i.e. in order to “meet the needs of coordination of transport”. That is because the legal basis for the PSC Decision is Article 106(2) TFEU, and Article 106(2) does not apply to State Aid for activities falling within the scope of Article 93 TFEU. Local authorities should therefore not seek to rely on the PSC Decision in relation to funding provided to support CTS.

It may, however, be possible to provide funding for certain forms of CTS – namely, services provided on a “non-discriminatory and continuous” basis, such as scheduled bus services – pursuant to Regulation (EC) No 1370/2007 (“the Public Passenger Transport Regulation”, or “PPTR”)⁸. The PPTR is a Regulation that has Article 93 TFEU as its legal basis.

In order for a grant to be provided under the PPTR, at least one of the following conditions would need to be satisfied⁹:

⁷ Commission Decision 2012/21/EU of 20 December 2011 on the application of Article 106(2) of the Treaty on the Functioning of the European Union to State aid in the form of public service compensation granted to certain undertakings entrusted with the operation of services of general economic interest, EU Official Journal [2012] L7/3.

⁸ Regulation (EC) No 1370/2007 of the European Parliament and of the Council of 23 October 2007 on public passenger transport services by rail and by road, EU Official Journal [2007] L315/1.

⁹ These conditions reflect Article 5(4) of the PPTR. Article 5(4) sets out the conditions subject to which a public authority may award a contract for public passenger transport services by bus or tram without carrying out a competitive tendering procedure. It should be noted, however, that the application of the PPTR to a particular CTS grant may involve interesting legal issues concerning, for

(1) The average annual value of the funding to be provided to the organisation by the authority in respect of CTS is less than €1,000,000.

(2) The CTS to be provided by that organisation, and in respect of which the local authority will provide funding, concerns the provision of transport services covering less than 300,000 kilometres a year.

(3) The organisation is a small or medium-sized enterprise operating not more than 23 vehicles, and the average annual value of the funding to be provided to the organisation by the authority in respect of CTS is less than €2,000,000.

(4) The organisation is a small or medium-sized enterprise operating not more than 23 vehicles, and CTS to be provided by that organisation, and in respect of which the local authority will provide funding, concerns the provision of transport services covering less than 600,000 kilometres a year.

Even where one of these conditions is met, the funding will also need to comply with other requirements set out in the PPTR. Given the complexities of complying with the PPTR requirements, it is essential that specialist State Aid legal advice is sought.

Monitoring

The CTO should be required to keep accounts that enable the local authority to verify the organisation's costs and revenues of operating the supported CTS and ensure that the grants and revenues received are not being used to cross-subsidise other services or activities. Accordingly, where the organisation's activities are not limited to providing the supported CTS, it will need to put in place internal accounting mechanisms to ensure that such accounts are available and are prepared in accordance with generally accepted accounting principles.

Local authorities should ensure that public funding which they provide in any form whatsoever in support of community transport services is not used by the beneficiaries to cross-subsidise commercial activities. Therefore, they must ensure that where the undertaking also carries out activities falling outside the scope of the SGEI, only the costs related to the SGEI are covered by public funding. The costs related to the SGEI may cover include all the direct costs incurred in operating the SGEI and an attributable part of costs common to both the SGEI and the other activities. For example, beneficiaries which receive public funding in the form of vehicles must in principle not use these vehicles to provide transport services procured by local authorities in competitive tenders. However, if the CTO uses the vehicle provided for the SGEI also for other activities (for instance, 50% for the SGEI and 50% for the other activities) only 50% of the cost of the vehicle can be

example, whether or not the award of the grant constitutes the award of a "contract", and/or whether or not the services to be provided are "public passenger transport services" within the meaning of the PPTR. In drafting these Guidelines, the DfT does not place specific or sole reliance on the PPTR and does not express or assume any position as to whether or not grants for CTS come within the scope of the PPTR (since the determination of that issue is likely to turn on the facts of each individual case).

subsidised by the local authorities. Otherwise such beneficiaries would have had an unfair competitive advantage over private non-subsidised commercial operators participating in these tenders.

Review

DfT intends to keep these Guidelines under review. Any suggestions as to how these Guidelines could be improved can be provided to: buses@dft.gsi.gov.uk.

Other sources of guidance regarding the State Aid rules

Further information regarding the State Aid rules can be found via the UK Government's State Aid information portal at <https://www.gov.uk/state-aid>

In addition, the European Commission's Europa website contains further guidance on State Aid and, in particular, services of general economic interest. These may be updated from time to time.

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

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

http://ec.europa.eu/competition/state_aid/overview/new_guide_eu_rules_procurement_en.pdf